

(submitted electronically to: agriculturalworkshops@usdoj.gov)

December 31, 2009

The Honorable Eric Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

The Honorable Tom Vilsack
Secretary
U.S. Department of Agriculture
1400 Independence Avenue, SW
Washington, DC 20250

Dear Attorney General Holder and Secretary Vilsack:

The undersigned organizations are writing to provide comments and suggestions with regard to the upcoming Department of Justice/U.S. Department of Agriculture competition workshop regarding poultry, scheduled for May 21, 2010, in Normal, Alabama. While many of us have also provided other comments regarding other aspects of the USDA/DOJ workshop process, these comments are specific to poultry.

Overview

The poultry industry has been fully vertically integrated and dominated by contract production for almost forty years. Decades ago there were many poultry firms competing to buy product from farmers. Poultry growers had the option of being independent or to contract their services directly with a poultry integrator firm. In this more competitive environment than now, contract terms, payments and relationships were somewhat better for growers, as poultry companies had an incentive to make the contract terms as attractive as possible to encourage farmers to give up their independence and sign production contracts. But now that 90 to 95 percent of poultry is produced under contract, and growers have few (if any) choices of poultry companies with which to contract in their area, they are faced with contracts of adhesion under terms that are very one-sided and abusive.

Because the poultry sector was the first to become fully vertically integrated, it represents the best example of the dangers of monopsony in conjunction with total vertical integration. The poultry model is rapidly spreading to other sectors of agriculture, as processors see the opportunity to shift risk and costs to the growers as a strategy to maximize profits for themselves. Therefore, addressing the competitiveness and fairness problems of the poultry sector has implications for trends in agriculture more broadly, particularly in the livestock arena.

Suggested Topics of Focus for the Alabama Hearing

While there are many competition and unfair/deceptive trade practice concerns with regard to the poultry sector, we believe that most of the concerns fall within the following areas:

- USDA/ Department of Justice Enforcement of Packers and Stockyards Act
- Regional Competition and Tacit Collusion
- The Ranking System of Payment
- Capital Investment Requirements

Therefore, we are recommending that these 4 topics be the main focus of the Alabama poultry workshop, and would like to provide greater detail about our views in each of these areas.

USDA/ Department of Justice Enforcement of Packers and Stockyards Act

The statutory authority to enforce against poultry violations of the Packers and Stockyards Act (P&SA) is awkwardly split between USDA and the U.S. Department of Justice.

The Packers and Stockyards Act 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 unreasonable advantage to any particular person or locality.”

When violations of the Act are discovered in the livestock industry, USDA’s Grain Inspection, Packers and Stockyards Agency (GIPSA) has the authority to take administrative actions, including holding hearings and assessing civil and criminal penalties. However, GIPSA does not have this administrative enforcement authority in the poultry industry. In poultry, when violations of the Act are discovered, GIPSA can only issue an order to cease illegal conduct and must forward the case to the Justice Department to take further action.

This bifurcated authority has been a major impediment to effective enforcement of the Act with regard to unfair and deceptive trade practices in the poultry sector, to the detriment of poultry growers.

In the near term, since both USDA and DOJ have publicly announced intentions to increase scrutiny of anti-competitive practices and structures in the livestock and poultry sectors, we are urging that a memorandum of understanding (MOU) be developed between USDA and DOJ explicitly outlining the procedures for cooperation on poultry Packers and Stockyards Act enforcement cases, and that someone in the Office of the Assistant Attorney General for Antitrust be designated as the point person on this matter.

Ultimately, in order to address the statutory problem of split enforcement authority, we encourage USDA and DOJ to endorse legislation to give USDA full administrative enforcement authority for poultry violations of the Packers and Stockyards Act, parallel to the authority that USDA already has for P&S Act violations in the livestock sector. In addition, we are recommending that the civil penalties be increased for all livestock and poultry sector violations to create a more realistic deterrent to unfair and deceptive actions.

Lastly, we encourage USDA to reconsider its current interpretation of the Packers and Stockyards Act with regard to authority over unfair and deceptive practices affecting pullet and breeder hen growers.

