

SUMMARY OF TRANSITION ISSUES

**AGRICULTURAL COMPETITION AND
CONTRACT FAIRNESS ISSUES**
(USDA AND DEPARTMENT OF JUSTICE)

Campaign for Contract Agriculture Reform
Farm and Ranch Freedom Alliance
Food and Water Watch
Land Stewardship Project
Institute for Agriculture and Trade Policy
Iowa Citizens for Community Improvement
Missouri Rural Crisis Center
National Family Farm Coalition
Organization of Competitive Markets
Ranchers Cattlemen Action Legal Fund – United Stockgrowers of America
Rural Advancement Foundation International-USA
Western Organization of Resource Councils

The above organizations have a long history of working together through the National Campaign for Sustainable Agriculture's Competition and Concentration Committee. The Committee's goal is to increase fairness in all agricultural contracts and markets and restore open public markets for livestock producers by ending price manipulation and discrimination in those contracts and markets. In January 2007, over 200 organizations signed on to a platform to return competition to the livestock and agricultural markets and urged Congress to consider those priorities while constructing the Farm Bill (<http://tinyurl.com/3gcty2>).

The Obama Administration will take office at a time when the 2008 Farm Bill will be implemented providing important opportunities to shape the impact of this crucial omnibus food and agricultural legislation. Our organizations have an interest in the competition and fairness provisions of the Farm Bill. Over 200 organizations supported the platform that gave rise to these provisions. This transition document focuses on the Farm Bill and other provisions that should be considered to achieve fair, open and competitive markets.

President-elect Obama campaigned, in part, on a promise to reduce anti-competitive practices, increase fairness, and revitalize family farm agriculture. The issues and actions listed in this document will achieve Mr. Obama's goals. We hope they are helpful to the transition process.

Vision Statement

Today, a small handful of corporations overwhelmingly dominate our food supply. The concentration of market control in the top four firms in U.S. food retailing, grain processing, red meat processing, poultry processing, milk processing, and nearly every category of food manufacturing is at an all-time high. Corporate mergers and buyouts have concentrated the power of these firms and increased their ability to unfairly manipulate market conditions in their favor. This unprecedented level of horizontal market consolidation effectively eliminates free market competition to the detriment of independent family farmers and consumers.

Compounding the problems of horizontal consolidation is the rapid trend toward vertical integration. Manufacturers, processors, and packers increasingly control all stages of production and inventory through commodity ownership and one-sided contracts. This corporate control of production unnecessarily eliminates market transparency, creating an environment ripe for price manipulation and discrimination. It replaces farm-level decision making with centralized corporate planning and leaves farmers trapped in long-term debts tied to short-term, non-negotiable production contracts. In addition, top retailers and packers increasingly engage in relationships with dominant suppliers that exclude smaller competitors and minimize price competition. Because the same few players in the market control both supply and demand, the basic principles of supply and demand cannot function.

A critical role of government is to ensure fairness by facilitating properly operating markets and balance in the economic relationships among farmers/ranchers, consumers and food companies. Currently, inadequate federal legislation and the lack of enforcement of anti-trust policies allow a handful of corporations to continue to consolidate market power, manipulate prices, and create anti-competitive market structures. Federal government inaction has a dramatic, negative impact on not only farmers and ranchers, but also on rural communities, the environment, food quality, food safety, and consumer prices. It undermines sustainable production practices and state and local laws that support family-scale, sustainable farm and ranch operations.

Policy makers often voice the laudable policy goals of maintaining a diverse, farm-and-ranch-based production sector and providing consumers with a nutritious, affordable food supply. However, government failure to redress industry concentration--both vertical and horizontal--is thwarting these policy goals and driving the earnings of farmers and ranchers down and consumer prices up.

