Farm Action

January 10, 2025
Submitted via regulations.gov

S. Brett Offutt
Chief Legal Officer
Packers and Stockyards Division, USDA, AMS, FPP
1400 Independence Ave. SW, Washington, DC 20250-3601

Re: Comment by Farm Action on the Agricultural Marketing Service's Proposed Rule Concerning Price Discovery and Competition in Markets for Fed Cattle, RIN 0581-AE30

Dear Mr. Offutt,

Farm Action is a farmer-led organization that develops and advances bold solutions to stop corporate monopolies, hold government accountable, and build fair competition in rural America.[1] Its activities include education through reports, blogs, and other educational tools; collaboration with a variety of other organizations; and policy reform efforts that have shaped legislation and public policy. Farm Action contributed to the roadmap of President Biden's *Executive Order on Promoting Competition in the American Economy*.[2]

These comments respond to the Department of Agriculture's ("USDA") Notice of Proposed Rule Making: *Price Discovery and Competition in Markets for Fed Cattle*.[3] The Notice suggests that the USDA is concerned with all aspects of the market for fed cattle, but it focuses primarily on questions concerning the use of alternative marketing agreements ("AMAs"). Because such agreements are increasingly dominant in the sale of fed cattle, this focus is not unreasonable; however, this fails to take as holistic a view of the issues facing producers of fed cattle. There are, also, other buying practices in the cash market that raise serious concerns. Two practices merit particular attention, and the Notice does identify both. Delay picking up cattle purchased in the cash market creates an unjustified burden on the feeder unless there is compensation for the expenses associated with that delay. Moreover, delaying the receipt of such cattle can manipulate subsequent

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[1] More information about Farm Action is available at its website: https://farmaction.us/about-us/. Farm Action thanks Peter Carstensen, Professor Emeritus, University of Wisconsin Law School, for his assistance in preparing this comment.
[2] See, *Executive Order on Promoting Competition in the American Economy* available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.
[3] 89 Fed. Reg. 82519 (October 11, 2024), hereafter "Notice."

market prices. The second challenge for market integrity results from the practice of packers using "top of the market" purchases which remove these cattle from the cash market process.

Some of the proposed rules restricting or eliminating potentially serious problems with AMAs would not require their elimination. However, Farm Action's view is that restoration of a cash market including sales for longer term delivery is the more desirable option. But the fundamental problem with the market for fed cattle is the undue and unnecessary concentration of the buying side of the market. The USDA has and is trying to create more competition in the market by supporting new entry and expansion of small and middle-sized packers.[4] In developing rules to facilitate the better operation of the market for fed cattle it is essential to address the potential for exclusionary conduct by the incumbent packers not only in the market for fed cattle but also in the downstream markets for beef. Such rules are necessary to protect the ability of these new and expanding packers to compete effectively in the market.

Markets exist only within a framework of rules and regulations. In the absence of such legal structures complex economic activity would be impossible. This insight is important because it means that the issue in this proceeding is not whether there will be rules, but rather which rules will define the underlying market relationships. The goals of a market defining legal system should be to achieve an efficient and fair market process that is as open as feasible to new entry and ensures that desirable innovation can occur.

These comments start by reviewing the implications of the concentrated structure of the buying side of the market for fair and efficient marketing of cattle. This structure creates substantial buyer power that in turn creates incentives to exploit the market for fed cattle. The extensive use of AMAs is closely linked to the structure of the markets for fed cattle. Economic logic and empirical work show that contemporary AMAs make business sense as much as a means of exploiting producers as achieving market efficiency. Indeed, other marketing systems can achieve most or all of the purported advantages of AMAs.

The next part examines the problem of transparency in the contemporary market for fed cattle. The USDA can and should substantially enhance the disclosure of important market information that it obtains but for various reasons does not share in a timely fashion. Access to this information is essential to reducing the informational imbalance between producers and buyers. Since the USDA receives or can receive most of this information, the primary concern is with establishing a more comprehensive system of timely public reporting.

The third part critically reviews the various methods of pricing cattle for present and future delivery as well as the problem of access by feeders to AMAs. A central conclusion based on the earlier analysis of economic incentives is that no packer should be allowed to use a future cash price for cattle as the base price for an AMA if it is also a participant in that cash market. Indeed, the least acceptable form of such a forward price setting occurs when a packer uses its own cash price as the

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[4] See, Press Release, *USDA Announces Funding Availability to Expand Meat and Poultry Processing Options for Underserved Producers and Tribal Communities*, April 19, 2023, available at https://www.usda.gov/article/usda-announces-funding-availability-expand-meat-and-poultry-processing-options-underserved-producers#.

basis for its AMAs. Such restrictions would not preclude the use of AMAs that rely at least in part on some future price as the basis for the contract. But such a basis needs to be as free as possible of potential incentives to manipulate that future price. The related concern is access to AMAs for all feeders. Currently, packers can decide with which feeders they will deal. This discretion facilitates both exclusionary and exploitative conduct. Hence, opening access to AMA contracts, assuming this form of purchase continues to be permitted, is another essential step in limiting the potential for discriminatory and anticompetitive conduct by packers.

The fourth part elaborates on two problems that Notice identifies in the cash market. The first is packer delay in collecting purchased cattle without compensating the feeder for the resulting costs. This imposes a burden on the feeder and can create a risk of manipulation of the subsequent cash market. The second is the practice of cash purchases based on a "top-of-the-market" price. This method is likely to distort cash prices and has no justification.

The final part summarizes the options for rules that Farm Action recommends being proposed. Some proposed rules would, at best, only modestly reform the markets for fed cattle while others would make major changes that would be likely to contribute more meaningfully to improving the market.

I. The Structure of the Cattle Buying Market and the Implications for Competition

A. The beef packing oligopoly creates incentives for tacit and express collusion

The beef packing industry is currently highly concentrated with the four largest firms buying more than 80% of fed cattle.[5] This structure represents a radical change from the situation prior to the 1980s when beef packing markets were relatively unconcentrated.[6] The change resulted in substantial part from a number of mergers in the 1980s and 1990s. The antitrust enforcement agencies failed to challenge these mergers, and the Supreme Court rejected the one major private case focused on the competitive risks of multi-market buyer power.[7]

In this period the enforcement agencies apparently assumed that competition would remain vigorous and that there would be significant efficiency gains from consolidation so long as 3 or 4 competitors remained. There was also a notable failure to focus on the buying side of markets on the part of the public agencies. Empirical work has now shown that this assumption was wrong with respect to both efficiency and competition.[8] Moreover, there was an increasing recognition of the

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[5] See, Notice, supra note 3, at 82522.
[6] See, id.
[7] Cargill v. Monfort, 479 U.S. 104 (1986) (rejecting challenge to a merger creating a significant multi-market cattle buyer able to engage in predatory buying strategies in selected cattle markets).
[8] See, John Kwoka, Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy (2014); see also, Peter C. Carstensen & Robert Lande, *The Merger Incipiency Doctrine and the importance of "Redundant" Competitors*, 2018 Wis. L. Rev.780, 811-822 (summarizing empirical scholarship showing that major mergers tend to increase prices and do not produce efficiencies).

adverse effects of concentration on the buying side of the market.[9] But by then many markets, including beef packing, were already concentrated resulting in market power. As the Notice points out there is a general recognition that the major beef packers have market power in the fed cattle market.[10] A firm or group of firms with market power has both the ability and the incentive to exploit that power to increase revenue and exclude potential or marginal competitors.

