



November 22, 2010

Tess Butler  
GIPSA, USDA  
1400 Independence Ave., NW  
Room 1643-S  
Washington, DC 20250-3604

**Re: Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act; Proposed Rule; RIN 0580-AB07; 75 *Fed. Reg.* 35338 (June 22, 2010).**

Dear Ms. Butler:

The American Meat Institute (AMI) submits this letter in response to an invitation for comments in the above-referenced notice of proposed rulemaking (proposal) published by the Grain Inspection, Packers and Stockyards Administration (GIPSA or the agency). AMI is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products, and AMI member companies account for more than 95 percent of United States output of these products. Many AMI members procure livestock and poultry on the spot market and through a variety of marketing agreements and contracts and as such would be subject to these proposed rules.

Title XI of the Food, Conservation and Energy Act of 2008 (Pub. L. 110-246) (Farm Bill) directed the Secretary of Agriculture to "promulgate Regulations with respect to the ... Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*) to establish criteria that the Secretary will consider in determining

(1) whether an undue or unreasonable preference or advantage has occurred in violation of such Act;

(2) whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement;

(3) when a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of such Act; and

(4) if a live poultry dealer or swine contractor has provided a reasonable period of time for a poultry grower or a swine production contract grower to remedy a breach of contract that could lead to termination of the poultry growing arrangement or swine production contract." Section 11006, Farm Bill.

In addition to exceeding the Farm Bill's mandate, the proposal is fatally flawed and should be withdrawn for several other reasons.

- The proposed rule conflicts with long-standing judicial precedent.
- Many provisions would cause severe economic harm to producers, consumers, packers, and live poultry dealers.
- Many elements of the proposal are unconstitutionally vague and patently unworkable.
- The proposal would adversely affect the meat and poultry industry's ability to compete regarding international trade.
- The agency failed to meet the requirements of Executive Order 12866.

For these reasons, articulated in more detail below, AMI urges the agency to withdraw the proposal, reconsider many of the proposed sections, and reissue a proposed rule that is consistent with the Farm Bill mandate and that will not adversely affect livestock and poultry producers and the meat packing industry.

## **I. MANY PROVISIONS IN THE PROPOSED RULE ARE LEGALLY INFIRM.**

GIPSA, through the proposal, seeks to do what it has failed to do through the judiciary on multiple occasions and what the Congress has not authorized the agency to do through legislation. Specially, the proposal would, in effect, waive a necessary element in a Packers and Stockyards Act (PSA or the Act) case, *i.e.*, a showing of competitive injury, thereby setting in motion a cascading effect that will dramatically increase the threat of litigation brought under the PSA and that ultimately will undermine the significant progress made by the meat and poultry industry in meeting consumer demands during the past quarter century. The elements of the proposal that would cause this problem, however, are flawed legally. A more detailed discussion of the legal infirmities follows.

### **Proposed Section 201.3(c) Conflicts with the Plain Meaning of the Act and Numerous Appellate Court Decisions, including Recent Cases in which the Agency has Participated.**

#### **Extensive Case Law before Enactment of the Farm Bill Conflicts with the Proposed Rule.**

The agency asserts in the proposed rule that a plaintiff seeking to establish a claim under subsections 202(a) or 202(b) of the PSA need not demonstrate competitive injury or likelihood of competitive injury. This assertion conflicts with the great weight of judicial authority that has on numerous occasions examined that very question and thoroughly reviewed the intent of congress in enacting section 202 of the PSA. In fact, the agency's position conflicts with decisions of every federal circuit court to address the issue over the course of decades.

One of the first circuits to address this issue was the Seventh Circuit, which interpreted subsection 202(a) to require "either [predatory] intent or adverse competitive effect."<sup>1</sup> In that seminal decision, *Armour & Co. v.*

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<sup>1</sup> *Armour & Co. v. United States*, 402 F.2d 712, 718. See also at 717-718 (discussing *Swift & Co. v. Wallace*, 105 F.2d 848 (7<sup>th</sup> Cir. 1939); *Wilson & Co. v. Benson*, 286 F.2d 891 (7<sup>th</sup> Cir. 1961); and *Swift & Co. v. United States*, 308 F.2d 849 (7<sup>th</sup> Cir. 1962)); see also *Pacific Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-370 (7<sup>th</sup> Cir. 1976) (holding that plaintiffs had failed to state a Section 202(a) claim because "the purpose of [the PSA] is to halt unfair business practices which adversely affect competition, not shown here").

*United States*, the Seventh Circuit recognized the PSA’s “ancestry in antitrust law.”<sup>2</sup> The antitrust laws, the court observed, “express a basic public policy distinguishing between fair and vigorous competition on the one hand and predatory or controlled competition on the other.”<sup>3</sup> “The fact that a given provision [in the PSA] does not expressly specify the degree of injury or the type of intent required,” the *Armour* court reasoned, “does not imply that these basic indicators of the line between free competition and predation are to be ignored.”<sup>4</sup> Thus, the court concluded, “[s]urely words such as ‘unfair’ and ‘unjustly’ in Section 202(a) \* \* \* require some examination of [a dealer’s] intent and the likely effects of its acts or practices under scrutiny, even though [the] test under Section 202(a) \* \* \* [may] be less stringent than under some of the anti-trust laws.”<sup>5</sup>

The *Armour* court also found that the PSA’s legislative history “fully supports [the] conclusion that Section 202(a) was not directed at [a practice] unless there was some intent to eliminate competition or unless the effect of the [practice] might lessen competition.”<sup>6</sup> The court noted that the Senate Committee Report “makes it clear that this part of the legislation was promoted primarily by fear of monopoly and predation.”<sup>7</sup> Likewise, the House Committee Report makes clear that the PSA “was aimed at halting ‘a general course of action for the purpose of destroying competition.’”<sup>8</sup>

Many circuits have followed *Armour*’s lead. For example, the Eighth Circuit stated that section 202(a) “authorize[s] the Secretary of Agriculture to regulate anticompetitive trade practices in the livestock and meat industry” and that “[a] practice is ‘unfair’ [under the PSA] if it injures or is likely to injure competition.”<sup>9</sup> Likewise, the Ninth Circuit has held that, at the very least, section 202(a) requires “a reasonable likelihood that \* \* \* the result [of

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<sup>2</sup> *Been v. O.K. Indus., Inc.*, 495 F.3d1217, 1228 (10th Cir. 2007)

<sup>3</sup> *Armour*, 402 F.2d at 717.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* (Emphasis added).

<sup>6</sup> *Id.* at 720.

<sup>7</sup> *Id.* (citing S. Rep. No. 66-429, at 1, 3) (Emphasis added).

<sup>8</sup> *Id.* (quoting H.R. Rep. No. 66-1297, at 11 (1921)).

<sup>9</sup> *Farrow v. United States Dep’t of Agric.*, 760 F.2d 211, 214 (8th Cir. 1985) (Emphasis added). See also *IBP Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999) (agreement providing for right of first refusal did not violate Section 202(a) where it did not “potentially suppress or reduce competition sufficient to be proscribed by the Act”); *United States v. Stanko*, 491 F.3d 408, 417-418 (8th Cir. 2007) (construing Section 202(a) to require “proof of economic effects on competition or consumers”).

a practice] will be an undue restraint of competition.”<sup>10</sup> As the *DeJong* court stated, “[w]hile § 202 of the [PSA] may have been made broader than antecedent antitrust legislation in order to achieve its remedial purpose, it nonetheless incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation.”<sup>11</sup>

Similarly the Fourth Circuit concluded that a plaintiff must prove that a practice or action at issue “was likely to affect competition adversely in order to prevail on [a] claim under [Section 202(a) of the PSA].”<sup>12</sup> And the Tenth and Eleventh Circuits have followed suit and held that “only those unfair, discriminatory or deceptive practices adversely affecting competition are prohibited by the PSA.”<sup>13</sup> Thus, every circuit that examined this issue before enactment of the Farm Bill — reaching back over the course of decades — has held that showing an anticompetitive effect is required to establish a claim under subsections 202(a) or 202(b) of the PSA.<sup>14</sup>

In the face of this judicial precedent GIPSA attempts to support its erroneous interpretation of the PSA by citing legislative history and Congressional amendments to the PSA. Specifically, GIPSA claims that “Congress confirmed the agency’s position by amending the P&S Act to specify specific instances of conduct prohibited as unfair that do not involve any inherent likelihood of competitive injury.”<sup>15</sup> The amended sections of the PSA to which the agency refers for support for its argument, however, are sections 409 and 410 of the Act – not section 202.<sup>16</sup> If Congress wished to

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<sup>10</sup> *DeJong Packing Co. v. United States Dep’t of Agric.*, 618 F.2d 1329, 1337 (9th Cir. 1980).

