UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	P. & S. Docket No. D-99-0010
	)	
Excel Corporation,	)	
	)	**Order Denying Petitions**
Respondent	)	**for Reconsideration**

PROCEDURAL HISTORY

Harold W. Davis, Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint and Notice of Hearing" on April 9, 1999. Complainant instituted this proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229) [hereinafter the Packers and Stockyards Act]; the regulations issued under the Packers and Stockyards Act [hereinafter the Regulations] (9 C.F.R. §§ 201.1-.200); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice]. On April 21, 1999, Complainant filed an "Amended Complaint and Notice of Hearing" [hereinafter Amended Complaint].

Complainant alleges that, during the period between October 23, 1997, and June 1, 1998, Excel Corporation [hereinafter Respondent] violated section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) and section 201.99 of the Regulations (9 C.F.R. § 201.99) by failing to make known to hog producers a change in the formula used to estimate lean percent in hogs, prior to Respondent's purchasing hogs on a carcass grade, carcass weight, or carcass grade and weight basis. Complainant alleges that, as a result of the change in the formula to estimate lean percent in hogs, Respondent paid hog producers approximately $1,839,000 less for approximately 19,942 lots of hogs than Respondent would have paid if Respondent had not changed the formula. (Amended Compl. ¶¶ II-III.) On May 18, 1999, Respondent filed an "Answer" denying the material allegations of the Amended Complaint.[1]

On February 7, 2002, after an oral hearing and after Complainant and Respondent filed post-hearing briefs, the Chief ALJ issued a "Decision and Order" [hereinafter Initial

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[1]On March 29, 2001, Complainant moved to revise the Amended Complaint to conform to the evidence (Tr. 2260). Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] granted Complainant's motion in part allowing Complainant to revise the period during which Respondent's violations of the Packers and Stockyards Act and the Regulations allegedly occurred and Complainant's alleged estimated harm to hog producers caused by Respondent's change in the formula used to estimate lean percent in hogs (Tr. 2260-87). The revised Amended Complaint alleges Respondent violated section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) and section 201.99 of the Regulations (9 C.F.R. § 201.99) during the period between October 23, 1997, and July 20, 1998, and alleges additional economic harm incurred by hog producers as a result of Respondent's change of the formula used to estimate lean percent in hogs. On May 7, 2001, Respondent filed "Excel Corporation's Answer to Revised Amended Complaint" which denies the material allegations of Complainant's revised Amended Complaint.

Decision and Order]: (1) finding Respondent failed to notify hog producers of an October 1997 change in the formula Respondent used to estimate lean percent in hogs prior to changing the formula; (2) concluding Respondent violated section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) and section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) when Respondent failed to notify hog producers of the change in the formula used to estimate lean percent in hogs; (3) ordering Respondent to cease and desist from failing to notify livestock sellers of any change in the formula used to estimate lean percent; and (4) ordering Respondent to submit to arbitration with hog producers who sold hogs to Respondent between October 1997 and July 1998 under Respondent's changed formula to estimate lean percent, who may have received less money for their hogs than the hog producers would have received under the old formula, and who have not otherwise been compensated or resolved the matter by agreement with Respondent (Initial Decision and Order at 26-27).

Complainant and Respondent each filed appeal petitions, and on January 30, 2003, I issued a "Decision and Order:" (1) concluding Respondent violated section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) and section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) when Respondent failed to make known to hog producers that it was changing the formula to estimate lean percent, prior to purchasing hogs on a carcass merit basis from those producers; and (2) ordering Respondent to cease and desist from:
(a) failing to make known to sellers, or their duly authorized agents, prior to purchasing livestock, the factors that affect Respondent's estimation of lean percent, including, but not

limited to, any change in the formula used to estimate lean percent; and (b) failing to make known to sellers, or their duly authorized agents, prior to purchasing livestock, the details of the purchase contract, including, when applicable, the expected date and place of slaughter, carcass price, condemnation terms, description of the carcass trim, grading to be used, accounting, and any special conditions.[2]

On February 10, 2003, Complainant filed "Complainant's Petition for Reconsideration," and on February 14, 2003, Respondent filed "Excel Corporation's Petition for Reconsideration." On March 5, 2003, Respondent filed "Excel Corporation's Reply to Complainant's Petition for Reconsideration,"and on March 12, 2003, Complainant filed "Complainant's Reply to Respondent's Petition for Reconsideration." On March 17, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for reconsideration of the January 30, 2003, Decision and Order.