Poultry production has several stages. Before breeder hens are of laying age, they are raised on a pullet farm. After the pullets reach laying age, they are moved to a breeder farm where the hens produce eggs that are collected and trucked to the hatchery. Once the eggs hatch, the chicks are delivered to a broiler farm where they are raised until ready for processing.

The definition of a "poultry grower" in the present Packers and Stockyards Act is "any person engaged in the business of raising and caring for live poultry *for slaughter* by another..." This definition has been misinterpreted to mean that the Act applies only to broiler growers because the birds they care for go directly to a processing plant, whereas the primary role of pullet and breeder hens is not for meat production. Since pullets and breeder hens do ultimately go to slaughter for meat after their initial role is complete, we believe the Act applies to them as well.

Previous Administrations have supported a statutory fix to resolve this problem, and many of us have supported that change. However, we believe that the current statute already provides this authority, and should be reinterpreted in this regard.

Whether the change is made administratively or by statute, it is important that the P&SA enforcement accurately reflects the integrated nature of the modern poultry industry where the total supply line for a processing plant - including pullet, breeder, and broiler farms - is tightly controlled by one company.

Regional Competition and Tacit Collusion

Poultry companies typically seek to source live poultry from growers within close proximity to their processing plants to minimize transportation costs. In many cases, poultry growers may only have the option of growing for one company within their region. In cases where companies do overlap territory, it is very uncommon for growers to be able to leave one company to grow for another. Anecdotally, it appears that there are formal or informal arrangements between companies to blacklist growers who have been cut off or have voluntarily ended an association with another poultry company in the region.

In addition to the lack of competition between poultry companies in these areas, the problem is exacerbated by another common practice, which is for poultry companies to site poultry processing plants in areas where there are few other economic or job opportunities, giving farmers few options but to grow chickens for that one company.

Therefore, we urge USDA and DOJ, when analyzing competition in the poultry sector, to focus on the areas within a radius of 30-50 miles around the nation's poultry plants as the relevant area of geographic analysis. Further, we urge both agencies to analyze economic

behavior in areas where there is one poultry plant versus areas where two or more plants overlap territory, to measure whether the overlap has resulted in greater competition, as would be expected in the absence of collusion. If economic conditions for growers are not improved in those geographic areas with multiple poultry companies, we would argue that this suggests the existence of some sort of anti-competitive behavior, such as tacit collusion.

Measurements that can be used to analyze economic conditions for growers include terms directly affecting grower pay (such as payment per pound, fuel bonuses, quantity of birds in houses, length of time between delivery of flocks), broader contract terms (such as contract length, limitations on access to court, etc), and more difficult to measure contract relationship aspects (such as prevalence of retaliatory actions against growers).

In addition, one practice that has become commonplace in the poultry industry in recent years has been for companies to suspend delivery of birds to growers for longer than usual periods of time. This practice results in great economic loss to growers, who must continue to service their loans without any income from their vacant poultry houses. This practice becomes particularly acute in areas where there is little competition.

The Ranking System of Payment

Under a typical poultry growing arrangement, growers take out a bank loan in excess of \$1 million to build sole-purpose, specialized poultry houses on their own land in order to grow the day-old chicks supplied by their poultry company until the birds are ready to be picked up for slaughter. Growers typically put up their farmland and house as collateral for the loan. The company retains title to the chicken throughout the process, minimizing any leverage the grower might have in the contract relationship.

Though poultry contracts vary in their complexity, the most common payment system is called the “tournament” contract or “ranking system”, which leaves growers assuming substantial risks for company-supplied inputs. Under the ranking system, contract poultry growers pay is based on the ability of the grower to put weight on the chickens during the seven-week grow-out period, relative to other growers whose birds are in that same settlement group. This system is designed to appear like a method to allow growers to compete fairly for pay based on performance. However, because the inputs that determine a producer’s performance are supplied by the poultry company itself, the ranking system has become a back-door, anti-competitive mechanism for poultry companies to shift risks to growers and to discourage dissension. For example, the final weight of a chicken depends more on the initial health of the chicks and the quality of feed, which are both provided directly by the company, than on the narrow range of managerial decisions within the growers’ responsibilities.