Finally, those justifying the current structure of the industry focus on economies of scale. But those occur at the plant level to the extent that they occur at all. At the plant level, no plant handles more than a relatively modest total share of the total beef market.[11] Moreover, given the number of smaller plants, it is likely that scale economies diminish significantly once a modest level of product exists. The implication of this is that there is no efficiency justification for the current concentrated structure of the beef packing industry. While some specialization by plants with a common owner may result in limited additional efficiencies, those efficiencies are vulnerable to changes in demand which can, and did in the period of Covid, require substantial reorganization of such plants to address the changes in demand.[12] One estimate, based on 2000 data, showed that if each firm had no more than three plants, that would result in a market with seven or eight packers in place of the four dominant firms.[13] A market with this many firms is much more likely to yield competitive prices for inputs and outputs.[14]

B. *The Incentive to Exploit Buyer Power in an Oligopsonistic Market*

The basic incentive of buyers participating in an oligopsonistic market is to restrict price competition for inputs as long supply is relatively inelastic. The lower price will not significantly reduce the supply in the short or intermediate run although eventually the market will respond as the least profitable input producers exit the market. Assuming relatively inelastic demand for the output, even a modest reduction in supply will be likely to increase the downstream price. Thus, an interdependent reduction in price on the input side correlates with an increase in prices on the output side. Thus, an oligopoly can exploit both input and output sides of the market at the same time.

[9] See, e.g., Toys R Us v. FTC, 221 F.3d 928 (7th Cir. 2000) (upholding finding that buyer had used its power to deny competitors access to equal prices); Knevelbaard Dairies v. Kraft, 232 F.3d 979 (9th Circuit 2000) (upholding claim that market manipulation in the cheese market to reduce the buyer's cost had harmed dairy farmers); Todd v. Exxon, 275 F.3d 191 (2nd Cir. 2001) (upholding a complaint that major employers had agreed to share employment information to limit wages).

[10] Notice, supra note 3, at 82529.

[11] This conclusion rests on the observation that no single beef packing plant handles more than 6% or so of total production.

[12] See, Notice, supra note 3, at 82528.

[13] Peter C. Carstensen, *Concentration and the Destruction of Competition in Agricultural Markets: The Case for Change in Public Polic*y 2000 WIS. L. REV. 531, 537 (22 large packing plants would allow creating 7 packers each with three plants).

[14] See, Jeremy Sandford, *Competition and Endogenous Impatience in Credence Good Markets*, 169 J. INSTI. & THEO ECON 531 (2013) (finding that six or seven firms were necessary to produce effective competition in markets where customers faced switching costs and risks).

Even before AMAs became the dominant form of cattle purchase, the increasingly dominant packers found it rational to engage in conduct that held down the price paid for cattle.[15] Because of their frequent interactions the packers may only have needed to engage in a tacit collusion. They shared a common interest in limiting the price paid for cattle. Moreover, deviation from this consensus would be difficult, costly, and risky.[16] When shortages occurred in the cattle markets, this led to periods of competition, but once supply increased again the tacit collusion resumed.[17]

Starting in the middle 2010s, apparently induced by several shocks to the market, the margin between the price paid for cattle and the price of wholesale beef expanded substantially.[18] On the cattle buying side of the market, prices declined leaving a surplus of cattle and inducing a longer run decline the number of cattle reaching the market. Not surprisingly, given the relatively inelastic demand for beef, the wholesale price increased. As a direct result, the profits of the packers grew dramatically.[19] This is again illustrative of a parallel and interdependent action by the dominant packers. Indeed, it appears that at least some of this conduct was overtly collusive.[20] In a workably competitive market, the higher prices of beef and the availability of cattle at reduced prices would have resulted in increased production resulting in lower prices for beef and higher prices for cattle.

When the highest price in such a market sets the price for all sales in a relevant time period, it is obvious that buyers have a strong incentive not to bid up prices at the margin because of the impact such price competition will have on their total purchases. This in turn creates a strong incentive for tacit collusion among such firms. They have a collective interest in restraining price competition. Where buying practices are relatively public, such coordination is relatively easy to achieve.

The constraint on excessive exploitation of cattle producers is that the packers need a continuing supply of cattle. Hence, driving the price below the long-term average cost of producing cattle would deprive the packers of the supply they need. It is still rational for such buyers to extract any surplus that might otherwise accrue to the producer. Indeed, where the producers have substantial sunk costs in durable assets, the exploitation can exceed the costs of production for extended periods of time without forcing such suppliers to exit.

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[15] Xiaowei Cai, Kyle Stiegert, Stephen Koontz, *Regime Switching and Oligopsony Power: The Case of US beef Processing,* 42 Ag. Econ. 99 (2011).
[16] Bidding up the price of an input to gain a larger share results in increased output which in turn is likely to result in lower prices for the output. Hence, even dominant firms have little incentive to engage in such conduct. See, PETER C. CARSTENSEN, COMPETITION POLICY AND THE CONTROL OF BUYER POWER A GLOBAL ISSUE (2017) 108. See also, Robert Marshall & Michael Meuer, *Bidder Collusion and Antitrust Law: Refining the Analysis of Price Fixing to Account for the Special Features of Auction Markets,* 72 ANTITRUST L. J. 83 (2004)
[17] See, Cai et al, supra note 15.
[18] Notice, supra note 3, at 82528.
[19] Id.
[20] The major packers have been sued by buyers and feedlot operators alleging collusion, see, e.g., In re Cattle Antitrust Litigation, 2021 WL 7757881 (D. Minn. 2021) (rejecting a motion to dismiss a complaint charging a conspiracy to set beef prices; subsequently many defendants settled). The packers employees have also asserted a claim of unlawful collusion to restrict employee wages and benefits, Brown v. JBS USA Food Co., 2023 WL 6294161 (D. Colo. 2023) (rejecting the defendants' motion to dismiss). Many of the packers have elected to settle those claims with substantial payments.