Respondent's exhibits are designated by "RX." Transcript references are designated by "Tr."

[2]*In re Excel Corporation*, 62 Agric. Dec. 196, 250 (2003).

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Complainant's Petition for Reconsideration

Complainant seeks reconsideration of my conclusion that a civil penalty is not appropriate in this case. Complainant contends that my characterization of Respondent's violations of section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) as grave, my finding that Respondent is a large business, and my finding that a substantial civil penalty would not affect Respondent's ability to continue in business, logically require the assessment of a substantial civil penalty. (Complainant's Pet. for Recons.)

Generally, a substantial civil penalty is warranted where a respondent commits a number of grave violations over a significant amount of time, the respondent is a large business, and a substantial civil penalty would not affect the respondent's ability to continue in business. However, the sanction in each case must be determined based on the facts of that case. Respondent committed a large number of violations of section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) during approximately a 9-month period, Respondent is a large business, and a substantial civil penalty would not affect Respondent's ability to continue in business. However, while section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) requires that each packer make known to hog producers that the packer is changing the formula to estimate lean percent, prior to purchasing hogs on a carcass merit basis, Complainant has not alleged this specific violation in the past and this proceeding is one of first impression (Complainant's Proposed Findings of Fact, Conclusions of Law, and Proposed Order at 88). The record establishes that, while Respondent should have

known that its failure to inform hog sellers of the change in the formula to estimate lean percent, at the time of Respondent's violations, Respondent and others in the industry were not actually aware that the failure to inform hog sellers of a change in the formula was a violation of section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)). Moreover, the record establishes that Respondent changed the formula in an effort to obtain a more accurate estimate of lean percent; not in an effort to harm hog sellers. The change in the formula resulted in some hog producers receiving more for their hogs and other hog producers receiving less for their hogs.

Further, once Respondent became aware of Complainant's position regarding section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)), Respondent took remedial action by informing hog sellers of the change in the formula and making restitution to those who had received less for their hogs under the new formula than they would have received had the old formula been used to estimate lean percent.

Respondent's lack of actual knowledge, Respondent's purpose for changing the formula, and Respondent's remedial actions are not defenses to Respondent's violations of the Packers and Stockyards Act and the Regulations; however, based on the unique circumstances in this proceeding, I conclude that a civil penalty is not necessary in order to deter Respondent and other packers from failing to make known to hog sellers, prior to purchasing hogs on a carcass merit basis, any change in the formula used to estimate lean percent.

Complainant contends that my failure to assess a civil penalty against Respondent has significant implications for the future enforcement of the Packers and Stockyards Act (Complainant's Pet. for Recons. at 13-17). I disagree. My decision not to assess a civil penalty against Respondent is based upon the unique circumstances in this case. If the January 30, 2003, Order raises expectations of a general policy of lenient sanctions in the future, those expectations will be short-lived. The sanction in each case will be determined based on the facts in that case and my evaluation of the sanction necessary to deter future violations by the violator and other potential violators. Generally, a substantial civil penalty will be warranted where a respondent commits a number of grave violations over a significant amount of time, the respondent is a large business, and a substantial civil penalty would not affect the respondent's ability to continue in business. Complainant contends that I failed to accord any weight to Complainant's sanction recommendation. While I did not adopt Complainant's sanction recommendation, I did accord Complainant's sanction recommendation weight, but rejected Complainant's recommendation based on my conclusion that a civil penalty is not necessary in order to deter Respondent and other packers from future similar violations. The United States Department of Agriculture's sanction policy does not require an administrative law judge or the Judicial Officer to adopt a complainant's sanction recommendation. Instead, the recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the

sanction imposed may be considerably less, or different, than that recommended by administrative officials.[3]

Respondent's Petition for Reconsideration

Respondent raises four issues in Excel Corporation's Petition for Reconsideration. First, Respondent contends the cease and desist order in the January 30, 2003, Decision and Order is too broad (Excel Corporation's Pet. for Recons. at 2-6).

