New rules for 89-year-old federal law split Midwest's agriculture community

USDA wants to change how livestock markets are regulated

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For years, economic, legal and legislative battles over consolidation in the livestock industry have been waged in the Midwest.

In the 1980s and 1990s, for example, Nebraska and South Dakota voters passed perhaps two of the toughest anti-corporate-farming laws in the nation — only over the past decade to have them struck down in the federal courts as unconstitutional violations of the Commerce Clause.

This year, attention has shifted to what the U.S. government might do.

New rules proposed by the U.S. Department of Agriculture's Grain Inspection, Packers and Stockyards Administration could dramatically change the way processors buy livestock and poultry.

Published in June, and since then the subject of a series of packed hearings across the country, the rules are a response to a directive in the 2008 farm bill, which called on the USDA to clarify how to enforce market protections for producers in the 89-year-old Packers and Stockyards Act.

The proposed regulations have captured the attention of the seed, poultry and dairy industries, but concern about consolidation and vertical integration in the livestock sector has often generated the most attention and policy debate. Consider these numbers from the USDA:

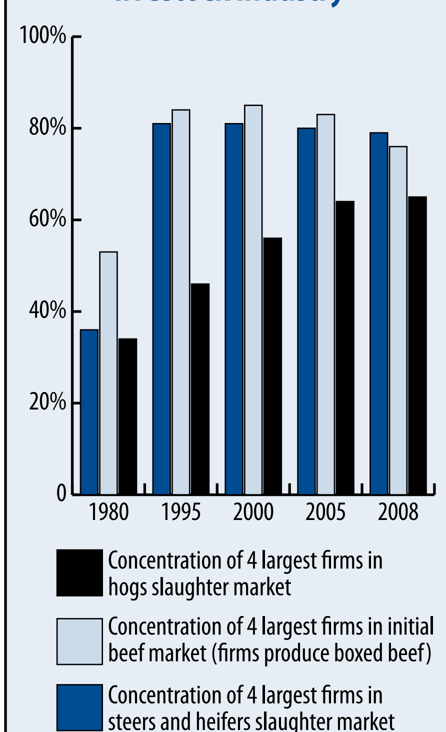
• The number of cattle and hog farms has shrunk by 55 percent since 1980. The U.S. cattle herd now numbers just over 93 million animals, the lowest total since 1959, and the pig-breeding herd is at a near-record low of 5.79 million.

• Since 1980, the top four processors of retail beef have seen their market share rise from 36 percent to 80 percent.

• In 2009, pig farmers received 24.5 percent of the retail value of the animal, half the share they received in 1980. Cattlemen received 42.5 percent of the retail value of a steer in 2009, compared to 62 percent in 1980.

The shrinking number of processing companies has been accompanied by a shift from the cash purchase of cattle and hogs to the use of long-term production contracts. Today, 65 percent of cattle and 94 percent of hogs are contracted to specific processors. According to USDA-commissioned research, the use of these contracts has adversely impacted the prices that producers receive.

Trends in concentration of livestock industry



Sources: "Packers & Stockyards Program 2009 Annual Report" and R-CALF USA

No consensus on rules

The proposed new rules have split the livestock industry.

Larger producers, many of which sell thousands of hogs or cattle a year, say the regulations would dismantle marketing agreements that reward them for producing the size and quality of cattle and hogs that meatpackers want. Conversely, many smaller producers support the rules, saying they would restore competition by making marketing agreements public and by empowering the federal government to prosecute violators.

A day after the new rules were published, the National Farmers Union hailed the USDA for "standing up for independent family farmers." It singled out several provisions, including one that prohibits packers from purchasing, acquiring or receiving livestock from other packers.

Other groups — including the National Cattlemen's Beef Association and the National Pork Producers Council — oppose the new rules. Pork Council president Sam Carney has said the proposal is "a recipe for stifling innovation, driving up costs, forcing simple contract disputes into court and — given those adverse consequences — compelling packers to own their animals rather than to contract with farmers."

The rules have divided policymakers as well.

At the federal level, USDA Secretary Tom Vilsack denied in October a request by more than 100 members of the U.S. Congress to conduct a comprehensive analysis of the rules' economic impact.

At the state level, Iowa Democratic Sen. Jack Kibbie supports the USDA's attempt to bring transparency and fairness to the livestock market.

"Packers may still offer premiums and discounts, but they will have to treat everyone the same," he says. "The increased overall transparency will significantly help small producers."

Kibbie's concern is that the rules "may be too complicated for producers to respond appropriately."

Conversely, South Dakota Sen. Larry Rhoden worries that "some aspects of the [USDA rules] may be too far-reaching" and an overstep by the federal government into the private marketplace.

Earlier this year, in comments made to the USDA, attorneys general from Iowa, Ohio and South Dakota and 11 other states urged the USDA "to consider legislative and regulatory revisions to the [Packers and Stockyards Act] to ensure compliance with the act."

The new rules are an attempt to do that. The attorneys general also recommended greater state involvement in enforcement of the act.

Overview of proposed USDA rules

• Require livestock processors and contractors to keep records justifying differential pricing and contracts.

• Remove the requirement for proof of harm to competition for successful litigation.

• Make it a violation to offer higher prices to ***single producers*** with larger volumes as compared to a ***group of producers*** with similar volumes.

• Prohibit a buyer from representing multiple processing companies or processors from buying from each other.

• Require that contractors provide the USDA with sample copies of contracts.

• Require that company contracts for poultry growers provide the same base pay for similar birds.

• Require poultry contractors to give 90-day notice of suspension of delivery of birds.

• Place more restrictions on the demands that a poultry or swine contractor can make on a producer to upgrade facilities.

• Provide greater oversight of the arbitration process.

States use legislation, litigation and negotiation to protect producers

With or without new federal rules governing agricultural markets, states will continue to have a role to play in protecting producers. In fact, the new federal regulations include several elements that are similar in intent to the protections already afforded producers in Iowa under that state's Contract Grower's Bill of Rights.

The Bill of Rights is the result of years of legislation and litigation — and reflects the prominent role that states have had in addressing many of the issues now being taken on by the U.S. Department of Agriculture. The Iowa attorney general's office spent six years in litigation with Smithfield Foods in an effort to enforce the state's restrictions on vertical integration in livestock production. (The litigation came about after Smithfield acquired a hog production business in 1999.)

During that six-year period, Smithfield successfully challenged Iowa's existing statute as an unconstitutional violation of the Commerce Clause. The legislature responded by making statutory changes. This ultimately led to negotiations between the attorney general's office and Smithfield; in 2003, the company agreed to abide by the Contract Grower's Bill of Rights. The protections include the right to be a "whistle blower," to join an association, to use a contract-producer lien, and to publicly discuss and disclose the terms of contracts. In addition, Smithfield agreed to purchase 25 percent of hogs on the open market for two years and to pay $2 million for environmental-improvement programs.

As part of the consent decree, Democratic Attorney General Tom Miller agreed not to pursue enforcement of the state's ban on vertical integration in the livestock industry. The state has signed similar consent decrees with Cargill, Hormel and Tyson. Since then, Iowa's hog industry has continued to expand, especially in the production-contracting sector.

Earlier this year, the attorneys general from Wisconsin, Illinois and Michigan (along with the U.S. Department of Justice) filed an antitrust lawsuit against milk processor Dean Foods over the company's acquisition of two processing plants in Wisconsin.