Another relevant scenario for cattle is that if a buyer has more than one input market to draw on, it can exploit the one in which it has substantial buyer power in more extreme ways because it can offset lost supply with increased purchases in the other market. Domestically, this can occur when packers have plants in several regional markets and multinational packers can import cattle or beef from other countries to replace supplies lost as result of greater exploitation of market power in this country. Indeed, empirical work shows that such multi-plant enterprises coordinate purchases of cattle with a resulting increase in packer margins. Moreover, that same empirical work finds that such enterprises will close specific plants sooner than will a single plant operator.[21] This further reduces the number of competitors buying cattle in any region.

AMAs based on future cash market prices create even greater incentives to distort the cash market. A packer with a substantial supply of cattle already locked in place with AMAs where the basis for the price is some measure of the cash market price at the time of delivery has an incentive to restrain price competition in that market.[22] Any price increase in the cash market will be magnified many times as a result of the increased base price. Individual feeders will still have a strong incentive to accept such contracts because they are likely to receive a premium over the cash market and an assurance of a buyer.[23] AMAs using cash market prices do not serve the collective economic interest of feeders in receiving reasonable prices, but for any individual feeder, an AMA is likely to be a better option than participation in the cash market in most regions of the country.

Another distortion in the market price comes from the practice of using "top of the market" contracts for buying cattle in the cash market. This method of buying involves a commitment by a producer to sell cattle during the week at whatever price turns out to be the highest price that week in the market. As a packer accumulates such commitments, its incentive to compete for further purchases on a cash basis declines because any increase in the final market price increases the total cost of that week's purchases in both the cash and AMA markets.[24] There does not appear to be any legitimate reason for the use of this buying tactic.

C. *Implicit or explicit all or nothing implication of oligopsony*

Another tactic which can further exploit producers is the use of an "all or nothing" buying practice.[25] The buyer offers to buy the entire production or will not buy any of it. In an oligopsonistic market if the producer has few or no alternatives, the buyer can demand an output that would approximate that which would occur in a competitive market but would pay only enough

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[21] Christopher C. Pudenz & Lee L. Schulz, *Multi-plant Coordination in the U.S. Beef Packing Industry*, 106 AMER J AGR ECON. 1 (2023).
[22] See, Francisco Garrido, Minji Kim, Nathan Miller, Mathew Weinberg, *Buyer Power in the Beef Packing Industry: An Update on Research in Progress* (January 2024) available at https://www.nathanhmiller.org/cattlemarkets.pdf.
[23] See, Notice, supra note 3, at 82528 ("AMA contracts commonly pay adjustments over the base price . . . ").
[24] See, Tian Xia & Richard Sexton, *The Competitive Implications of Top-of-the-Market and Related Contract-Pricing Clauses,* 86 AM. J. AG. ECON. 124 (2004) (model showing how top-of-the-market buying results in lower prices).
[25] See, ROGER D BLAIR & JEFFREY L. HARRISON, MONOPSONY IN LAW AND ECONOMICS 83-85 (2010); see also, CARSTENSEN, supra note 6,. at 42 -43.

to cover the costs of production.[26] The short run implication of such buying is that the quantity remains close to the competitive level. This may suggest that this is primarily a "wealth transfer" between buyer and seller. The longer run implication is that efficient producers are denied a reward for their efficiency. This reduces the incentive to invest and even to participate in such a market. Hence, the ultimate implication of such buying practices is that they harm the overall competitive process and are likely to result in inefficiency and a lack of innovation.

It appears that many feeders selling via AMAs are subject to explicit exclusive dealing contracts with major packers.[27] This is a form of the all-or-nothing contract. Moreover, these same feeding operations are often located in regions where there are very limited alternative outlets for their cattle.[28] This same all or nothing treatment exists in many cash markets. The empirical work by Hunnicutt et al shows that most feeders selling into the cash market have a continuing and largely exclusive relationship with a single packer.[29]

The incentive of packers to employ such a system is easily understood. It reduces the need to compete for purchases. As long as each packer has its set of exclusive suppliers, the incentive to compete vigorously to buy from another packer's supplier will be limited because it is likely to trigger a competitive response from that other packer. Hence, even if a competing packer is willing to make a bid, it is unlikely to do so on advantageous terms to the feedlot operator except in times of short supply where, as discussed earlier, the usual tacit collusion breaks down.[30]

D. AMAs are not the only solution to efficiency and predictability

Most economists focused on cattle markets apparently assume that because AMAs can provide efficiency enhancing elements, they should necessarily be preferred over any other method of marketing cattle.[31] When, however, the specific advantages of AMAs are listed and compared to the advantages of other established marketing systems for cattle, the results show that most of the desirable attributes can be achieved through other marketing systems including cash markets where price is based on "grade and yield" or some comparable grid system that compensates for favorable

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[26] See, ID. This analysis assumes that the producer has increasing marginal costs which in turn means that the average cost of production is below marginal cost. In a workable competitive market, the producer would price its output at the marginal cost and enjoy revenue above cost for all the infra-marginal units sold. Economics calls these Ricardian Rents. They are the reward for the efficient production of inputs. However, the all or nothing buyer can extract those rents by setting a price at the average cost of production.

[27] See, Notice, supra note 3, at 82522.

[28] Perhaps, given the scale of their operations, the largest feedlots are still able to bargain sufficient compensation to justify their continued investment.

[29] Lynn Hunnicutt, Deevon Bailey, Michelle Crook, *Rigidity in Packer-Feedlot Relationships*, 36 J. AG. & APPLIED ECON. 627 (2004)

[30] See, text at note 17 , supra.

[31] See generally, THE U.S. BEEF SUPPLY CHAIN: ISSUES AND CHALLENGES (Bart L. Fischer, Joe L. Outlaw, & David P Anderson eds., 2021)(essays by leading economists who specialize in the cattle/beef industry basically defending AMAs as the best means of selling cattle); for a critique of this perspective, see Peter C. Carstensen, *Dr. Pangloss as an Agricultural Economist: The Analytic Failures of THE U.S. BEEF SUPPLY CHAIN: ISSUES AND CHALLENGE*S," 68 S. D. L. REV 458 (2023)

characteristics and imposes penalties for negative ones.[32] Indeed, specifying other characteristics desired in the cash market provides an alternative method for marketing cattle which are grass-fed or have some specific breeding characteristic.

An exclusive cash market is said to increase the risk or uncertainty for both producers and packers. But that perception is largely elusive if the great bulk of cattle were marketed on a cash basis. The supply available at any point is relatively set and cannot change much because of the long period between calving and the time when the cattle are ready for slaughter. Similarly, the demand for other basic characteristics, feeding preferences, and other considerations once established in the market can generate production to satisfy this demand.

The present cash system may result in increased costs in the transaction process. Moreover, producers may well find financing more challenging if lenders do not understand the marketing process and perceive greater risk. If, however, the marketing process took advantage of modern technology, the risk of such negative effects could largely evaporate.