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[3]*In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. ___, slip op. at 33-34 (Oct. 29, 2003), *appeal docketed*, No. 03-4008 (8th Cir. Dec. 16, 2003); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 762-63 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003); *In re Karl Mitchell*, 60 Agric. Dec. 91, 130 (2001), *aff'd*, 42 Fed. Appx. 991, 2002 WL 1941189 (9th Cir. 2002); *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165, 190 n.8 (2001), *aff'd*, 221 F. Supp.2d 1209 (E.D. Cal. 2002), *aff'd*, 66 Fed. Appx. 706, 2003 WL 21259771 (9th Cir. 2003); *In re Fred Hodgins*, 60 Agric. Dec. 73, 88 (2001) (Decision and Order on Remand), *aff'd*, 33 Fed. Appx. 784, 2002 WL 649102 (6th Cir. 2002) (unpublished); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 226-27 (2000), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001), *appeal withdrawn*, No. 01-6214 (2d Cir. Apr. 30, 2002); *In re James E. Stephens*, 58 Agric. Dec. 149, 182 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1604 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. 1498, 1514 (1998); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

A cease and desist order must bear a reasonable relation to the unlawful practice found to exist.[4] As discussed in the January 30, 2003, Decision and Order, Respondent violated section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) by failing to make known to hog sellers that it was changing the formula to estimate lean percent prior to purchasing hogs on a carcass merit basis from those sellers. The Order issued in the January 30, 2003, Decision and Order reads, as follows:

ORDER

> Respondent, its agents and employees, directly or indirectly through any corporate or other device, in connection with its purchases of livestock on a carcass merit basis, shall cease and desist from:
>
> (a) Failing to make known to sellers, or their duly authorized agents, prior to purchasing livestock, the factors that affect Respondent's estimation of lean percent, including, but not limited to, any change in the formula used to estimate lean percent; and
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> (b) Failing to make known to sellers, or their duly authorized agents, prior to purchasing livestock, the details of the purchase contract, including, when applicable, the expected date and place of slaughter, carcass price, condemnation terms, description of the carcass trim, grading to be used, accounting, and any special conditions.

In re Excel Corporation, 62 Agric. Dec. 196, 250 (2003).

Paragraph (a) of the January 30, 2003, Order addresses Respondent's violations of section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)); namely, Respondent's failure

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[4] *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *FTC v. National Lead Co.*, 352 U.S. 419, 429 (1957); *Standard Oil Co. of Cal. v. FTC*, 577 F.2d 653, 662 (9th Cir. 1978); *Thiret v. FTC*, 512 F.2d 176, 180-81 (10th Cir. 1975); *Spiegel, Inc. v. FTC*, 411 F.2d 481, 484-85 (7th Cir. 1969); *Swift & Co. v. United States*, 317 F.2d 53, 56 (7th Cir. 1963); *Gellman v. FTC*, 290 F.2d 666, 670 (8th Cir. 1961); *Carter Products, Inc. v. FTC*, 268 F.2d 461, 498 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959).