<sup>11</sup> *Id.* at 1335 n.7 (Emphasis added).

<sup>12</sup> *Goldsboro Milling Co.*, 1998 WL 709324, at \*4. See also *Griffin v. Smithfield Foods, Inc.*, 183 F. Supp. 2d 824, 827 (E.D. Va. 2002) (“only those unfair, discriminatory or deceptive practices adversely affecting competition are prohibited by the Act”) (quotation omitted); *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197, 201 (E.D.N.C. 1996) (Section 202(a) “is a general mandate against unfair acts by live poultry dealers which adversely affect competition”).

<sup>13</sup> *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005). See *Been*, 495 F.3d at 1230 (“a plaintiff who challenges a practice under § 202(a) [must] show that the practice injures or is likely to injure competition”).

<sup>14</sup> For like discussions that subsection 202(b) requires the same showing see *Adkins v. Cagle Foods JV, LLC*, 411 F.3d 1320, 1321, 1324 & n.6 (11th Cir. 2005); *IBP*, 187 F.3d at 976-977; *Armour*, 402 F.2d at 717.

<sup>15</sup> 75 *Fed. Reg.* at 35340.

<sup>16</sup> *Id.* See footnote 23 referencing sections 409 and 410.

amend section 202, as it has amended sections 409 and 410, it has had ample opportunity to do so. Congress, however, has declined that option.<sup>17</sup>

The agency also asserts that judicial decisions involving sections 307 and 312 support the concept articulated in proposed subsection 201.3(c). That effort, too, fails because the cases cited are both in circuits that have examined specifically the question of competitive injury as it pertains to section 202 of the PSA and both of those circuits have concluded that a showing of competitive harm is necessary. Specifically, GIPSA cites a 10<sup>th</sup> Circuit case, *Capitol Packing Company v. the United States*, 350 F.2d 67 (10<sup>th</sup> Cir. 1965), and a 9<sup>th</sup> Circuit case, *Spencer Livestock Comm'n Co. v. USDA*, 841 F.2d 1451 (9<sup>th</sup> Cir. 1988), which deal with parts of the PSA other than section 202, to support its position. The preamble, however, ignores the fact that a showing of competitive injury has been found necessary with respect to section 202 in both circuits.<sup>18</sup>

The agency also argues that the courts should defer to the agency's interpretation of the PSA. Deference, however, is inappropriate in this instance because, "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."<sup>19</sup> Among the several circuits that have faced the deference argument the Eleventh Circuit's discussion in rejecting the agency's claim for deference best captures the issue: "Congress plainly intended to prohibit only those unfair, discriminatory or deceptive practices adversely affecting competition."<sup>20</sup> Thus, "a contrary interpretation of Section 202(a) deserves no deference."<sup>21</sup>

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<sup>17</sup> Section 202 has been amended more than once over the last few decades and Congress has never amended the statute to indicate that an anticompetitive effect is not required to establish a PSA claim. See, e.g., Farm Security and Rural Investment Act of 2002, Pub. L. No. 101-171, 116 Stat. 134, 509-510 (2002); Poultry Producers Financial Protection Act of 1987, Pub. L. No. 100-173, 101 Stat. 917, 917-918 (1987). In the Farm Bill Congress failed to enact proposed legislation that would have done just that. See Competitive and Fair Agricultural Markets Act of 2007, S. 622, 110th Cong., at 29 (2007).

<sup>18</sup> See *London* (10<sup>th</sup> Cir.) and *DeJong* (9<sup>th</sup> Cir.).

<sup>19</sup> *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

<sup>20</sup> *London*, 410 F.3d at 1304 (quotation omitted).

<sup>21</sup> *Id.* See also *Been*, 495 F.3d at 1227 ("we are not persuaded by the USDA's interpretation of the statute"); *Armour*, 402 F.2d at 722 ("in Section 202(a) Congress gave the Secretary no mandate to ignore the general outline of long-time antitrust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged").

Finally, the agency contends that publication of the new regulations constitutes a “material change in circumstances that warrants judicial reexamination of the issue.”<sup>22</sup> That argument is inapplicable here, where 1) GIPSA has participated repeatedly in cases in which this issue was presented and in doing so has provided to the courts its interpretation of subsection 202(a) and (b), and 2) has had that interpretation rejected at least four times in the last five years by every circuit that has examined the issue.<sup>23</sup>

**Cases Decided since the 2008 Farm Bill also Conflict with the Proposed Rule.**

***Wheeler v. Pilgrim’s Pride Corp.* – December 2009**

The discussion above focused on the conflict between the several cases decided before the 2008 Farm Bill. Since passage of the Farm Bill two more circuits have examined the issue and the agency’s position, as reflected in subsection 201.3(c), which directly conflicts with the uniform interpretation of the PSA from the eight (8) different federal appellate courts that have considered the issue. The preamble discussion and the language in section 201.3(c) simply confirms that agency officials intend to apply the law as they see fit -- regardless of statutory language, Congressional intent, and existing judicial precedent.

Judicial rejection of the interpretation advanced by GIPSA in the preamble and articulated in section 201.3(c) is captured in the recent *en banc* decision from the United States Court of Appeals for the Fifth Circuit, *Wheeler v. Pilgrim’s Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (*en banc*). The *Wheeler* case includes an extensive review and analysis of the Act’s language, its legislative history, and the extensive case law history. The opinion begins, however, with the following observation, which more than suggests that the necessity of showing competitive injury in a PSA case is a matter of settled law.

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<sup>22</sup> 75 *Fed. Reg.* at 35341.

<sup>23</sup> *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005); *Been v. O.K. Indus., Inc.*, 495 F.3d1217, 1228 (10th Cir. 2007); *Wheeler v. Pilgrim’s Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (*en banc*); and *Terry v. Tyson Farms, Inc.* 604 F3rd 272 (6th Cir. 2010).

Once more a federal court is called to say that the purpose of the Packers and Stockyards Act of 1921 is to protect competition and, therefore, only those practices that will likely affect competition adversely violate the Act. That is this holding.<sup>24</sup>

The *Wheeler* court engaged in a thorough analysis of the history of the PSA and the extensive case law that preceded *Wheeler*. In that regard, the court examined holdings of the Supreme Court, as well as decisions in the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup> Circuits.<sup>25</sup>

*Wheeler* also examined the legislative history of the Act and concluded that the history “supports the conclusion that it was designed to combat restraints on trade, with everyone from the Secretary of Agriculture to members of Congress testifying to the need of this statute to promote healthy competition.”<sup>26</sup> The *Wheeler* court also recognized that Congress has amended the Act several times since its enactment, including the Farm Bill amendments.<sup>27</sup> The language at issue in *Wheeler* and in proposed section 201.3(c) however, sections 202 (a) and (b), has remained unchanged from original enactment even after many courts found that proving competitive injury necessary. Thus, the *Wheeler* court concluded, “[I]t is reasonable to conclude that Congress accepts the meaning of § 192(a) to require an effect on competition to be actionable because congressional silence in response to circuit unanimity ‘after years of judicial interpretation supports adherence to the traditional view’.”<sup>28</sup>

The *Wheeler* court properly rejected the agency’s *Chevron* deference argument, which GIPSA made through its role as *amicus*. In fact, contrary to the agency’s position in the proposed rule, *Wheeler* specifically found that such deference “is unwarranted where Congress has delegated no authority

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<sup>24</sup> *Wheeler* at 357.