Specifically, electronic auctions could handle immediate transactions in a way comparable to the cash market but with substantially lower transaction cost. Equally important, such auctions could provide a method for making sales for future delivery even though they are months away. Indeed, such auctions already exist both for selling calves and in one regional market for selling beef cattle.[33] The fed cattle market offers both alternative types of sales for immediate delivery and future delivery.[34] These examples demonstrate the viability of this system. Thus, buyers could bid on pens-of-cattle for immediate or deferred delivery. This in turn would open the opportunity to participate in the market for future delivery to any interested feeder and would provide a path for feeders and growers to have an assured market for cattle satisfying specific characteristics. Finally, the electronic auction can provide guarantees by becoming the intermediate party which would reduce risks on both sides of the transaction. Such electronic auctions require further technical development and a set of regulatory rules to ensure their reasonable and fair operation.

Unlike the futures market which operates nation-wide through a single auction, auctions for actual cattle would apparently have to be regional in order to ensure the workability of the transaction.[35] Thus, while electronic auctions could provide a better means to achieve market efficiency and transparency, the buying side of the market remains highly concentrated, especially in some regions.[36] As a result, there is a substantial likelihood that the packers would continue to engage in at least tacit collusion to the greatest extent feasible in each regional market. It is hard to imagine a single national auction market for physical cattle. Such a market would require, at a minimum, developing a means of trading rights to cattle among buyers so that the physical cattle can

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[32] Ted C. Schroeder, Brian K. Coffy, & Glynn T. Tonsor, *Enhancing Supply Chain coordination through Marketing Agreements: Incentives, Impacts, and Implications,* 81, 85 Table 4.1, in BEEF SUPPLY CHAIN, supra note 31.
[33] Northern Livestock Video Auction offers online auctions for calves and other types of cattle, see https://www.northernlivestockvideo.com/. Central Stockyards provides online auctions for fed cattle. See, https://centralstockyards.com/.
[34] See, https://centralstockyards.com/about-the-fed-cattle-exchange/.
[35] For example, Central Stockyards requires that the buyer be within 225 miles of the selling feeder or make a separate arrangement for delivery. See, https://centralstockyards.com/about-the-fed-cattle-exchange/#.
[36] See, Notice, supra note 3 at 82522.

ultimately be linked to geographically relevant packers. Even then, the concentration of the overall buying market is likely to induce tacit collusion among buyers.

E. The core problem for workable competition: market structure

As long as beef packing remains highly concentrated, as the foregoing analysis has demonstrated, the potential for fully competitive markets for fed cattle will remain elusive. The USDA is currently assisting both new entrants and existing smaller packers in their efforts to expand their presence in the market.[37] Ultimately, changes in market structure are essential to the long-term goal of restoring workable competition in the fed cattle markets. As the recent USDA report on wholesale beef marketing practices shows there are very significant risks of exclusionary conduct that can stifle and frustrate the emergence of a more competitive beef packing industry.[38] One dimension of this risk is the use of AMAs and tacit or express exclusive dealing contracts with feeders. Such agreements can foreclose access to a sufficient supply of cattle and so diminish the effectiveness of new or expanded entry into beef packing. Moreover, both large packers and large retailers have a reciprocal interest in limiting the ability of smaller packers and smaller retailers to have workably competitive sources of supply.

II. Transparency — better and more comprehensive reports of sales and inventory

Full and comprehensive information is a central concern in any market, especially one in which a few buyers deal with many sellers. The buyers have a clear informational advantage because of the volume of business they do, the repeated interactions of their buyers with multiple sellers which can then be shared and analyzed internally. In contrast, sellers in such contexts lack the kind of information that would come from multiple and repeat interactions. In order to make such markets workably competitive and fair, the sellers need access to substantially similar data. While information cannot by itself make markets work competitively, indeed, in concentrated markets sharing information can facilitate tacit collusion, especially when the information is shared only among buyers.[39] To produce fair and efficient markets, the information is essential but must be joined with rules that ensure as much competition among buyers as possible. Thus, producing better information is not by itself a solution to the problems feeders face in cattle markets, but it is an indispensable first step. This section explains the kinds of information that are necessary for an informed market.

A. Volume under contract/related to delivery date

One of the features of the AMA system that its supporters extoll is that it creates a reliable supply system allowing the packer to better plan its overall production schedule. While as noted

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[37] See, note 4 supra.

[38] See, USDA, *Interim Report: Competition and Fair Practices in Meat Merchandising* (2024) available at https://www.ams.usda.gov/sites/default/files/media/MeatMerchandisingInterimReport.pdf.

[39] See, e.g., United States v. Agri Stats, 2024 WL 2728450(D. Minn. 2024) (rejecting a motion to dismiss a case claiming that pork and poultry producers shared sensitive business information through a central coordinator resulting in higher prices in the affected markets).

earlier, the AMA is not the only way to achieve this result, what is important for both those feeders with access to the AMA process and those relying on the cash market is the volume of cattle under contract with respect to each week. Knowing the volume of cattle that packers have booked through their AMAs for each period is important for all feeders. When the scheduled AMA deliveries would approximately equal demand in any particular period, a feeder could adjust its own timing in bringing cattle to the cash market or making a commitment to provide cattle under an AMA during such a period. While a feeder subject to an AMA contract may have less of an option with respect to timing of delivery, this information given its implications for any AMA based on cash prices will incentivize such feeders to manage delivery times as much as possible.

The USDA has or can obtain such information through its reporting process. It can share this information with all market participants on a weekly basis. The data should provide the national total volume of cattle coming to market in any time period. This will most directly determine the wholesale price of beef and set thus the overall value of cattle in that period. Regional data is important because cattle ready for slaughter are unlikely to be shipped any great distance. The cost and potential damage to the cattle themselves from such movement makes it economically unattractive. For this reason, the regional information is going to be important both for those selling on the regional cash market and for those evaluating AMA contracts.

The potential problem with reporting regional inventory in detail is that it allows packers in regions with only a handful of competing firms to verify what their competitors are doing. Increases in volume would be a signal that the packer intends to compete in the wholesale beef market more vigorously at future dates. Such a signal would be likely to induce retaliation by the other packers in that region. Hence, better reporting can deter price competition. This problem may be less significant in practice because the major packers in those highly concentrated regional markets are very likely to already possess this information. Only the producers lack it.

B. Price information including terms of AMA

The USDA is to be commended for its program to collect and analyze AMA agreements. That analysis has shown that it is "common[to] pay adjustments above the base price . . .."[40] Such payments are prima facie questionable as an undue preference under the Packers and Stockyards Act.[41]

This information should also include the basis on which any future price is to be calculated and the timing for delivery of cattle. The premiums for grade and yield should be disclosed as well as any penalties that might result from carcasses that are below the standard required. To the extent that any of this information is not being obtained, the USDA needs to modify its regulations to ensure that it has comprehensive information about these contracts. It is also essential to ensure that the scope of the information being sought is expansive. For example, there are reports that favored feeders get year end payments or favorable financing nominally independent of their AMA contracts.[42] Such additional compensation, whether explicit in the AMA contract or not, can be a

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[40] Notice, supra note 3, at 82528.
[41] See, 7 U.S.C. 192(b).
[42] Id. at 82527-82528

significant factor in differentiating the compensation to such favored feeders and feeders subject to the same AMA that are not so favored as well as feeders selling in the cash market. Hence, the reporting requirements need to include information about all payments or other assistance given to feeders who get AMA contracts.