to make known to hog sellers that Respondent was changing the formula to estimate lean percent prior to purchasing hogs on a carcass merit basis from those sellers. As Respondent contends, paragraph (a) of the January 30, 2003, Order goes beyond Respondent's precise unlawful practice by ordering Respondent to make known to livestock sellers, rather than just hog sellers, factors that affect Respondent's estimation of lean percent, rather than just a change in the formula to estimate lean percent. However, a cease and desist order need not exactly mirror the violation found to exist; instead, a cease and desist order need only bear a reasonable relation to the unlawful practice found to exist.[5] The power to issue a cease and desist order is not limited to proscribing only the precise unlawful practice found to exist, but includes power to prohibit variations of the unlawful practice to prevent the practice from reappearing in a slightly altered form.[6] Paragraph (a) of the January 30, 2003, Order is designed to prohibit variations of Respondent's unlawful practice to prevent Respondent's unlawful practice from reappearing in a slightly altered form. Therefore, I reject Respondent's contention that paragraph (a) of the January 30, 2003, Order is too broad.

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[5]See note 4.

[6]*FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965) (stating the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past; holding it is reasonable for the Commission to frame its order broadly enough to prevent the respondents from engaging in similar illegal practices in the future); *Consumer Sales Corp. v. FTC*, 198 F.2d 404, 408 (2d Cir. 1952) (stating the Commission's power is not limited to proscribing only the particular practice used in the past; it may also prohibit variations of the practice to prevent the practice from reappearing in a slightly altered form), *cert. denied*, 344 U.S. 912 (1953).

Respondent also objects to paragraph (b) of the January 30, 2003, Order even though it closely tracks section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) (Excel Corporation's Pet. for Recons. at 6).

Paragraph (b) of the January 30, 2003, Order prohibits Respondent, in connection with its purchases of livestock on a carcass merit basis, from failing to make known to sellers, prior to purchasing livestock, the details of the purchase contract.[7] Respondent correctly points out that the preamble of the final rulemaking document promulgating section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) states the regulation requires packers purchasing livestock on a carcass merit basis to make known to the seller only the *significant* details of the purchase contract.[8] However, section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) does not limit the details of the purchase contract that a packer must make known to the seller. Language in the preamble of a regulation is not controlling over the language of the regulations itself; however, the preamble of a regulation is evidence of an agency's contemporaneous understanding of its rules.[9] I conclude the plain meaning of section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) is not superceded by an unadorned limitation in the preamble of the final rulemaking document promulgating section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)).

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[7]*In re Excel Corporation*, 62 Agric. Dec. 196, 250 (2003).

[8]33 Fed. Reg. 2760 (1968) (RX 50 at 25).

[9]*HRI, Inc. v. EPA*, 198 F.3d 1224, 1244 n.13 (10th Cir. 2000); *Wyoming Outdoor Council v. United States Forest Service*, 165 F.3d 43, 53 (D.C. Cir. 1999).

Therefore, I decline to change paragraph (b) of the Order issued January 30, 2003, to limit to *significant* details of the purchase contract the details Respondent must disclose to a seller.

Respondent further asserts that paragraph (b) of the January 30, 2003, Order places Respondent at a severe competitive disadvantage because Respondent, and only Respondent, would be exposed to criminal sanctions for violating the language of paragraph (b) of the January 30, 2003, Order (Excel Corporation's Pet. for Recons. at 6).

Paragraph (b) of the January 30, 2003, Order requires Respondent to cease and desist from failing to comply with section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)). All packers are required to comply with section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)). Therefore, I reject Respondent's contention that paragraph (b) of the January 30, 2003, Order places Respondent at a severe competitive disadvantage vis-a-vis other packers. Moreover, even if I were to find that an appropriate cease and desist order happened to place a particular packer at a competitive disadvantage, it would constitute no basis for my precluding issuance of the cease and desist order.

Second, Respondent relies on section 202(a) of the 21st Century Department of Justice Appropriations Authorization Act to contend the cease and desist order in the January 30, 2003, Decision and Order should expire after no longer than 3 years (Excel Corporation's Pet. for Recons. at 6-7).

Section 202(a) of the 21st Century Department of Justice Appropriations Authorization Act amends 28 U.S.C. by adding a new section which requires reports to Congress of settlements and compromises of actions, as follows:

§ 530D. Report on enforcement of laws

(a) REPORT.—

(1) IN GENERAL.—The Attorney General shall submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice—

. . . .