<sup>25</sup> The *Wheeler* court also discussed an unpublished opinion from the 4<sup>th</sup> Circuit with a consistent finding.

<sup>26</sup> *Wheeler* at 361.

<sup>27</sup> Congress amended the PSA to provide for guidelines for poultry and hog production contracts that allow producers to terminate a contract within three days of execution, as well as mandating disclosure of required capital investments. The 2008 amendments also established a judicial forum for dispute resolution and provided producers an option regarding refusing arbitration clauses in contracts. See 122 Stat 1651, Pub. L. 110-246.

<sup>28</sup> *Wheeler* at 361-362 citing *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 593-94, 124 S. Ct. 1236, 1244-45 (2004).

to change the meaning the courts have given to the statutory terms, as the Eleventh and Tenth Circuits have held.”<sup>29</sup>

Finally, in writing for the majority, Judge Reavley wrote: “We conclude that an anticompetitive effect is necessary for an actionable claim under the PSA in light of the Act’s history in Congress and its consistent interpretation by the other circuits. ... Given the clear antitrust context in which the PSA was passed, the placement of § 192(a) and (b) among other subsections that clearly require anticompetitive intent or effect, and the nearly ninety years of circuit precedent, we find too that a failure to include the likelihood of an anticompetitive effect as a factor actually goes against the meaning of the statute.”<sup>30</sup>

#### **Terry v. Tyson Farms, Inc. – May 2010**

Subsequent to *Wheeler* and just six weeks before the proposed rule published, the most recent interpretation of the PSA, this time from the United States Court of Appeals for the Sixth Circuit in *Terry v. Tyson Farms, Inc.* raised to eight the number of federal appellate courts that have considered the key issue of whether demonstrating harm or likely harm to competition is a necessary element of a PSA claim.<sup>31</sup> In *Terry* the Sixth Circuit said the following:

The tide has now become a tidal wave, with the recent issuance of the Fifth Circuit Court of Appeals’ *en banc* decision in *Wheeler v. Pilgrim’s Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (*en banc*), in which that court joined the ranks of all other federal appellate courts that have addressed this precise issue when it held that “the purpose of the Packers and Stockyards Act of 1921 is to protect competition and, therefore, only those practices that will likely affect competition

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<sup>29</sup> *Wheeler* at 362.

<sup>30</sup> *Id.*

<sup>31</sup> *Terry v. Tyson Farms, Inc.* 604 F3rd 272 (6th Cir. 2010). An interesting and telling indicator of the agency’s stubborn refusal to abide by the repeated rulings against the position articulated in proposed subsection 201.3(c) is the fact that in footnote 31 in the preamble to the proposed rule GIPSA references the fact that *Terry* was argued in March 2010, leaving the impression that the case had yet to be decided when the proposed rule published on June 22. The agency does not acknowledge that *Terry* was decided consistently with seven other circuits, and in a manner at odds with the agency’s interpretation, on May 10 – six weeks before publication of the proposed rule.

adversely violate the Act.” *Wheeler*, 591 F.3d at 357. All told, seven circuits – the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits – have now weighed in on this issue, with unanimous results. *See Wheeler*, 591 F.3d 355; *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1230 (10th Cir. 2007); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11<sup>th</sup> Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006); *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005), *cert. denied*, 546 U.S. 1034 (2005); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *Philson v. Goldsboro Milling Co.*, Nos. 96-2542, 96-2631, 164 F.3d 625, 1998 WL 709324, at \*4-5 (4th Cir. Oct. 5, 1998) (unpublished table decision); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *Farrow v. United States Dep’t of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985); *DeJong Packing Co. v. United States Dep’t of Agric.*, 618 F.2d 1329, 1336-37 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980); and *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir. 1976).<sup>32</sup>

The *Terry* court also referenced directly the agency’s participation in the case as *amicus* stating:

In this appeal, *Terry*, joined by *amicus curiae* United States Department of Agriculture (“USDA”), seeks to persuade us to adopt the decidedly minority view embraced by some district courts and vigorously articulated by Judge Garza, along with six of his colleagues, in his dissenting opinion in *Wheeler*. *See Wheeler*, 591 F.3d at 371 (Garza, J., dissenting). ...Ultimately, *Terry* and the USDA would have this court deviate from the course taken by the seven other circuits that have spoken on this issue, thus creating a conflict. We decline to do so.<sup>33</sup>

The *Terry* court found that “the rationale employed by our sister circuits is well-reasoned and grounded on sound principles of statutory construction. Moreover, under the fundamental principle of *stare decisis*, we deem the construction of this nearly 90-year-old statute to be a matter of settled law. We therefore join these circuits and hold that in order to succeed

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<sup>32</sup> *Terry* at 277.

<sup>33</sup> *Terry* at 277-278.

on a claim under §§ 192(a) and (b) of the PSA, a plaintiff must show an adverse effect on competition.”<sup>34</sup>

The agency’s blatant disregard for the holdings in the extensive case law and its misplaced reliance on report language and dissents in one of those cases is the definition of arbitrary and capricious under the Administrative Procedure Act.

**Proposed Section 201.3(c) does not reflect a Longstanding Agency Interpretation of the Packers and Stockyards Act.**

The proposal is far reaching and several of the provisions are legally suspect. That conclusion is especially true with respect to proposed section 201.3(c), which reads as follows.

*(c) Scope of Sections 202(a) and (b) of the Act.* The appropriate application of section 202(a) and (b) of the Act depends on the nature and circumstances of the challenged conduct. A finding that the challenged act or practice adversely affects or is likely to adversely affect competition is not necessary in all cases. Conduct can be found to violate section 202(a) and/or (b) of the Act without a finding of harm or likely harm to competition.

This proposed subsection conflicts not only with extensive judicial precedent requiring that private plaintiffs and the agency demonstrate harm or likely harm to competition to prevail in a PSA case brought under section 202(a) or (b), but it is at odds with previous agency positions.

In the preamble the agency contends that it has “consistently taken the position that, in some cases, a violation of section 202(a) or (b) can be proven without proof of predatory intent, competitive injury, or likelihood of injury.”<sup>35</sup> Indeed, the agency goes on to say “[T]he longstanding agency position that, in some cases, a violation of section 202(a) or (b) can be proven without proof of likelihood of competitive injury is consistent with the language and structure of the P&S Act, as well as its legislative history and purposes.”<sup>36</sup>

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<sup>34</sup> *Terry* at 279.

<sup>35</sup> 75 *Fed. Reg.* 35338, 35340 (June 22, 2010).

<sup>36</sup> *Id.*

That assertion is at odds, however, with a 1997 agency report responding to a petition submitted by the Western Organization of Resource Councils (WORC).<sup>37</sup> In its response to WORC GIPSA wrote:

In order to prohibit activities of the packers through regulation or to file a complaint citing a violation of section 202, the Department must develop evidence that the packers have either predatory intent or that there is the likelihood that the complained of activity will result in injury.<sup>38</sup>

That the reference to injury means injury to competition is confirmed in the next sentence in which the report states:

Case precedent supports this statement of the Secretary's authority to regulate packer activities. As the *Armour* court states: The clearer the danger of the [likelihood of competitive injury], as when competitors conspire to eliminate the uncertainties of price competition, the less important is proof of [predatory intent]. Conversely, the likelihood of injury arising from conduct adopted with predatory purpose is so great as to require little or no showing that such injury has already taken place. *Armour*, 402 F.2d 717. ...Therefore, to satisfy the *Armour* test, WORC would have to establish a violation of the Act based on evidence of the likelihood of injury.<sup>39</sup>

In addition, the Eleventh Circuit also concluded that the government had failed to establish that its interpretation was the Department of Agriculture's (USDA) "consistent view" of section 202(a).<sup>40</sup> That the

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<sup>37</sup> Review of Western Organization of Resource Councils (WORC) Petition for Rulemaking, Grain Inspection and Packers and Stockyards Administration, Packers and Stockyards Programs, August 29, 1997 [http://archive.gipsa.usda.gov/psp/issues/worc\\_petition/worchmpg.pdf](http://archive.gipsa.usda.gov/psp/issues/worc_petition/worchmpg.pdf). (Attachment A)

<sup>38</sup>. *Id.* at 15-16.citing OGC Memorandum to the Chief Economist, June 20, 1996, p. 5 (Attachment 2).