C. *Better and more comprehensive reporting of beef sales*

The wholesale price buyers pay for beef is another relevant piece of data. It is important to producers to let them predict the likely level of future demand for cattle. It is also important for retailers and wholesalers who will want to shop around more actively as margins between the price of cattle and the wholesale price of beef increase. Indeed, a few major retailers may well already be avoiding the increased packer margins by buying cattle, having them slaughtered in smaller independent packing houses, and then performing their own fabrication.[43]

The recent report by the USDA on distribution issues in meat highlights the weakness of the current reporting of wholesale prices.[44] The great bulk of beef sales are direct from packers to buyers, either wholesalers or larger retail and restaurant chains. If these transactions are not included in the reported wholesale price index, this may create misleading price data and deny beef buyers full information. While it is likely that the largest buyers get some volume discounts, a fuller report of wholesale prices including the range of prices in direct sales would be illuminating in terms of concerns with price discrimination and the use of discounts as an exclusionary practice.

The USDA has or can obtain all wholesale prices for beef and create a regular report that will show whatever discrepancies exist between the public market in boxed beef and the dominant direct sale markets. If AMAs can no longer be based on cash market prices, one possible alternative would be a measure of the wholesale price of beef. But for that to be a reliable measure, it is essential that it be as free from the risk of manipulation as possible. The experience in the cheese market some decades ago illustrates the risk of letting a small part of a larger market provide the basis for setting prices.[45]

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[43] Chris Clayton, *Walmart to Build Case-Ready Beef Plant,* PROGRESSIVE FARMER (June 14, 2023).available at https://www.dtnpf.com/agriculture/web/ag/news/business-inputs/article/2023/06/14/walmart-taking-next-step-develop-end.

[44] See, note 38, supra, at 24-25.

[45] Major cheese buyers manipulated the public market price for cheese by selling small quantities on the Green Bay cheese exchange which at the time provided the basis for off exchange cheese prices. See, Mueller at al, *Cheese Pricing: A Study of the National Cheese Exchange* (1996) available at https://www.researchgate.net/publication/262698134_Cheese_Pricing_A_Study_of_National_Cheese_Exchange. This manipulation harmed dairy farmers because the price of milk was based on the price of cheese. See, Knevelbaard Dairies v. Kraft Foods, 232 F.3d 979 (9th Cir. 2000).

III. Price and access models for AMAs (assuming they are allowed)

If the USDA decides to allow the continued use of AMAs, there are important choices that need to be made about the kinds of pricing methods that can be allowed to avoid undue risks of manipulation and exploitation. The Notice, indeed, reflects these concerns and highlights some options that could function with more reliability. A second issue that is not raised but should have been is the problem of access to AMAs. Currently, the packers determine at their discretion which feeders will get an AMA. Moreover, as noted earlier, these commitments usually are for the entire production of the feedlot which in turn creates additional risks to the overall competitive process. The following sections examine related issues with respect to pricing of AMA contracts.

A. Regional definitions invite bias in the cash market and need reconsideration

Currently the USDA provides regional cash price information as well as a national price. Some regions have so few buyers that the cash price is not even reported.[46] Further it appears that most AMAs using a cash market price as the basis for the contract use one of the regional prices rather than the national one. But in some regions, there is only a very limited number of negotiated sales.[47] This condition is associated with only a limited number of buyers in either the AMA or cash market. The implication is that the use of regional negotiated prices creates a substantial incentive to manipulate those prices, especially if the packer is also buying in other regional markets so that it can satisfy its overall demand for cattle. The opposite is also possible. Packers can depress prices in regional markets with larger volumes of negotiated sales in reliance on the volume of AMA cattle in other regions.

The central point is that as the negotiated sale market diminishes in volume, the continued reliance on regional prices increases the incentives to manipulate those prices. Hence, if, contrary to the view of Farm Action, AMAs are to continue to be allowed to use negotiated prices as a basis for the sale of cattle, then such contracts should not be allowed to use regional prices where there are only limited cash sales.

B. Selective buying distortions

A second problem with the use of negotiated prices as the basis for AMA contracts regardless of whether that price is regional or national is that packers with substantial volumes of cattle coming in through AMAs have an incentive to buy lower quality cattle in the cash market because that will result in a lower reported price.[48] Again, this points out the inherent problem of allowing packers with substantial AMA holdings to participate in the negotiated sale market if the prices derived from that market play a significant role in the price for AMA cattle.

The harm that results is to both feeders selling through AMAs and to those feeders participating in the cash market. By depressing the overall cash price, packers can lower their overall input costs with respect to the most significant input to their business.

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[46] Notice, supra note 3, at 82522.
[47] Id.
[48] See, text at note 22, supra.

C. *Cash but based on grade and yield—standardized transaction as basis.*

If AMAs are allowed to use future cash market prices, one somewhat better option is to require the use of a standardized transaction based on cash prices adjusted for grade and yield. This concept is one that the Notice identifies as a way to avoid some of the distortions that can arise, as discussed above, from use of the average negotiated price whether regional or national.[49] Another way to standardize the basis for AMA contracts, relying on some measure of the market price for cattle, would be to use the future's market price. But as the Notice points out there are timing problems with such reliance.[50]

A standardized basis would eliminate some potential ways to manipulate the cash market price for cattle. The fundamental problem with allowing the use of cash prices in any form as a basis for AMA prices would remain. The basic incentive for packers relying on a substantial volume of cattle based on AMA contracts is to limit the cash price that provides that basis. Moreover, such an incentive has adverse effects for all feeders.

D. Alternative Bases for AMA Prices

Assuming that the USDA decides to continue to allow AMAs based on some measure of future prices, two potential bases should be considered that are less amenable to manipulation.

1) Wholesale price of beef

The wholesale price of beef is one option. There is an obvious relationship between the price of beef and the price of cattle. The difference is the packer's margin, including both its costs and profits. Unlike the market for cattle, packers have a clear incentive to seek as high a price for their product as possible. Put differently, there is no incentive to reduce the price of beef to reduce the price of cattle. The AMA contract in this scheme would involve a discount from the prevailing wholesale price for the cattle which could be adjusted based on characteristics of the cattle at the time of slaughter.