(C) approves . . . the settlement or compromise . . . of any claim, suit, or other action—

. . . .

(ii) by the United States (including any agency or instrumentality thereof) pursuant to an agreement, consent decree, or order (or pursuant to any modification of an agreement, consent decree, or order) that provides injunctive or other nonmonetary relief that exceeds, or is likely to exceed, 3 years in duration: *Provided*, That for purposes of this clause, the term "injunctive or other nonmonetary relief" shall not be understood to include the following, where the same are a matter of public record—

. . . .

(III) requirements or agreements merely to comply with statutes or regulations[.]

. . . .

(e) APPLICABILITY TO THE PRESIDENT AND TO EXECUTIVE AGENCIES AND MILITARY DEPARTMENTS.—The reporting, declaration, and other provisions of this section relating to the Attorney General and other officers of the Department of Justice shall apply . . . to the head of each executive agency or military department (as defined, respectively, in sections 105 and 102 of title 5, United States Code) that establishes or implements a policy described in subsection (a)(1)(A) or is authorized to conduct litigation, and to the officers of such executive agency.

28 U.S.C. § 530D(a)(1)(C)(ii)(III), (e).

As an initial matter, section 202(a) of the 21st Century Department of Justice Appropriations Authorization Act is not applicable to this proceeding because the parties did not settle or compromise this proceeding; instead, I issued the January 30, 2003, Decision and Order only after the parties litigated the matter. Moreover, even if the 21st Century Department of Justice Appropriations Authorization Act were applicable to this proceeding, the cease and desist order in the January 30, 2003, Decision and Order merely requires Respondent to comply with the Packers and Stockyards Act and the Regulations; thus, the exemption in 28 U.S.C. § 530D(a)(1)(C)(ii)(III) would apply to this proceeding. Finally, section 202(a) of the 21st Century Department of Justice Appropriations Authorization Act does not prohibit the issuance of a cease and desist order that exceeds, or is likely to exceed, 3 years in duration. Therefore, I reject Respondent's contention that, based on the 21st Century Department of Justice Appropriations Authorization Act, the cease and desist order issued January 30, 2003, should be modified to expire after no longer than 3 years.

Third, Respondent contends I erroneously characterized its violations of section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) as "grave." Respondent argues that its alleged violations of the Regulations are not grave because: (1) Complainant did not demonstrate that Respondent harmed hog producers; (2) Respondent took immediate remedial action once informed of the alleged violations; and (3) Respondent's alleged

violations were neither intentional nor deliberate. (Excel Corporation's Pet. for Recons. at 7-9.)

I disagree with Respondent's contention that I commit error by characterizing as grave its violations of section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)). Two of the primary purposes of the Packers and Stockyards Act are to prevent economic harm to livestock producers and to maintain open and free competition.[10]

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[10]*See Mahon v. Stowers*, 416 U.S. 100, 106 (1974) (per curiam) (stating the chief evil at which the Packers and Stockyards Act is aimed is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells and unduly and arbitrarily to increase the price to the consumer who buys); *Denver Union Stock Yard Co. v. Producers Livestock Mktg. Ass'n*, 356 U.S. 282, 289 (1958) (stating the Packers and Stockyards Act is aimed at all monopoly practices, of which discrimination is one); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1460 (8th Cir. 1995) (stating the Packers and Stockyards Act has its origins in antecedent antitrust legislation and primarily prevents conduct which injures competition); *Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 214 (8th Cir. 1985) (stating the Packers and Stockyards Act gives the Secretary of Agriculture broad authority to deal with any practices that inhibit the fair trading of livestock by stockyards, marketing agencies, and dealers); *Rice v. Wilcox*, 630 F.2d 586, 590 (8th Cir. 1980) (stating one purpose of the Packers and Stockyards Act is to protect the owner and shipper of livestock and to free the owner from fear that the channels through which his product passed, through discrimination, exploitation, overreaching, manipulation, or other unfair practices, might not return to him a fair return for his product); *Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978) (stating one purpose of the Packers and Stockyards Act is to assure fair trade practices in the livestock marketing industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock); *Solomon Valley Feedlot, Inc. v. Butz*, 557 F.2d 717, 718 (10th Cir. 1977) (stating one purpose of the Packers and Stockyards Act is to make sure that farmers and ranchers receive true market value for their livestock and to protect consumers from unfair practices in the marketing of meat products); *Pacific Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369 (7th Cir. 1976) (stating the Packers and Stockyards Act is a statute prohibiting a variety of unfair business practices which adversely affect competition); *Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co.*, 498 F.2d 925, 927 (10th Cir. 1974) (stating the chief evil sought to be prevented or corrected by the