Summary of Transition Issues:

I. USDA- Grain Inspection, Packers and Stockyards Administration

A. General Packers & Stockyards Act Enforcement

1. Curb Contract Manipulation through Packer Ownership and Captive Supply

- a. Issue: Captive supplies of livestock are those committed to a packer either through a forward contract or owned by the packer for delivery more than 14 days before slaughter. Captive supplies are anti-competitive and depress prices. There are specific remedies to address each of the two types of captive supplies.
- b. Action for addressing captive supplies through forward contracts:
 - i. USDA should issue rules under the authority of the Packers and Stockyards Act that reform captive supply procurement practices to:
 1. Prohibit packers from procuring cattle for slaughter through the use of a forward contract, unless the contract contains a firm base price that can be equated to a fixed dollar amount on the day the contract is signed and the forward contract is offered or bid in an open, public manner and;
 2. Prohibit packers from owning and feeding cattle, unless the cattle are sold for slaughter in an open, public market.
- c. Action for addressing Packer Ownership of livestock:
 - i. USDA should either pursue rulemaking or encourage through statute a prohibition on packer ownership of livestock more than 14 days prior to slaughter.

2. Define and Enforce Undue Preferences Language

- a. Issue: Section 202 of the Act prohibits “undue or unreasonable preference or advantage”. However, USDA has never defined this provision. Section 11006 of the 2008 Farm Bill requires USDA to promulgate regulations establishing the criteria the agency will use to determine whether the actions of packers, swine contractors, and live poultry dealers constitute “undue or unreasonable preference or advantage” in violation of the Packers and Stockyards Act prohibition.
- b. Action: USDA should swiftly promulgate these regulations. The regulations must make clear that it is not necessary to show anti-competitive impact to find an undue preference and recognize that undue preferences may arise in any aspect of transactions between packers and producers; regulations also must be amended to keep pace with industry practices and not narrow application of statutory language.

3. Ensure USDA-GIPSA Annual Report on Its Investigations to Congress

- a. Issue: USDA-GIPSA has not accurately tracked and conducted investigations in the past.
- b. Action: The 2008 Farm Bill requires the agency to annually report its investigative activities to Congress, each March.

B. Contract Fairness

1. Enforce Mandatory Arbitration Opt- Out Provisions in 2008 Farm Bill

- a. Issue: Producers and growers often must sign contracts mandating arbitration as a dispute resolution mechanism, prohibiting access to the courts. The 2008 Farm Bill (Section 11005) requires every livestock or poultry contract to contain a conspicuous provision for a producer or grower to opt out of the arbitration provision, prior to entering the contract.
- b. Action: GIPSA should take enforcement action against live poultry dealers that are not complying with the opt-out requirements of Section 11005 of the 2008 Farm Bill. They should not wait to take enforcement action against poultry companies that fail to comply with the arbitration opt-out requirements of the Act. Regulations should be propounded that clarify that the arbitration opt-out requirements of the Farm Bill apply to all contracts, included flock-to-flock contracts, entered into, amended, altered, modified, renewed, or extended after the date of the enactment of the Food, Conservation, and Energy Act of 2008.

2. Reform Unfair Investment Requirements in Production Contracts

- a. Issue: Processors often require poultry growers, after the initial production contract is signed and houses built to company specifications, to make additional capital upgrades to their chicken houses that cost tens of thousands of dollars. Section 11005 of the 2008 Farm Bill requires disclosure of potential future capital investments. Section 11006 requires USDA to propound regulations describing when capital investment requirements violate the Act.
- b. Action: Regulations should be propounded stating that any capital investment that the company requires beyond the original house specifications is unlawful unless growers are additionally and fairly compensated at the time of the upgrade. Companies should also be prohibited from forcing growers to upgrade their houses prior to selling their farms, or in any way interfering with the right of the grower to sell their farms.

3. Prevent Arbitrary and Unfair Suspensions of Delivery of Birds

- a. Issue: Processors sometimes halt or delay the delivery of new birds, a practice that often devastates the cash flow of growers under contract. Section 11006 of the Farm Bill requires USDA to propound regulations to define when suspension of delivery is an unlawful “unfair practice” and to require “reasonable notice” of when a suspension or delay of delivery will occur.
- b. Action: Regulations must be developed to require processors to give growers written notice of any suspension of delivery of birds at least 90 days prior to the removal of the last flock, with an explanation of the reason for the suspension, the grower’s appeal rights, and the date that the bird delivery will resume.