There is a problem, however, with the current state of information about wholesale prices.[51] The most prominent basis is the public market in boxed beef. But the volume of beef in that market is limited.[52] The USDA has highlighted this problem in connection with its examination of distribution issues.[53] More inclusive information collection can probably resolve this issue. The USDA can collect all transactional prices from major packers and derive from that an overall average price for beef.

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[49] See, Notice, supra note 3, at 82531, 82533.
[50] Id. at 82533-82534.
[51] See the earlier discussion of necessary market information, text supra at notes 43 - 45.
[52] *Interim Report*, supra note 38,at 16 - 21, 24-25..
[53] See generally, id.

2) Input costs as base price with premium for grade/yield or market.

Another option would be to require that AMAs use as their basis some measure of the cost of producing cattle. This would include the price for cattle coming into feedlots,[54] the costs of feeding, and some measure of the fixed costs of lot operation.[55] This measure adjusted for any regional variations would be a weighted average so that actual feedlot costs might be higher or lower than the average. More efficient fed lot operations would get a greater price advantage. This in turn would provide incentives for all operators to seek to improve their efficiency.

Such a required basis would provide a floor for AMA contracts. Those contracts could also include a grid so that better quality cattle get a premium while lower quality results in a penalty. Another option would be to link premiums (but not penalties) to the market price for beef. No packer is likely to have an incentive to offer a market price premium which reduces its own profits in a market where wholesale prices have increased. But, in a workably competitive market, a packer seeking AMA contracts might offer to share some of the gains from a strong market to attract sufficient commitments. Unfortunately, the markets where AMAs dominate do not currently have workably competitive structures.

E. Access to AMAs in regions with limited options-the WORC rule revisited

Finally, if the USDA determines that the AMAs in some form should be continued, it needs to address the problem of access. More than twenty-five years ago, the Western Organization of Resource Councils (WORC) proposed a rule that would have required packers using AMAs to offer them to all feeders.[56] The proposal had two elements. First, it would have required packers to invite tenders based on some reasonable quantity, e.g., a pen of cattle with whatever characteristics the buyer sought, and, second, that the price be set at the time of the tender.

The focus on this section is on the first element of the WORC proposal. Requiring packers to disaggregate their purchases would still leave them with the purported advantages to a longer-term supply commitment. At the same time, it would make two important contributions to enhancing the competitiveness of cattle markets especially in those regions with high concentration. First, it would allow all existing feeders to participate in the AMA market. Indeed, it would make entry more feasible in such markets because the entrant could make bids for future delivery as part of its own entry. Second, it would effectively eliminate the problem of exclusive buying arrangements which as discussed earlier, are in themselves likely to reduce price competition. With the bidding system based on the WORC model the packer is a much more passive buyer taking the best contract offers that it receives. Feeders in turn will have an incentive to diversify their sales within the admittedly limited set of buyer options.

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[54] Notice, supra note 3, at 82534. This assumes that the market for such cattle is workably competitive. By ensuring that feedlot operators have a better cost-based basis for their sales of cattle should ensure that backgrounders or other producers would benefit from the resulting competition where the feedlots had a more reliable and adequate basis for the cattle that they would be selling.

[55] The concept here is what economics calls average total cost.

[56] See, Notice, supra note 3, at 82527.

IV. Two problems in cash markets

The Notice expressly identified these problems: undue delay by packers in collecting cattle they have purchased and the use of "top-of-the-market" buying in negotiated sales. Both problems adversely affect the cash market regardless of any broader reform.

A. Unreasonable Delay in Collecting Cattle

The Notice reports that the USDA has found that some packers have failed to collect the cattle they bought in the cash market for extended periods of time.[57] While this is in itself not necessarily undesirable, it illustrates one other way that a packer can create a secured supply line over time without use of AMAs. The problem is that the feeder incurs costs over time for such cattle but may not receive any further compensation. The practice illustrates again the relative power of packers in relation to feeders. In a more competitive market context, feeders would be able to condition sales on prompt pickup with an express charge if the packer for any reason delayed collecting the cattle. To impose a reasonable requirement on packers either to collect the cattle they have purchased or compensate the feeder for holding the cattle would replicate the situation in a workably competitive market. Such a rule should set a reasonable period for collecting cattle, seven or ten days.

The more challenging question is what rule to impose if the cattle are not collected within the permitted time period. One option would be to impose by rule a daily fee for holding cattle beyond that point. Alternatively, the rule could authorize the feedlot to sell the cattle to another buyer if they were not collected within the required time unless the original buyer had contracted with the feedlot to hold the cattle for a longer period on reasonable terms.

Each option has some difficulties. Different feedlots are likely to have different costs and logistical issues. Hence setting a daily fee may create in some cases either over or under compensation for feeders. Determining a reasonable fee whether regionally or nationally would itself be a challenge. Moreover, the costs of such important components as feed can change significantly which makes rulemaking a much more problematic task.

A rule allowing the feedlot owner to sell cattle left beyond the pickup date unless the buyer had contracted for the cattle to remain would avoid the regulatory burdens of setting a price for such service. However, such an approach also has problems. First, given the market structure, packers have very great bargaining power in most regions and so could compel the feedlot to provide care for the cattle at unremunerative prices. Second, the right to treat cattle left beyond the pickup date as abandoned so that they can be sold again raises challenging issues with respect to allocation of the proceeds from the two sales.

Given the present structure of the buying market, imposing a required daily fee for cattle left beyond the pickup date is probably the better option in most regions. In regions with more competition, it might be preferable to allow the packer and the feeder to work out the charges for retaining the cattle. Either way, the USDA ought to act to protect feeders from this abusive practice.

[57] Notice, supra note 3, at 82529

The second problem for the cattle market such delays create is the inventory of cattle that the packer can bring to market at its election. Like the problems that AMAs create with respect to cash prices, here too the potential is for packers to use this inventory in strategic ways to affect market prices. At the least, the USDA should require reporting by packers and then publicly report the volume of cattle held by packers beyond some reasonable time period. If the resulting evidence shows that packers are in fact making strategic use of such delayed deliveries, then a stricter rule requiring delivery within a set period of days (subject to some exceptions for emergency situations) might be necessary.