<sup>39</sup> *Id.* at 16. (Emphasis added).

<sup>40</sup> *London*, 410 F.3d at 1304 n.7. Indeed, in *In re IBP, Inc.*, 57 Agric. Dec. 1353 (1998), the Judicial Officer held that a right of first refusal violated Section 202(a) precisely "because it ha[d] the effect or potential effect of reducing competition." 1998 WL 462705, at \*34 (emphasis added), rev'd, *IBP*, 187 F.3d at 977 (holding that right of first refusal did not violate Section 202(a) because it did not "potentially suppress or reduce competition sufficient to be proscribed by the Act") (emphasis added).

government's interpretation is a mere litigating position also means it is not entitled to deference.<sup>41</sup>

In short, as recently as 1997 the agency understood and accepted the position that in order to prevail in a PSA case a plaintiff must demonstrate injury or likelihood of injury to competition, which calls into question the agency's assertion that the proposed rule reflects a "longstanding" GIPSA interpretation of the PSA. Why the agency shifted its position to that posited in the preamble is unknown and not explained by GIPSA.

### **The Proposed Rule Inappropriately Exceeds the Congressional Mandate in the Farm Bill.**

As stated earlier, the Farm Bill directed the Secretary of Agriculture to promulgate rules that would establish criteria on several explicit topics. Specifically, the Secretary was directed to develop criteria for determining:

- (1) whether an undue or unreasonable preference or advantage has occurred in violation of such Act;
- (2) whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement;
- (3) when a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of such Act; and
- (4) if a live poultry dealer or swine contractor has provided a reasonable period of time for a poultry grower or a swine production contract grower to remedy a breach of contract that could lead to termination of the poultry growing arrangement or swine production contract.<sup>42</sup>

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<sup>41</sup> See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); see also *Been*, 495 F.3d at 1227 ("USDA's position as stated in its *amicus* brief [is entitled] little to no deference").

<sup>42</sup> Section 11006, Farm Bill.

In addition, section 11005 of the Farm Bill amended the Act with respect to production contracts, choice of law and venue, and arbitration and for that reason the proposal includes proposed language concerning arbitration.

In contrast, several other provisions of the proposal were not mandated nor authorized by the Farm Bill. Indeed, the concepts included in many of these sections were considered by the House Committee on Agriculture, the Senate Committee on Agriculture, Nutrition and Forestry, or both, and were rejected or not included in the Farm Bill. In that regard, the provisions found in sections 201.3, 201.94, 201.210, 201.212, 201.213, and 201.214 are all outside the scope of the Farm Bill mandate.

For example, proposed rule's putative abolition of the competitive injury requirement found in section 201.3 was included in a discussion draft of Chairman Harkin's markup of the Farm Bill, but subsequently deleted from the bill offered to the Senate Agriculture Committee. Likewise, the concepts in section 201.210 regarding fairness were included in Chairman Harkin's mark up of the Farm Bill and were removed in conference. Similarly, the business justifications requirements in section 201.94 were included in an amendment offered by Senator Tester on the Senate Floor during the debate and vote on the Senate version of the Farm Bill. That amendment was defeated.

That these concepts were considered by the Congress in its debate on the Farm Bill and rejected or not included requires GIPSA to delete them and implement the Farm Bill as Congress intended. That the agency would usurp the will of Congress and seek to implement through the regulatory process that which the elected officials in the Congress have rejected is at odds with our system of government.

**The Proposal Essentially Eliminates Preferences or Advantages that Possess a Valid Business Justification and have, on Balance, No Anticompetitive Effect.**

Development of the criteria mandated by the Farm Bill concerning section 202(b) must start with a review of the plain language of the statute. In that regard, section 202(b) of the Act provides that

“It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to: ...

(b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; ....”<sup>43</sup>

Thus, the plain language of the Act contemplates that preferences or advantages may be afforded to livestock suppliers by a packer or swine contractor, so long as those preferences or advantages are not "undue" or "unreasonable." As a practical matter, this conclusion makes perfect sense. A packer should be able to pay more, for example, for cattle that grade prime than for cattle that grade select, because meat derived from a prime steer generally has greater value than the meat from a select steer. By structuring payment terms to reward attributes that are desired by consumers, *e.g.*, organic, grass fed, *etc.*, packers are able to create incentives that benefit everyone in the supply chain. The proposal, however, is crafted in a manner such that a packer or swine contractor essentially is precluded from employing a preference or advantage that yields a social benefit (such as preferred product characteristics, increased efficiency, lower transaction costs, *etc.*).

In developing the proposal, GIPSA was not writing on a blank slate. Courts have addressed the meaning of this statutory language in case law that extends over decades. This case law makes clear that a preference is "undue" or "unreasonable" when (a) it has no valid business justification and (b) it has, on balance, an anticompetitive effect.

The following discussion of section 202 (from the Seventh Circuit) is illustrative.

Surely words such as ... "undue" and "unreasonable" in Section 202(b) require some examination of the seller's intent and the likely effects of its acts or practices under scrutiny, even though these tests under Section 202(a) and (b) be less stringent than under some of the

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<sup>43</sup> 7 U.S.C. 192(b). (Emphasis added).

antitrust laws. These adjectival qualifications expressed in the statutory language enjoin the Department and courts to apply a rule of reason in determining the lawfulness of a particular practice under Section 202(a) and (b).<sup>44</sup>

The Seventh Circuit properly concluded that the packer's intent is one legitimate factor to consider in determining whether a preference or advantage is undue or unreasonable. The crucial issue with respect to intent is whether the packer made use of the preference or advantage in order to achieve a valid business objective, such as improved quality, greater efficiency, lower transaction costs, to meet competition, obtain a consistent supply of livestock for a plant, or the like. The proposal as written, however, does not contemplate this factor as a part of determining whether a preference or advantage is "undue" or "unreasonable."

Where there is no valid business justification for a preference, and the preference has the effect of suppressing competition, it is illegal under section 202. As the Seventh Circuit explained, the "rule of reason" is the appropriate screen to distinguish those preferences that have an anticompetitive effect. The "inquiry mandated by the [r]ule of [r]eason is whether the challenged agreement is one that promotes competition or one that suppresses competition."<sup>45</sup>

The courts have already considered assertions that section 202 requires that all producers be treated the same, regardless of valid business justifications that might warrant differences. Such assertions have been emphatically rejected. A leading Eighth Circuit case contains this discussion:

Thus, their claim, in essence, is that § 202 of the PSA, 7 U.S.C. § 192, statutorily creates an entitlement to obtain the same type of contract that Swift Eckrich may have offered to other independent growers. We are convinced that the purpose behind § 202 of the PSA, 7 U.S.C. § 192, was not to so upset the traditional principles of freedom of contract. The PSA was designed to promote efficiency, not frustrate it.<sup>46</sup>

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<sup>44</sup> *Armour & Co. v. United States*, 402 F.2d 712717 (7th Cir. 1968) (emphasis added). Although in *Armour* the focus was on the packer's behavior as a seller of meat, the same reasoning and standards should apply to the packer's behavior as a buyer of livestock.

<sup>45</sup> *National Society of Professional Engineers v. United States*, 435 U.S. 679, 691 (1978).

<sup>46</sup> *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995).

Indeed, the United States agreed with such an approach in its *amicus* submission in a brief recently filed in *Wheeler v. Pilgrim's Pride Corp.* Specifically, the agency stated that "a primary (but not sole) purpose of the PSA was to foster competition and, for that reason, practices that have the potential to enhance efficiency should not be condemned as 'unfair' under the PSA without consideration of competitive effects."<sup>47</sup>

### **A Rule of Reason Approach also Must Apply to Many Other Components of the Rule.**

A number of elements of the proposal fail to contemplate a rule of reason approach. For example, section 201.218 involves contract termination and providing a "reasonable time" to cure a breach of contract. Elements of that section suggest that in no circumstance can a swine contractor or live poultry dealer take immediate action to terminate a contract. Although hopefully the circumstances where immediate termination is necessary do not frequently arise, the criteria do not recognize that in some cases immediate action is necessary and warranted.