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Packers and Stockyards Act is monopolistic practices in the livestock industry); *Glover Livestock Comm'n Co. v. Hardin*, 454 F.2d 109, 111 (8th Cir. 1972) (stating the purpose of the Packers and Stockyards Act is to prevent economic harm to producers and consumers), *rev'd on other grounds*, 411 U.S. 182 (1973); *Bruhn's Freezer Meats of Chicago, Inc. v. United States Dep't of Agric.*, 438 F.2d 1332, 1337-38 (8th Cir. 1971) (stating the purpose of the Packers and Stockyards Act is to assure fair trade practices in the livestock-marketing and meat-packing industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats and other products); *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968) (stating the purpose of the Packers and Stockyards Act is to prevent economic harm to producers and consumers); *United States Fidelity & Guaranty Co. v. Quinn Brothers of Jackson, Inc.*, 384 F.2d 241, 245 (5th Cir. 1967) (stating one of the basic objectives of the Packers and Stockyards Act is to impose upon stockyards the nature of public utilities, including the protection for the consuming public that inheres in the nature of a public utility); *Safeway Stores, Inc. v. Freeman*, 369 F.2d 952, 956 (D.C. Cir. 1966) (stating the purpose of the Packers and Stockyards Act is to prevent economic harm to the growers and consumers through the concentration in a few hands of the economic function of the middle man); *Bowman v. United States Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966) (stating one of the purposes of the Packers and Stockyards Act is to ensure proper handling of shipper's funds and their proper transmission to the shipper); *United States v. Donahue Bros., Inc.*, 59 F.2d 1019, 1023 (8th Cir. 1932) (stating one purpose of the Packers and Stockyards Act is to protect the owner and shipper of livestock and to free the owner from fear that the channels through which his product passed, through discrimination, exploitation, overreaching, manipulation, or other unfair practices, might not return to him a fair return for his product); *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197, 200 (E.D.N.C. 1996) (stating the Packers and Stockyards Act was enacted to regulate the business of packers by forbidding them from engaging in unfair, discriminatory, or deceptive practices in interstate commerce, subjecting any person to unreasonable prejudice in interstate commerce, or doing any of a number of acts to control prices or establish a monopoly in the business); *Pennsylvania Agric. Coop. Mktg. Ass'n v. Ezra Martin Co.*, 495 F. Supp. 565, 570 (M.D. Pa. 1980) (memorandum opinion) (stating one purpose of the Packers and Stockyards Act is to give all possible protection to suppliers of livestock); *United States v. Hulings*, 484 F. Supp. 562, 567 (D. Kan. 1980) (memorandum opinion) (stating one purpose of the Packers and Stockyards Act is to protect farmers and ranchers from receiving less than fair market value for their livestock and to protect consumers from unfair practices); *Guenther v. Morehead*, 272 F. Supp. 721, 725-26 (S.D. Iowa 1967)