B. The Top-of-the-Market Problem

Some packers in negotiated transactions make offers to buy cattle based on the ultimate market price that week. These so-called "top-of-the-market" deals can remove significant quantities of cattle from the active cash market. Once a feeder has committed its cattle to such a sale, the incentive of the buyer is to limit as much as possible the price paid for cattle in the relevant market. This becomes more likely if there are relatively few buyers, and each is using this strategy. As each packer obtains a substantial number of cattle committed by this pricing mechanism, each has an incentive to limit further purchases in that market. Here again, the fact that the major packers operate in multiple regional markets means that they can satisfy their overall cattle needs by purchases in other markets and adjusting production schedules. Thus, the overall impact of the use of this strategy is to increase the incentives to keep cash prices lower than they would have been if it had been necessary to bid specific prices for all cattle being acquired.[58]

From the perspective of an individual feeder, it may well be rational to accept a top-of-the-market offer because this avoids uncertainty with respect to whether the cattle will be sold that week and provides the assurance that the price paid will be at the highest price reported for that week. This conflicts, however, with the collective interest of feeders to have as robustly competitive a cash market for their cattle as is feasible. Hence, a ban on top-of-the-market sales may increase the risk and uncertainty feeders face individually while enhancing the competitive workability of the cash market overall. If this buying strategy is banned altogether, then much of the risk or uncertainty is reduced because the buyers will need to obtain sufficient cattle to operate their plants. The overall volume of purchases will therefore remain largely unchanged. The timing and pricing of the purchases would be altered. Feeders selling in such a cash market should find that the uncertainty of making a specific sale is offset by increased prices. This is a classic example of the tension between individual rational self-interest when top-of-the-market buying is allowed and the collective interest of feeders to forbid this practice to enhance the working of the cash market.

V. Recommendations

The Notice asks for views on a number of issues. Here, the emphasis is on the policies that Farm Action recommends. We have divided this section into three parts. The first part starts from the basic position of Farm Action that the AMA system itself is undesirable and should be replaced.

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[58] See, Tia & Sexton, supra note 24.

The second part assumes that the AMAs remain lawful in general and so presents recommendations about better rules to define that market process in ways that will improve the AMA process to make it fairer and more equitable as well as increasing the potential for access. The third part addresses rules that the USDA ought to adopt regardless of its decisions on the rules to govern AMAs.

A. Replace the AMA system with an internet-based market

The best way to avoid the problems of access and price discovery that exist in the present mixed system of AMAs and a cash market is to mandate that fed cattle sales be conducted through an internet based electronic auction system. As shown earlier in these comments, such a system can operate to replace both immediate and longer-term contracts. Because it would be public, the current problems of transparency would be largely or entirely eliminated. But, as discussed earlier, this system needs fuller development in terms of technology, market options, and regulations. Hence, at this time, the focus should be on encouraging the development of such auctions and a concomitant plan for a reasonable set of rules to govern their operation.

Even with a fully worked out auction system, the current structure of the beef packing industry means that the problem of buyer power would remain. There is Supreme Court precedent for challenging mergers and acquisitions long after their consummation when the adverse competitive risks emerge.[59] Hence, even now, the USDA could urge the Justice Department to challenge the mergers it allowed in the 1980s and 1990s. Frankly, such an undertaking would be unlikely for political and institutional reasons. Assuming after lengthy litigation, the government prevailed, reconstructing at least three of the four leading packers would itself be complex and time consuming.

Instead, the USDA has invested substantial public funds in assisting small and middle-sized packers to expand their capacity.[60] As this "competitive fringe" increases, this will impose greater constraints on the dominant packers. This process requires careful attention to the dual challenges such firms face: obtaining sufficient cattle to process and having an adequate outlet for the resulting beef. Exclusive supply contracts are a particular source of concern on the input side. There are also clear risks of both foreclosure and exclusion on the selling side that require active enforcement to ensure that this expansion of capacity can successfully contribute to increasing the competitiveness of the overall beef market. USDA has some ability to mitigate this risk by proactively using its procurement policy to support this "competitive fringe."

B. If the existing AMA system remains better rules are required

In the present political and economic environment, it is unlikely that the USDA would be willing to undertake the sea change that a comprehensive move to an electronic auction market would entail. This should not preclude developing regulations and authorizations to facilitate the expansion of the existing electronic cattle markets. Nevertheless, AMAs would be likely to remain the dominant form of cattle buying for the near future. As such, they exist within the framework of

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[59] See, United States v. E. I. du Pont de Nemours, 353 U.S. 586 (1957) (holding that du Pont's acquisition of control of General Motors many years earlier had become a violation of the Clayton Act's anti-merger provision when General Motors achieved a substantial share of the automobile market).
[60] See, Notice, note 4 supra.

rules that authorize and define the permitted terms of such agreements. Failing to provide better rules that ensure fair, efficient, equitable treatment of feeders validates rules in use today that empower the discretion of packers to the detriment of feeders.

1) Establish better rules to govern the AMA price process

We set forth our recommendations based on the priority that we would recommend they be adopted.

a. Set base price at time of contract with market and quality adjustments

Much of the concern with AMAs rests on their use of a future price as the basis for the contract combined with adjustments based on the quality of the cattle delivered. While quality adjustments to price, or market differentiation adjustments or premiums such as black angus, where the amount of the adjustment is defined at the time of the contract seems reasonable, making the base price contingent on future prices if that base price derives from any market for cattle creates an undue and unnecessary incentive to manipulate the base price. Thus, there ought to be a base price set at the time the contract is entered into. It would not be unreasonable to allow an increase in that base price if the market price for cattle increased as well. But under no circumstances should the base price be reduced based on subsequent market prices because the incentive to manipulate cash or other benchmark prices would again exist.

b. Ban the use of cash prices in any way by packers that make AMA purchases

If the USDA is unwilling to prohibit the use of a forward-looking basis for AMAs, it should prohibit packers from using future cash prices for cattle in determining the basis for the AMA. As discussed earlier, as long as a packer has a substantial number of cattle available to it under AMAs where the cash price of cattle at the time of delivery is a significant element in determining the base price for those cattle, it has an incentive to manipulate the cash market price. Both theoretical and empirical work confirm that packers have exploited that opportunity.[61] If a packer prefers to use an AMA, it can employ an alternative basis to compute that price such as the cost of raising the cattle or the wholesale price of beef.

c. Ban certain AMA contracting bases—own price, own region price

Even if the USDA is unwilling to impose a requirement that the base price be set at the time of contacting or that future cattle prices not be used as the basis for an AMA, it should forbid the use of certain future prices in AMA contracts. Specifically, some packers may still be using their own plant cash price as the basis for their AMA contracts.[62] There does not appear to be any legitimate reason for the use of such a manipulable price as the basis for an AMA. This practice should be totally forbidden.

[61] See, references at notes 15, 22, and 24 supra.
[62] See, Notice, supra note 3, at 82526 (most AMAs now employ AMS reported prices; the description of the various methods of using market prices does not specifically identify the number of packers using their own cash prices to set the basis for their AMA purchases).

The use of the regional price for an AMA when the packer is also a substantial buyer in the residual cash market raises similar concerns. The easiest rule would be to forbid the use of such a regional price as the basis for AMA contracts with feeders in that region. Another option would be to require use of a regional price from a region in which the packer is not a significant buyer.

d. Require use of standardized cash metric

There are quality differences in the cattle taken in the cash market from week to week and region to region.[63] The data the USDA collects provides, as the Notice reports, the basis to identify the cash price of a standardized steer. Requiring that packers use such a price as a basis for an AMA using forward cash market prices would limit one particular manipulative strategy. It would not eliminate the more general kinds of market manipulation. Hence, it would be a minimal requirement for AMAs. It could also make more visible the kinds of manipulation coming from adjusting the total volume of cattle being acquired in the cash market.