For example, many contracts include provisions allowing termination of a contract if the grower is found to have violated applicable animal welfare laws or if the grower fails to maintain the facilities in a manner such that the welfare of the livestock or birds is at risk. Section 201.218(d) includes as one of the criteria whether sufficient time has been afforded the grower to rebut in writing the allegation in the notice that serves as the basis for the termination and establishes a presumption that 14 days is necessary for the grower to respond. In the animal welfare circumstance discussed above, a swine contractor or live poultry grower should not have to wait 14 days to receive a response before taking action or risk being subject to a possible PSA violation. Yet, the proposal contemplates just that result – to the detriment of the livestock or birds in the care of the grower and the industry at large.<sup>48</sup> Similarly, other actions by growers may warrant immediate termination. In

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<sup>47</sup> *Wheeler v. Pilgrim's Pride Corp.*, U.S. Court of Appeals for the Fifth Circuit, No. 07-40651, *en Banc Brief for Amicus Curiae the United States*, September 8, 2009.

<sup>48</sup> Indeed, public viewing of and reaction to past instances of undercover film footage taken by animal rights organizations at a very small number of livestock and poultry production facilities documenting abuses by workers on those farms caused as much damage to the packers and poultry processors to whom those growers supplied livestock or birds than it did to the growers themselves.

short, the proposal's 14 day time in subsection 201.218(d) should be reconsidered.

Similarly, the agency should not establish "absolutes" in the rule regarding when a capital investment requirement "constitutes a violation" of the Act. A host of factors, such as technological advances or the development of generally accepted best practices related to food safety or animal welfare, are part of the calculus that can dictate the need for additional capital investment on the part of the grower. Such requirements must be considered in the context of whether there is a legitimate business justification for the investment requirement.

## **II. THE PROPOSAL WOULD RESULT IN CHANGES TO THE LIVESTOCK AND MEAT INDUSTRY THAT THE GIPSA RTI INTERNATIONAL STUDY FOUND HARMFUL TO PRODUCERS AND CONSUMERS**

### **The RTI International Study Warns of Severe Adverse Effects if Alternative Marketing Agreements are Reduced or Eliminated.**

The 2002 Farm Bill authorized, and in 2003 Congress allocated monies to GIPSA to conduct a study regarding the effects of what the agency defined as "alternative marketing arrangements" (AMAs) on the livestock and meat industries. RTI International (RTI) conducted the GIPSA Livestock and Meat Marketing Study (GIPSA study), which was completed in 2007.<sup>49</sup> As the discussion below demonstrates, based on the GIPSA study's conclusions, the proposal, if finalized, would have a very adverse effect on the meat and livestock industry. Livestock producers and consumers would suffer the greatest adverse effects, with a lesser but still significant adverse economic impact on packers and processors.

In its *Assessment of the Livestock and Poultry Industries Fiscal Year 2007* the agency recognized and discussed the GIPSA study and its results. In that regard, the agency stated that "[T]he study addressed many questions and concerns that have been raised about changes in the structure

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<sup>49</sup> GIPSA Livestock and Meat Marketing Study, prepared for Grain Inspection, Packers and Stockyards Administration, prepared by RTI International (January 2007), [http://archive.gipsa.usda.gov/psp/issues/livemarketstudy/LMMS\\_Vol\\_1.pdf](http://archive.gipsa.usda.gov/psp/issues/livemarketstudy/LMMS_Vol_1.pdf). (Attachment B)

and business practices in the livestock and meat industries.”<sup>50</sup> That 2007 Report went on to say that the “study found that alternative marketing arrangements provide net benefits to producers, packers, and consumers, and that net economic losses would result from restrictions on the use of such arrangements.”<sup>51</sup>

Significantly, GIPSA stated the following in its 2007 Report.

In particular, the study found that packers and consumers receive better quality and more consistent product as a result of alternative arrangements, and producers receive value for better quality livestock. All parties are better able to set delivery/sale dates. The arrangements help to stabilize the flow of supply, and provide cost savings in sellers and buyers interactions to arrive at a market price (*i.e.*, the price discovery process). In general, the use of alternative marketing arrangements provides livestock buyers and sellers with improved risk management options that lower costs or allow for the creation and capture of greater value.<sup>52</sup>

Certain specifics in the GIPSA study also are worthy of agency consideration regarding the proposed rule. In that regard, a fundamental conclusion of the GIPSA study was that “[M]any meat packers and livestock producers obtain benefits through the use of AMAs, including management of costs, management of risk (market access and price risk), and assurance of quality and consistency of quality.”<sup>53</sup> Moreover, the GIPSA study concluded that “[I]n aggregate, restrictions on the use of AMAs for sale of livestock to meat packers would have negative economic effects on livestock producers, meat packers, and consumers.”<sup>54</sup>

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<sup>50</sup> *Assessment of the Livestock and Poultry Industries* Fiscal Year 2007 Report, United States Department of Agriculture Grain Inspection, Packers and Stockyards Administration May 2008, p. 28-29. <http://archive.gipsa.usda.gov/pubs/07assessment.pdf>. (Attachment C)

<sup>51</sup> *Id.* at 29.

<sup>52</sup> *Id.* (Emphasis added).

<sup>53</sup> GIPSA study, ES-3.

<sup>54</sup> *Id.* (Emphasis added).

With respect to fed cattle and beef, the study found that “beef producers and packers interviewed believed that some types of AMAs helped them manage their operations more efficiently, reduced risk, and improved beef quality. Feedlots identified cost savings of \$1 to \$17 per head from improved capacity utilization, more standardized feeding programs, and reduced financial commitments required to keep the feedlot at capacity.”<sup>55</sup> The GIPSA study stated that producers who use AMAs “identified the ability to buy/sell higher quality cattle, improve supply management, and obtain better prices as the leading reasons for using AMAs.”<sup>56</sup> Packers also benefit, citing their top three reasons for using AMAs as 1) improving week-to-week supply management, 2) securing higher quality cattle, and 3) allowing for product branding in retail stores.<sup>57</sup>

Relevant to the impact of the proposed rule is RTI’s conclusion about “hypothetical” reductions in AMAs. Unfortunately, if the proposal as written is finalized, the troubling reductions identified by RTI will not be hypothetical – they will be real.

Specifically, RTI found that a reduction in AMAs would have “a negative effect on producer and consumer surplus measures. Beef and cattle supplies and quality decreased and retail and wholesale beef prices increased because of reductions in AMAs.”<sup>58</sup> Specifically, RTI found that the

short-run, long-run, and cumulative present value surplus for producers and consumers associated with reduced AMA volumes are all negative. Over 10 years, a hypothetical 25% restriction in AMA volumes resulted in a *decrease* in cumulative present value of surplus of – 2.67% for feeder cattle producers, – 1.35% for fed cattle producers, – 0.86% for wholesale beef producers (packers), and – 0.83% for beef consumers. A hypothetical 100% restriction in AMA volumes resulted in a *decrease* in cumulative present value surplus of – 15.96% for feeder cattle producers, – 7.82% for fed cattle producers, – 5.24% for wholesale beef producers (packers), and – 4.56% for beef consumers.<sup>59</sup>

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<sup>55</sup> *Id.* at ES-3. (Emphasis added.)

<sup>56</sup> *Id.* at ES-4.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at ES-8. (Emphasis added.)

<sup>59</sup> *Id.* at ES at 8-9.