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(stating the thrust of the Packers and Stockyards Act is in the direction of stemming monopolistic tendencies in business; the unrestricted free flow of livestock is to be preserved by the elimination of certain unjust and deceptive practices disruptive to such traffic; the Packers and Stockyards Act deals with undesirable modes of business conduct by livestock concerns which are made possible by the disproportionate bargaining position of such businesses); *De Vries v. Sig Ellingson & Co.*, 100 F. Supp. 781, 786 (D. Minn. 1951) (stating the Packers and Stockyards Act was passed for the purposes of eliminating evils that had developed in marketing livestock in the public stockyards of the nation; controlling prices to prevent monopoly; eliminating unfair, discriminatory, and deceptive practices in the meat industry; and regulating rates for services rendered in connection with livestock sales), *aff'd*, 199 F.2d 677 (8th Cir. 1952), *cert. denied*, 344 U.S. 934 (1953); *Midwest Farmers, Inc. v. United States*, 64 F. Supp. 91, 95 (D. Minn. 1945) (stating by the Packers and Stockyards Act, Congress sought to eliminate the unfair and monopolistic practices that existed; one of the chief objectives of the Packers and Stockyards Act is to stop collusion of packers and market agencies; Congress made an effort to provide a market where farmers could sell livestock and where they could obtain actual value as determined by prices established at competitive bidding); *Bowles v. Albert Glauser, Inc.*, 61 F. Supp. 428, 429 (E.D. Mo. 1945) (stating government supervision of public stockyards has for one of its purposes the maintenance of open and free competition among buyers, aided by sellers' representatives); *In re Petersen*, 51 B.R. 486, 488 (Bankr. D. Kan. 1985) (memorandum opinion) (stating one purpose of the Packers and Stockyards Act is to ensure proper handling of shippers' funds and their proper transmission to shippers); *In re Farmers & Ranchers Livestock Auction, Inc.*, 46 B.R. 781, 793 (Bankr. E.D. Ark. 1984) (memorandum opinion) (stating one of the primary purposes of the Packers and Stockyards Act and its regulations is to protect the welfare of the public by assuring that the sellers and buyers who are customers of the market agencies and dealers are not victims of unfair trade practices); *In re Ozark County Cattle Co.*, 49 Agric. Dec. 336, 360 (1990) (stating the primary objective of the Packers and Stockyards Act is to safeguard farmers and ranchers against receiving less than the true value of their livestock); *In re Victor L. Kent & Sons, Inc.*, 47 Agric. Dec. 692, 717 (1988) (stating the primary purpose of the Packers and Stockyards Act is to assure not only fair competition, but also, fair trade practices in livestock marketing and meat packing); Harold M. Carter, The Packers and Stockyards Act, 10 Harl, *Agricultural Law* § 71.05 (1983) (stating among the more important purposes of the Packers and Stockyards Act are to prohibit particular circumstances which might result in a monopoly and to induce healthy competition; prevent potential injury by stopping unlawful practices in their incipiency; prevent economic harm to livestock and poultry producers and consumers and to protect them against certain

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The January 30, 2003, Decision and Order makes clear Respondent impeded competition by failing to notify hog producers of the change in the formula for estimating lean percent. Thus, Respondent's violations undermine one of the primary purposes of the Packers and Stockyards Act and are, therefore, grave.

Further, Respondent advances no meritorious basis for its contention that its violations are not grave. Demonstration of economic harm to producers is not essential to a finding that a violation is grave. Moreover, while remedial actions are encouraged and can be taken into account when determining the sanction to be imposed, remedial actions neither eliminate the fact that the violations occurred nor change the gravity of those violations.

Further still, while the record indicates that, in 1997, Respondent was not aware that section 201.99 of the Regulations (9 C.F.R. § 201.99) required Respondent to notify hog producers of the change in the formula to estimate lean percent when not requested (Tr. 1653, 1861-64), Respondent's violations were intentional because Respondent should have known that its failures to notify hog producers of the formula change were violations of section 201.99 of the Regulations (9 C.F.R. § 201.99). As discussed in the January 30,

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[10](...continued)
deleterious practices of middlemen; assure fair trade practices in order to safeguard livestock producers against receiving less than the true value of livestock as well as to protect consumers against unfair meat marketing practices; insure proper handling of funds due sellers for the sale of their livestock; assure reasonable rates and charges by stockyard owners and market agencies in connection with the sale of livestock; and assure free and unburdened flow of livestock through the marketing system unencumbered by monopoly or other unfair, unjustly discriminatory, or deceptive practices).