4. Finalize Pending Contract Disclosure and Contract Standards Regulations

- a. Issue: On August 1, 2007 [72 Federal Register 41952-56], GIPSA published a package of proposed poultry regulations to give growers greater information about contract terms before they make related investments, and to require companies to give growers greater notice before cancellation. On February 11, 2008 [73 Federal Register Page 7686-7690], GIPSA published another set of proposed regulations, this time to address the weighing of poultry, livestock, swine and feed.
- b. Action: The regulations should be revised and finalized.

5. Improve Transparency in Poultry Settlement Sheets

- a. Issue: Contract poultry grower pay is often based on the ability of the grower to put weight on the chickens and the amount of feed used during the seven-week grow out period, relative to other growers' performance. This system is referred to as the "ranking system," which is designed to appear as a method for companies to use fair competition to assess grower performance. This payment system can be used by companies to retaliate against growers who seek to organize other growers for better treatment. Only if farmers have systematic access to information on factors that significantly impact farm performance and are solely under the contracting companies' control can they verify fair treatment and fair pay.
- b. Action: This issue was not addressed in the Farm Bill. USDA should amend the poultry Packers and Stockyards Act regulations [9 CFR 201.100(b)] to require that detailed quality and quantity information be included in the settlement documentation.

6. Protect Growers' Capital Investments from Arbitrary Contract Termination

- c. Issue: Poultry contract growers make very large investments in facilities, and are thus very vulnerable to contract termination, leaving them stranded with a large investment and no way to pay the loans. Section 11006 of the 2008 Farm Bill requires USDA to promulgate rules defining a reasonable period of time for a live poultry dealer or swine production contract grower to remedy a contract breach that could lead to termination.
- d. Actions:
 - i. Amend Packers and Stockyards Act regulations to require a poultry integrator to reimburse growers for capital investments made for purposes of the contract if the contract is cancelled prematurely without cause.
 - ii. If GIPSA determines that such regulation is not within their current authority, send draft legislation to Congress asking for an amendment to the Packers and Stockyards Act to address this concern.

7. Include Poultry in Packers and Stockyards Enforcement

- a. Issue: Under the Act, USDA has less authority in poultry enforcement than livestock. USDA cannot halt unlawful practices or assess civil penalties in poultry, although it can in livestock. In addition, the poultry provisions of the current Packers and Stockyards Act have been misinterpreted by GIPSA as applying only to protections for growers of broilers, to the exclusion of growers of breeder hens and pullets, an important part of the poultry production chain.
- b. Action: The new Administration should send draft legislation to Congress to amend Title II of the Packers and Stockyards Act to give USDA administrative enforcement authority over live poultry dealers, similar to Section 10202 of the Senate version of the 2008 Farm Bill (H.R. 2419). GIPSA should re-interpret its analysis of the Packers and Stockyards Act, which has been misread in the past to exclude protections for breeder hen and pullet growers.

C. Prevent Retaliation Against Farmer Associations Under the Agricultural Fair Practices Act

1. Issue: Responding to the retaliatory practices of processors, the Agricultural Fair Practices Act of 1967 was passed by Congress to ensure that family farmers could join together in associations and cooperatives to market their produce without fear of interference or retribution from processors. Unfortunately, loopholes in the legislation and changes in markets are making it increasingly difficult for producers to organize and attain a fair price for their products
2. Action: USDA should begin monitoring compliance with the Agricultural Fair Practices Act, and take enforcement action for clear instances where growers are being retaliated against based on their leadership of or membership in producer associations. If the Administration finds that statutory changes are necessary to fully enforce the Act, draft legislation should be sent to Congress to reform the Agricultural Fair Practices Act, to repeal the disclaimer clause and to require good faith bargaining by processors and handlers with producer associations.

II. USDA – Agricultural Marketing Service

A. Eliminate Country-of-Origin Labeling

1. Issue: The 2008 Farm Bill clarified Country of Origin Labeling legislation to eliminate problems with past USDA interpretations. USDA has propounded initial rules that are a good start, but enable processors to evade clear labeling requirements for multi-country meat and for processed foods.
2. Action: USDA should change the initial rules, before finalization, in this way:
 - a. Eliminate the multi-country labeling loophole; and eliminate or tighten the processed food loophole.
 - b. Remove livestock from the U.S. Department of the Treasury's list of imported products now exempt from the United States' general requirement that all imported products be permanently marked as to country of origin.