In short, with respect to beef, RTI found that the net effect of eliminating AMAs would be to reduce prices, quantities, and producer and consumer surplus in almost all sectors of the industry – meaning that “reducing the use of AMAs would result in economic losses for beef consumers and the beef industry.”<sup>60</sup>

RTI drew similar conclusions regarding the adverse impact that reducing or eliminating the use of AMAs would have with respect to hogs. In that regard, RTI found that “AMAs are an integral part of hog producers’ selling practices and pork packers’ procurement practices”<sup>61</sup> and that a “higher proportion of AMA use is associated with higher quality pork products.”<sup>62</sup>

As with cattle and beef, RTI examined hypothetical restrictions regarding AMA use in the hog and pork industries and “found that hog producers would lose because of the offsetting effects of hogs diverted from AMAs to the spot market, consumers would lose as wholesale and retail pork prices rise, and packers would gain in the short run but neither gain nor lose in the long run.”<sup>63</sup> (Emphasis added.) RTI identified losses to producers and consumers in every simulation scenario because of lost efficiencies associated with reducing the proportion of hogs sold through contracts and/or packer owned channels. RTI concluded that “[I]n all instances, the price spread between farm and wholesale prices would be expected to increase because of the net increase in the costs of processing. Moreover, wholesale, and hence retail, prices would increase, causing pork to become more expensive for consumers.”<sup>64</sup>

**The Proposal Will Force Packers to Consider Reducing Markedly Their Use of Marketing Agreements (Alternative Marketing Arrangements) or Eliminating them Altogether**

The RTI conclusions are both relevant and significant because many, if not all, marketing agreements and forward contracts either may no longer be used or they may be notably limited in their use if the proposed rule becomes

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<sup>60</sup> *Id.* at ES-9.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at ES-12.

<sup>63</sup> *Id.* at ES-12-13.

<sup>64</sup> *Id.* at ES-13.

final as written. The reasons for that conclusion are straightforward and arise from the disincentives the proposal creates regarding the use of marketing agreements.

First, the threat of liability facing packers from lawsuits that are likely to be brought, either by GIPSA or by private plaintiffs, alleging violations of the Act is markedly greater if proposed section 201.3(c) becomes final. As discussed above in Section I, lessening the burden that a potential plaintiff must meet to prevail in a PSA lawsuit and based on past experience may cause many packers to consider abandoning or significantly limiting the number and types of marketing agreements they utilize simply to limit risk. Past experience, e.g., *Pickett v. Tyson Fresh Meats* may cause packers to consider limiting, if not abandoning wholly, the use of AMAs – however specious the litigation.

Second, the breadth and ambiguity in the definition of “likelihood of competitive injury” also makes the use of such instruments much more risky, again because of the threat of litigation. That definition reads, in pertinent part:

It also includes situations in which a packer, swine contractor, or live poultry dealer wrongfully depresses prices paid to a producer or grower below market value, or impairs a producer's or grower's ability to compete with other producers or growers...<sup>65</sup>

This proposed definition is a backhanded attempt to satisfy the statutory requirement identified by the eight federal circuits regarding showing competitive injury or a likelihood of competitive injury. Elements of the definition, however, are so vague and so broad that a packer will not be able to make an informed decision regarding what must be done to comply. This uncertainty is particularly applicable regarding the risks of litigation attendant to using marketing agreements.

For example, under the proposed definition, it would be virtually impossible for a packer to know whether having marketing agreements with a particular producer or group of producers will be found to have “impaired” the ability of a different producer, e.g., a producer who affirmatively chooses

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<sup>65</sup> 75 *Fed. Reg.* at 35351, proposed 201.2(u) (Emphasis added).

not to use such agreements or who does business with another packer, to compete against the producers with whom the packer has such agreements.<sup>66</sup> Similarly, a packer may elect to enter into marketing agreements with a group of producers. At the same time the packer may choose not to enter into the same agreement with other producers for legitimate business reasons, *e.g.*, poor herd management skills, history of poor performance, or the packer simply has met all of its livestock needs. The definition's ambiguity leaves unclear whether the packer has impaired the ability of the producer with whom it has no agreement to compete with those producers who have such an agreement. If by not offering a marketing agreement to a producer the packer is deemed to have impaired that producer's ability to compete, that producer could be in a position to assert he or she has demonstrated a likelihood of competitive injury and prevail in a PSA because, as the agency stated in the preamble, "any act that ...is likely to harm competition necessarily violates the statute."<sup>67</sup>

Finally, the last clause of the "likelihood of competitive injury" definition is unacceptably vague. Specifically, the proposed definition would find a likelihood of competitive injury in a situation in which a packer impairs "a producer's or grower's ability to receive the reasonable expected full economic value from a transaction in the market channel or marketplace." (Emphasis added.) Absent is any explanation in the preamble of what the agency means by the phrase "reasonable expected full economic value."<sup>68</sup> Against this vague and unintelligible standard, the packer in both of the fact examples discussed above will be at an unacceptable risk in a lawsuit. In the first, the producer who sells on the cash market will assuredly assert that his ability to receive the "reasonable expected full economic value" was impaired by the packer's use of marketing agreements with other producers. In the second fact scenario, the producer who was denied a marketing agreement will contend that his ability to receive the "reasonable expected full economic value" was impaired because he was denied such an agreement.

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<sup>66</sup> This scenario is not hypothetical as the fact pattern of *Pickett v. Tyson Fresh Meats* is very similar.

<sup>67</sup> 75 *Fed. Reg.* at 35341. (Emphasis added).

<sup>68</sup> Indeed, the preamble merely recites the language in the proposed rule (or does the rule merely recite the language in the preamble?) in its attempt to explain what "likelihood of competitive injury" is.

In any of the circumstances discussed, and many others not discussed in these comments given time and space constraints, packers will be at risk of being sued successfully given the vagueness and breadth of the definition. Given the history of jury awards in earlier cases, packers will be reluctant to utilize marketing agreements in any meaningful way, to the detriment of most producers and consumers. Companies may consider reacting as they did in South Dakota and Missouri several years ago when those states enacted laws prohibiting any discrimination (including reasonable discrimination).

### **III. THE PRACTICAL IMPACT OF MANY PROVISIONS IN THE PROPOSED RULE WILL ADVERSELY AFFECT THE LIVESTOCK, MEAT, AND POULTRY SECTORS.**

#### **The Definition of “Likelihood of Competitive Injury” is Unworkable and Unconstitutionally Vague.**

Subsection 201.2(u)’s definition of “likelihood of competitive injury” is so vague that it is unworkable and contrary to law. Specifically, the definition provides that “likelihood of competitive injury”

includes but is not limited to situations in which a packer, swine contractor, or live poultry dealer raises rivals’ costs; improperly forecloses competition in a large share of the market through exclusive dealing; restrains competition among packers, swine contractors, or live poultry dealers; or represents a misuse of market power to distort competition among other packers, swine contractors, or live poultry dealers. It also includes situations in which a packer, swine contractor, or live poultry dealer wrongfully depresses prices paid to a producer or grower below market value, or impairs a producer’s or grower’s ability to compete with other producers or growers or to impair a producer’s or grower’s ability to receive the reasonable expected full economic value from a transaction in the market channel or marketplace. (Emphasis added.)

The proposed definition fails to consider, as required by the various judicial decisions discussed above, that the required competitive injury is injury to the competitive process. Such a construction of the PSA makes sense given the history of the statute. The only concept of injury to competition existing at the time of the PSA's enactment was the Sherman/Clayton/FTC Act concept of harm to the competitive process, and the terms used in the statute have to be understood in that context. The terms used in section 202 are terms of art that evince Congressional intent that there must be competitive harm in the antitrust sense before a violation is found. Therefore, any regulations issued under the authority of section 202 of the PSA may be no broader than the underlying statutory mandate.<sup>69</sup>

Many of the types of "competitive harm" identified in the proposed rule's definition of "likelihood of competitive injury" have no economic or legal content. In that regard, the concept of "raising rivals costs" is really a type of monopolization or attempted monopolization, but is utterly without definition in the proposed rule. Unclear from the proposed rule or the preamble is whether any conduct by a packer that causes the costs of a rival packer to increase is effectively a form of competitive injury under the proposed rule? For example, assume Packer A is more efficient than Packer B and therefore is able (and willing) to pay his livestock suppliers or poultry growers slightly more for their products than Packer B. If Packer A raises his price to his suppliers and Packer B must raise his price to match, has Packer A engaged in conduct that "raises rivals' costs" in an unlawful manner? Interestingly, such an interpretation would hurt not only the packer, but its livestock suppliers. The preamble and the proposal, however, provide no guidance, leaving the affected packer unsure of its regulatory responsibilities.