2003, Decision and Order, the record establishes that Respondent considered the Fat-O-Meat'er to be a form of grading. The formula Respondent used to estimate lean percent was also a part of the "grading" within the meaning of section 201.99 of the Regulations (9 C.F.R. § 201.99) as it was an element of Respondent's carcass evaluation process. Section 201.99 of the Regulations (9 C.F.R. § 201.99) explicitly provides that packers purchasing livestock on a carcass merit basis must make known to the seller the grading to be used prior to the purchase. Respondent's officials made a conscious choice not to tell hog producers about the change in the formula because company officials believed that the formula was not a factor that interested hog producers or formed a basis for whether they sold hogs to Respondent (Tr. 1645-46, 1649, 1724-25). Respondent's officials also believed that hog producers who received more because of a change to a more accurate formula would be unhappy because they had been selling in the past under an inaccurate formula, while hog producers who received less because of the change would be upset (RX 47 at 2; Tr. 1689-93).

Fourth, Respondent contends I erroneously found that Respondent's failure to notify hog producers of the equation change impeded competition (Excel Corporation's Pet. for Recons. at 9-10).

I disagree with Respondent's contention that its failure to notify hog producers of the change in the formula to estimate lean percent did not impede competition. Hog producers can compare prices and choose to continue to sell to Respondent or sell to Respondent's competitors. However, Respondent impeded that choice in this case when it

violated section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) by failing to notify hog producers of a change in the formula to estimate lean percent. Therefore, Respondent altered the price it would offer hog producers without the hog producers knowing that the price structure had changed. Had hog producers been alerted to the change, they could have shopped their hogs to other packers to determine if they could obtain a better price for their hogs than Respondent's price under its changed formula. As Complainant states, the purpose of section 201.99 of the Regulations (9 C.F.R. § 201.99) "is to provide some basic level of similarity to allow sellers to evaluate different purchase offers" (Complainant's Post-Hearing Brief at 91).

For the foregoing reasons and the reasons set forth in *In re Excel Corporation*, 62 Agric. Dec. 196 (2003), Complainant's Petition for Reconsideration and Excel Corporation's Petition for Reconsideration are denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition for reconsideration. Complainant's Petition for Reconsideration and Excel Corporation's Petition for Reconsideration were timely filed and automatically stayed the January 30, 2003, Decision and Order. Therefore, since Complainant's Petition for Reconsideration and Excel Corporation's Petition for Reconsideration are denied, I hereby lift the automatic stay, and the Order in *In re Excel Corporation*, 62 Agric. Dec. 196 (2003), is reinstated; except that the effective date of the

Order is the date indicated in the Order in this Order Denying Petitions for Reconsideration.

For the foregoing reasons, the following Order should be issued.

ORDER

Respondent, its agents and employees, directly or indirectly through any corporate or other device, in connection with its purchases of livestock on a carcass merit basis, shall cease and desist from:

(a) Failing to make known to sellers, or their duly authorized agents, prior to purchasing livestock, the factors that affect Respondent's estimation of lean percent, including, but not limited to, any change in the formula used to estimate lean percent; and

(b) Failing to make known to sellers, or their duly authorized agents, prior to purchasing livestock, the details of the purchase contract, including, when applicable, the expected date and place of slaughter, carcass price, condemnation terms, description of the carcass trim, grading to be used, accounting, and any special conditions.

This Order shall become effective on the day after service of this Order on Respondent.

Done at Washington, DC

March 26, 2004

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William G. Jenson

Judicial Officer