In most cases, the full financial implications of the payment system are often not clear to growers before they take out the loans and make the capital investments that commit them to the growing arrangement. Despite the lack of control over the inputs that largely determine their performance, the difference between being ranked on top or on bottom

for a particular grow-out period can be tens of thousands of dollars for growers, depending on the size of their operation. The opaque nature of this payment system creates the opportunity for gross manipulation of grower payments, and has given rise to the widespread perception that growers who challenge the terms of their contracts or organize with other growers to do so are vulnerable to having their payment reduced drastically as a retaliatory practice.

In recognition of the anti-competitive and non-transparent nature of the ranking system of payment in the poultry sector, we are recommending that the ranking system be considered an unfair trade practice, and therefore prohibited under the Packers and Stockyards Act. We are unaware of any other industry or sector that uses such a method of payment. Other methods of payment are available, such as payment based on square footage of the poultry houses used for growing a company's birds to slaughter weight, which is more objective and offers fewer opportunities for manipulation and anti-competitive behavior.

Capital Investment Requirements

Typically, poultry growers are heavily invested in specialized buildings and machinery and dependent on the poultry growing contract or arrangement to make debt payments. While the debt is financed over a decade or more, the contract may only be good for one flock (about seven weeks). Once the initial investment is made the growers must sign any new contract that is presented, even if the terms of the contract are unfavorable, or risk termination, bankruptcy, and the loss of their farm.

Because there are few, if any, alternatives for poultry growers to reap income from the expensive, sole-purpose poultry houses that they build on the farm as part of the poultry growing arrangement, they are very vulnerable to contract termination. If their contract is terminated, they are saddled with huge stranded investments.

This vulnerability also puts growers in a position where they can be pressured to make further costly capital upgrades to their facilities at their own expense, based on demands from their poultry company. Poultry companies often demand these upgrades to reduce the costs of the inputs that they provide, such as feed, even though the changes may actually increase the growers' costs, such as increased electricity costs and mortgage payments. Even though these upgrades rarely cash flow, growers feel great pressure to go further into debt to make these investments, for fear of contract termination or a loss of income through a retaliatory reduction in their rank under the payment system.

Therefore, our organizations are making the following recommendations with regard to capital investment requirements in the poultry sector:

USDA should promulgate amendments to the Packers and Stockyards Act regulations to:

- 1) require a poultry integrator to reimburse growers for capital investments made for purposes of the contract if the contract is cancelled prematurely without cause; and,

2) make it unlawful for a poultry integrator to require any additional capital investment to the growers' poultry facilities beyond the original poultry house specifications, unless growers are additionally and fairly compensated for that investment at the time of the upgrade.

As you finalize details of the Alabama poultry workshop, we urge you to be sensitive to the vulnerability of poultry growers to retaliation if they speak out in a public forum. A number of growers have expressed a willingness to share their concerns and stories during the workshop, and care should be taken to provide protection for those willing to take this step. But opportunity should also be provided for growers to speak in confidence if necessary.

Ultimately, we believe that USDA and DOJ efforts to increase the competitiveness of the poultry sector and to take more aggressive enforcement action against unfair and deceptive trade practices will minimize the retaliation threats. Until that time, however, the workshop process must make accommodations for this real problem in the poultry sector.

Sincerely,

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California Farmers Union
Campaign for Contract Agriculture Reform
Center for Rural Affairs
Contract Poultry Growers Association of the Virginias
Farm Aid
Food and Water Watch
Institute for Agriculture and Trade Policy
Iowa Farmers Union
Kansas Farmers Union
Michigan Farmers Union
Mississippi Agriculture Producer Association
Missouri Farmers Union
Missouri Rural Crisis Center
National Contract Poultry Growers Association
National Family Farm Coalition
Nebraska Farmers Union
North Carolina Contract Poultry Growers Association
Ohio Farmers Union
Organization for Competitive Markets
Pennsylvania Farmers Union
Rocky Mountain Farmers Union
R-CALF United Stockgrowers of America
Rural Advancement Foundation International- USA (RAFI-USA)
Southeast Asian American Farming Association
Western Organization of Resource Councils (WORC)

Addendum

We recommend that the following individuals be contacted to serve as panelists for the Alabama Poultry Workshop:

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