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<sup>69</sup> This principle is enshrined in numerous cases but most notably in the Supreme Court's securities law jurisprudence, which holds that rules promulgated by the Securities and Exchange Commission may not reach conduct not addressed by the statutory scheme that purports to authorize the regulations in the first instance. *Morrison v. National Australia Bank, Ltd.*, 130 S. Ct. 2869, 2881 (2010) (regulation promulgated under a statute "does not extend beyond conduct encompassed by [the statute's] prohibition") (quoting *United States v. O'Hagan*, 521 U.S. 642, 651 (1997)); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1975) ("scope [of a rule] cannot exceed the power granted the [agency] by Congress under [the relevant statute]").

Other provisions of the proposed rule certainly trade in antitrust concepts, throwing around terms such as "market power" and "competition" liberally. The agency, however, apparently takes the position that "competitive injury" is not required to violate section 202 of the Act, leaving vague how such terms will be construed.

Similarly, the provision that would prohibit "wrongfully depress[ing] prices paid to a producer or grower below market value" is incoherent. Does the agency mean "predatory buying" of the type that was at issue in *Weyerhaeuser v. Ross-Simmons Hardwood Lumber*? In the alternative, does the agency intend it be a form of monopsony pricing? "Market value" is far too vague a term to be enforceable because, by definition, the "market value," at least with respect to prices, is the price on which a willing buyer and willing seller agree when neither is compelled to enter the transaction and both have no information constraints. Moreover, "market value" must surely encompass more than price terms. Contracts are a bundle of rights and obligations. All of the obligations could be given a monetary value. A poultry grower who promises to provide a certain number of units to a processor and to provide services A, B, and C may expect and be entitled to a higher price than a grower who merely promises to provide a certain number of units to a processor without services A, B, and C. In other words, to determine "market value," one must look at a transaction as a whole – in both monetary and non-monetary terms -- and classify them accordingly.

From a practical standpoint and given the absence of any standard or guidance, this "market value" clause will become a *de facto* "seller's remorse" provision. This would allow a poultry grower or livestock producer to challenge a contract or a transaction once he finds out that another grower or producer got a "better deal," maybe because the favored grower or producer offered a higher quality product, agreed to provide additional services, or was simply a shrewder negotiator.

The "receive the reasonable expected full economic value from a transaction" provision also is unacceptably vague. No packer could possibly know what the "full economic value from a transaction" is, much less the "reasonable expected" full economic value. These terms have no economic meaning. The preamble does not provide any discussion regarding the phrase because the agency cannot provide a meaningful definition. Unlike a breach of contract case in which there is a set of objective standards to

measure the validity of the conduct of the two parties, in the proposed definition the expectancy is itself the measure of the “wrongful conduct.” Both parties could adhere strictly to the terms of a contract, but if the dealer or packer does something that the grower or producer does not like, he may well be accused of "impair[ing]" the grower or producer’s ability "to receive the reasonable expected full economic value from a transaction."

In short, as written, this proposed rule is a recipe for price controls. The only way that there can be any coherent application of it as drafted is for GIPSA, or jury in a civil trial, to get into the business of determining market prices and "reasonable expected full economic value" from a transaction. Even then, the proposal provides no way to know how to determine such values. This section is a price control regime without standards and Congress has not authorized that and therefore the proposal does not accord with the Act.

In addition, the proposed rule is unconstitutionally vague. Although not a criminal statute, the rule raises several due process concerns. Even in statutes establishing civil legal violations the operative provision must give those subject to it fair notice of what is prohibited so that they may reasonably conform their conduct to the legal requirements. This proposed rule does not come close to meeting that standard. In that regard, the Act shares some characteristics of a penal statute, most notably the possibility of imposing enhanced damages on violators.

Supreme Court precedent has controlled the quantum of punitive damages imposed in civil cases under the due process clause of the 14<sup>th</sup> Amendment because the standards for imposing punitive damages are often vague or malleable and depend upon the values of the jurors. Indeed, unlike the underlying liability standards in punitive damages cases, the liability standards in the proposed rule are not readily ascertainable. In fact, the “standards” in the proposed rule are much worse than the vague punitive damages standards because they go to liability rather than remedy. For that reason, the proposal raises significant risks of violating Fifth Amendment due process requirements.<sup>70</sup>

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<sup>70</sup> Antitrust theory provides that a competitive injury/consumer welfare standard is required in antitrust cases to meet constitutional due process requirements. See Professor Bork’s discussion in the *Antitrust Paradox*. See generally R. Bork, *The Antitrust Paradox* 73-89 (1978).

**The Requirement to Keep Records Justifying Differential Pricing or Deviations from Standard Pricing or Contract Terms is Unduly Onerous and Unconstitutionally Vague.**

Subsection 201.94(b) would require a packer, swine contractor, or live poultry dealer to keep “written records that provide justification for differential pricing or any deviation from standard price or contract terms offered to poultry growers, swine production contract growers, or livestock producers.”<sup>71</sup>

GIPSA asserts in the preamble that a packer, swine contractor, or live poultry dealer must keep records that justify differential treatment of poultry growers, swine production contract growers, or livestock producers. The agency further asserts that the “justification need not be extensive but should be enough to identify the benefit-cost basis of any pricing differentials received or paid, and may include increased or lower trucking costs; market price for meat; volume; labor, energy, or maintenance costs, *etc.*” In that regard, GIPSA cites as an example packer participation in a particular program that yields a premium for the meat as justification for paying a higher price for cattle.<sup>72</sup> The preamble goes on to state that the packer’s justification data essentially identify “those pecuniary costs and benefits associated with the treatment that demonstrate its decreased costs or increased revenues from a standard business practice.”<sup>73</sup>

This proposed requirement ignores the realities of livestock procurement and is unworkably and unconstitutionally vague. As an initial matter, the proposed rule grossly underestimates the economic impact of this detailed cost analysis and recordkeeping burden. This proposed rule will result in packers spending much more time and incurring significantly more expenses to calculate in detail and document the necessary justification. This is especially true when one considers that many of the tens of thousands transactions that some packers engage in every year take place “in the field.” For example, if, on the same day, different representatives of a packer buy cattle from several sellers in the same market region but pay different prices because some sellers simply are better negotiators than others, what would the agency expect and deem sufficient in terms of written justification? Or,

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<sup>71</sup> 75 *Fed. Reg.* at 35351. (Emphasis added).

<sup>72</sup> *Id.* at 35344.

<sup>73</sup> *Id.* (Emphasis added.)

what if the buyer's assumptions about the will grade are wrong? Given the provision's reference to "standard price," is the first sale the standard price and does the proposed rule contemplate all sellers receiving that price on that day or at that time? How do other changing elements of the market on a given day affect the construct of the "standard price?" Similarly, it is unclear how the proposed provision would function in an auction setting with different prices paid for different animals that may not be cost or revenue driven but may be a function of a factor as simple as supply and demand.

Indeed, one of the biggest differences in prices paid is simply supply and demand, *i.e.*, competition. If a packer needs 1,000 head to cover a day's kill and only acquires 500 head on its first offer, the packer may have to "pay up" to get the other 500 head needed. This circumstance results in paying two producers who may operate next door to each other different prices within the same hour. The proposed rule as written and as explained in the preamble does not consider supply and demand as a justification for different prices. Ironically, as written, the proposed rule would favor the use of marketing agreements generally where, if in writing, the justifications for premiums paid or discounts assessed are documented, in contrast to the spot market, the prices for which present have little opportunity for contemporaneous written justification and may be largely if not solely a function of supply and demand factors.

GIPSA's preamble statement that it "would consider the particular circumstances of any pricing disparity in determining whether a violation of the P&S Act occurred" is insufficient for a packer to be able to make an informed decision as to what constitutes compliant behavior, including whether there is a legitimate justification for the disparity. As discussed in the previous section, the only way that there could be any reasonable certainty about what this section requires would be for GIPSA to get into the business of determining market prices and contracts so that the packer can have some ability to ascertain what "standard price or contract terms" are in order to comply with the rule.