- c. Amend the COOL law to expand both the scope of commodities subject to the COOL law and the establishments that are required to label commodities (the COOL law's definition of retailer and its exemption for food service establishments effectively reduces COOL information to consumers).

III. USDA - Farm Service Agency

A. Suspend Direct and Guaranteed Loans for Specialized Hog and Poultry Facilities

1. Issue: The majority of livestock and poultry production contract loans are federally guaranteed, either by USDA's Farm Service Agency or the Small Business Administration. Because the federal guarantees make these production contract loans so easy to secure, it can lead to over-supply, particularly in the case of poultry. Whenever the company needs to cut back production to reduce supply, it is easy to do so by cutting off growers or suspending delivery of chickens until supply and demand are re-balanced. Yet despite being cut off, growers are still responsible for repaying their large loans on their stranded investments, a responsibility which reverts to the federal taxpayers if the grower goes bankrupt. Similar concerns exist about the use of guaranteed loans in the hog sector.
2. Action: USDA's Farm Service Agency should issue an administrative directive that places a suspension on issuance of any direct or guaranteed farm ownership or operating loans for the construction or expansion of a specialized hog or poultry production facility. Specialized hog or poultry production facility is defined as any building or enclosure and related equipment specifically to house, raise, or feed hogs or poultry of any type, size, age, or market class. Pursuant to such directive direct and guaranteed loans may continue to be made to an existing specialized hog or poultry production facility currently in use.

IV. USDA - Food Safety and Inspection Service

A. Facilitate the Shipment of Meat from Small State Inspected Slaughterhouses

1. Issue: A federal restriction on interstate shipment of state-inspected meat and poultry is a particular burden on small and mid-sized farmers and ranchers, who are often unable to access the services of federally inspected processors. Section 11015 of the 2008 Farm Bill amends the Federal Meat Inspection Act and Poultry Inspection Act by providing for the interstate shipment of meat and poultry products from small state-inspected packing and processing establishments.

2. Action: Expediently promulgate regulations to implement Section 11015 of the 2008 Farm Bill by (1) developing a regulatory framework that ensures that small and mid-sized livestock and poultry farmers and ranchers have access to interstate markets for their products and that safe, high quality meat and poultry products from state-inspected small-scale processing plants are available to consumers; and (2) securing adequate funding to launch this initiative, particularly funding for new state inspection coordinators and a new inspection training division.

VI. Department of Justice

A. Reform Merger Guidelines to Account for Concentrated Buyer Power on Prices

1. Issue: The U.S. Department of Justice (“DOJ”) and U.S. Federal Trade Commission (“FTC”) horizontal merger guidelines typically apply what is known as the SSNIP test (Small but Significant Non-transitory Increase in Price), which identifies the smallest relevant market within which a hypothetical monopolist or cartel could impose a profitable significant increase in price.
2. Action: The guidelines should be altered to clarify that, in buyer power cases; the SSNIP test would consider a small but significant *decrease* in price.

B. Coordinate Packers and Stockyards Act Enforcement for Poultry Cases

1. Issue: The present Packers and Stockyards Act (P&SA) makes it unlawful for a livestock packer or live poultry dealer "to engage in or use any unfair, unjustly discriminatory or deceptive practice or device," or "to give any undue or unreasonable advantage to any particular person or locality..." (Section 202) However, USDA's Grain Inspection, Packers and Stockyards Administration (GIPSA) has no administrative enforcement authority to either stop the unfair practices or penalize poultry dealers. When violations of the Act are discovered in the *poultry* industry, GIPSA can only issue an order to cease illegal conduct. After an investigation, GIPSA can send a complaint to the Justice Department for prosecution but such individual poultry cases are not likely to be considered a national priority by the DOJ.
2. Action: The new Administration should develop a MOU between the U.S. Department of Agriculture and the Department of Justice for a coordinated effort to prosecute poultry company violations of the Packers and Stockyards Act.

FOR FURTHER INFORMATION, CONTACT:

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