2) Eliminate exclusive dealing arrangements in cattle buying

Current practices in the use of AMAs appear to mirror the older pattern of exclusive or near exclusive dealing by major packers in their relationship with feeders. The Notice explains that this practice undermines the development of a fairer price system by excluding feeders subject to such agreements from any alternative outlet for their cattle. At the same time, such exclusivity can adversely affect the ability of smaller packers, especially those that are new entrants or have expanded production, from getting access to the necessary quantity of cattle. Since any change of buyer in this context is an "all or nothing" switch, from the perspective of a feeder, it may be unduly risky to switch all sales to such a new buyer. At the same time, feeders as a group will be better off if there are more options for the sale of their cattle.

The challenge is to frame a rule that would be effective and still allow reasonable alternative approaches. One option, examined earlier in this comment, is to require that packers frame their AMAs as offers to buy fixed lots of cattle with designated characteristics for future delivery. This would allow more feeders to participate in the AMA market and avoid setting a limit on the total quantity any one feeder could sell. Given that the feeding cycle is about 12 months from arrival to delivery for slaughter, packers could assure themselves of a reasonable quantity of cattle through this system. Feeders, at the same time, could lock in sales at the time they purchased the cattle for feeding. This reform is independent of the rules governing the pricing of the cattle.

The alternative is to impose on packers a requirement that they limit their buying from any feeder to no more than some percentage of its capacity. Such an approach would create some difficult challenges. Should it apply to feeders with smaller volumes of cattle? What time period would provide the basis for determining the relevant base? How would a feedlot's capacity be defined? The challenges of limiting buying from any feedlot by this approach seem substantial. Hence, the first option would be administratively more feasible and would serve both the purpose of giving smaller packers access and providing all feedlot operators with the option of participating in the AMA market.

[63] See, Notice supra note 3, at 82526-82527

C. Ensuring better information is collected and disclosed

The USDA is to be commended for its efforts to develop better price reporting that is more inclusive of actual transactions. As discussed earlier, there is a real need for better and more comprehensive data including more current information about cattle in the AMA inventory and timing of their delivery. Because such contracts currently extend over many months or even years, this data will provide important guidance to other feeders with respect to the timing of their delivery to the cash market. Indeed, feeders in regional cash markets where AMAs are significant should find this information particularly useful.

A second problem that the Notice highlights is the limited regional data from Colorado because of its essentially duopolistic market.[64] This gap in the data, again assuming that regional data remains a key component for both cash and AMA contracts, needs to be remedied. The USDA can either include Colorado in one of the adjacent regional markets or alter its rule that requires at least three significant buyers before regional data would be reported. Either way if regional market data remains central to the price making process, all regions must be regularly reported.

The recent USDA report on beef distribution reported concerns about the accuracy of the boxed beef prices because of the limited scope of the public market in boxed beef.[65] It is likely that if there are reforms that limit the use of cash cattle prices for setting AMA base prices and if future prices are still allowed as a basis for AMA contracts, that wholesale beef prices will emerge as an alternative. Because low volume markets are particularly vulnerable to manipulation, it will be important to improve the collection of data about wholesale prices for beef. Such data includes not only the public market in boxed beef but contemporary transactions involving direct sales to wholesalers or large retailers or restaurant chains.

Independent of the potential relevance of wholesale beef prices to the pricing of AMAs, buyers of beef both direct and indirect will benefit from a better and more comprehensive reporting system. One of the issues identified in the marketing report was the distortions in the market that come from exclusive dealing and loyalty discount plans. This conduct can allow the exploitation of buyers of beef, specifically smaller retailers and other comparable buyers, and can result in exclusionary effects with respect to smaller packers trying to expand their market presence. Achieving a more competitive beef packing market should be the fundamental objective of USDA policy. It is attempting to achieve this goal in part by its programs supporting entry and expansion by smaller packers in many regions of the country. Better wholesale price data is an element in creating a market environment in which such firms can prosper.

D. Establish rules governing pick up of cattle and top-of-the market buying in the cash market

Lastly, the Notice identified two practices in the cash market today that raise real concerns with respect to both fairness and the effective operation of the cash market. Even if the USDA does nothing else it should adopt rules to control these two problem areas.

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[64] See, Notice, supra note 3, at 82522.
[65] See, *Interim Report*, note 38, supra.

1) Collecting cattle

The USDA should impose a requirement that buyers in the cash market must either collect the cattle they have purchased within a relatively short time period, seven days seems to be the standard, or pay for the feeding and care of the cattle until they are collected. To the extent that such delayed pickup is occurring it shows that packers can in fact make purchases for future delivery based on a set base price. Indeed, the Notice suggests that such packers often agree to pay for feeding services if they elect not to take immediate delivery.

As a fairness matter, the feeder ought to be compensated for caring for the cattle after a reasonable period for pickup. As discussed earlier, on balance, given the existing market structure, it is probably best to impose on packers a minimum daily compensation obligation. The alternatives such as constructive abandonment allowing the feeder to sell the cattle appear to require more complex regulations and oversight.

The other troublesome aspect of this element of captive supply is that if a significant quantity of cattle is in this category, there is the potential that their future delivery will distort the cash market price at that point. Cattle owned by a packer for more than seven days should be reported as packer owned livestock. Thus, the data should be available to determine the scope of this practice. If the data shows that there is a significant quantity of cattle held past the usual pickup time, and that this creates a risk of electing delivery to manipulate the regional cash market price, then the USDA should either require that all cattle purchased in the cash market be collected within the permitted period or require that the packer state a date for collection if it is not collecting immediately and that information should be included in the public reports to ensure that all feeders know when these cattle are slated to be slaughtered.

2) Ban top-of-the-market contracts

As explained earlier, top-of-the-market contracts will decrease the number of cattle actually in the cash market while increasing the buyer's incentive to limit the highest price in the market. This type of buying directly frustrates the operation of a cash market, especially one in which volume is already limited. Given that the buyer and seller are already operating in the cash market, it makes sense that they should not be allowed to frustrate the normal operation of that market. Such contracts should be forbidden absolutely.

VI. Conclusion

The USDA is to be commended for its willingness to look at how the Packers and Stockyards Act rulemaking authority can be employed to improve the operation of the market for fed cattle. As these comments suggest, there is a great deal that ought to be done to improve the operation of this market to ensure fairness and efficiency to all participants. Frankly, our concern is that actions will be too little and too late. We strongly encourage the USDA to develop strong rules to facilitate the working of cattle markets. At the same time, the USDA must remain cognizant of the role that market structure will play in a regulatory reform. Hence, its efforts to create a larger community of packers should continue to have the highest priority.