**The Unfair, Unjustly Discriminatory and Deceptive Practice or Device Provisions are contrary to the Purposes of the Act and Are Unworkable and Unconstitutionally Vague.**

Many subsections of section 201.210 include elements or provisions that are so vague that it would be virtually impossible for a packer, swine contractor or live poultry dealer to behave in a manner ensuring compliance. For the reasons that follow, section 201.210 should be withdrawn.

It is well settled that laws of a penal nature must be of “sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”<sup>74</sup> Laws not meeting this standard are unconstitutionally vague and invalid.<sup>75</sup>

Specifically, section 201.210(a)(1) provides that an unfair, unjustly discriminatory and deceptive practice or device includes, but is not limited to “[A]n unjustified material breach of a contractual duty, express or implied, or an action or omission that a reasonable person would consider unscrupulous, deceitful or in bad faith in connection with any transaction in or contract involving the production, maintenance, marketing or sale of livestock or poultry.”<sup>76</sup>

This subsection inappropriately would turn state law contract disputes into federal cases. The courts have recognized this problem and rejected such a concept. “Failure to require a competitive impact showing would subject dealers to liability under the PSA for simple breach of contract or for justifiably terminating a contract with a grower who has failed to perform as promised.”<sup>77</sup> Moreover, the proposed standard, what a “reasonable person” would consider to be is unworkably vague, and therefore arguably unconstitutional, making it virtually impossible for a regulated entity to

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<sup>74</sup> *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Village of Hoffman Est. v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982) (applying standard to law imposing civil penalties).

<sup>75</sup> *Id.*

<sup>76</sup> 75 *Fed. Reg.* at 35351. Unclear from the proposed language and the preamble is whether the agency envisions the possibility of a “justified material of a contractual duty.” (Emphasis added.)

<sup>77</sup> *London v. Fieldale Farms Corporation* 410 F.3rd 1295 (11th Cir. 2005). See also *Been v. O.K. Indus., Inc.*, 495 F.3d 1217 (10th Cir. 2007) citing *London*. (Emphasis added).

know what behavior, other than treating every producer exactly the same, would be compliant.

Proposed subsection 201.210(a)(2) would make it an unfair practice for a packer, swine contractor, or live poultry dealer to take a retaliatory action or omission “in response to the lawful expression, spoken or written, association, or action of a poultry grower, livestock producer or swine production contract grower.”<sup>78</sup> As with subsection (a)(1) the breadth and vagueness of this provision makes ensuring compliance virtually impossible. For example, if a livestock producer or poultry grower makes defamatory remarks about a packer or live poultry dealer and the packer in turn sues for defamation, would that lawsuit be deemed to be a retaliatory action? Similarly, if a poultry grower frivolously sues a live poultry dealer and the dealer elects to terminate a contract, would that constitute a retaliatory action in violation of this standard?

Some of the problems associated with proposed subsection 201.210(a)(5) are, in many respects, similar to those raised by proposed section 201.94. Beyond that, however, the subsection ignores a fundamental reality of the livestock industry – many transactions are done on a handshake. Requiring substantiation of premiums or discounts in such circumstances is at best a difficult task. More generally, unclear from the proposed rule and nowhere discussed in the preamble, is whether a premium paid must be at least as much as (or not greater than) the financial benefit the company gained from the product or, conversely, that the discount applied is at least much loss as the company incurred. To engage in such calculations and document that justification will take far more time by the packer than the agency purports to have estimated in its Executive Order 12866 analysis, even if it were possible to make such calculations.

Beyond that, however, such an approach would be virtually impossible to achieve in the cash market, negotiated bid process. For example, would a packer have violated the proposed rule in the circumstance in which a buyer purchases a pen of cattle in the cash market and in doing so pays a premium for cattle, which later turn out not to be of the quality estimated at the feedlot? Likewise, if buyer discounts a pen of cattle that ultimately turn out to be better in quality than estimated, has a violation occurred? Also unclear is whether the packer has to provide revenue or cost justification for

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<sup>78</sup> *Id.*

differences in negotiated transactions that occur on or about the same time at different locations, and potentially with different buyers, that may be due solely to the dynamics of negotiations.

The proposed rule also likely will provide a disincentive for creativity and innovative marketing programs. It is not uncommon for a packer and producer to enter into an agreement with a “let’s see how this works” attitude. Sometimes, however, such arrangements do not work and it may be impossible, for example, for the packer to be able to revenue justify a premium paid to a producer in such a circumstance.

Finally, the proposed rule includes a catch-all provision that will trigger the filing of countless lawsuits and, as demonstrated above, is founded on a definition that is unconstitutionally vague and unworkable. Specifically, subsection 201.210 (8) provides that “any act that causes competitive injury or a likelihood of competitive injury” is an unfair practice.

Certain groups purporting to represent producers have, on several occasions, alleged that various practices engaged in by packers “distort competition in the marketplace” or impair the ability of a producer to compete with other producers. Given that the agency provided no explanation as to what the clause “distorts competition in the marketplace” means, it is virtually impossible for regulated entities to know what activity or behavior is compliant. For example, can a packer be accused of distorting competition in the market if it chooses to change operations from two shifts to one or if the packer elects to close a plant or transform the plant from a slaughter operation to a processing-only facility? Do any of these changes, or others, provide a claim to a private plaintiff who finds it more difficult to market livestock if the plant no longer slaughters or is limited to one shift? Has such action by the packer impaired the ability of that producer to compete with other producers? And how broad and geographically dispersed a group of producers must be considered? Similarly, has the packer impaired the ability of a producer to compete if the packer enters into an agreement or series of agreements with other producers that occupies considerable plant capacity? The possible scenarios in which the packer could be subject to litigation based on the breadth and vagueness of the proposed rule are endless. For the foregoing reasons, section 201.210 should be withdrawn.

**The Undue or Unreasonable Preferences or Advantages; Undue or Unreasonable Prejudice or Disadvantages Provisions are Unworkable and Unconstitutionally Vague.**

Section 201.211 provides several, but not all-inclusive, criteria that the Secretary may consider in “determining if an undue or unreasonable preference or advantage, or an undue or unreasonable prejudice or disadvantage, has occurred in violation of the Act.” Similar to section 201.210 discussed above, this provision of the proposed rule cites several subjective factors that the agency can consider in determining compliance. The language, however, is too vague for packers and processors to know how to operate to accomplish their business objectives while maintaining compliance with the rules.

Specifically, subsection 201.211(a) refers to whether contract terms “based on number, volume or other condition, or contracts with price determined in whole or in part by the volume of livestock sold are made available to all poultry growers, livestock producers or swine production contract growers who individually or collectively meet the conditions set by the contract.”<sup>79</sup> (Emphasis added.) Unclear from the language of the proposed rule or the preamble discussion is how a packer will, or is expected to, know which growers or producers are capable of meeting the terms and conditions of a contract. The language in the proposal suggests that a packer has an affirmative obligation to advise all producers or growers about the availability of a contract and to accept livestock or poultry from anyone who purportedly can satisfy the conditions of the contract, presumably on first come, first served basis. That is the equivalent of requiring a consumer to buy a Chevrolet if the Chevrolet dealer is the first to offer a functioning car. Moreover, should a consumer be forced to explain why he is willing to pay more for a Cadillac? If that is the agency’s intent, it is an inappropriate intrusion into the private right of contract. A packer or poultry dealer should be permitted to contract with whatever growers it wants based on a host of factors, including among others, past history and performance. If, on the other hand, the above interpretation is not the agency’s intent, that interpretation should be made clear and the rule revised to establish clear, ascertainable, and economically sensible guidelines. In either event, the proposed rule should be withdrawn.

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<sup>79</sup> *Id.* at 35352. (Emphasis added).

Subsection 201.211(c), with respect to “whether information regarding acquiring, handling, processing, and quality of livestock is disclosed to all producers when it is disclosed to one or more producers” is similarly flawed. Specifically, the proposed rule as written again seems to impose an affirmative duty on a packer to notify every producer regarding certain details of a transaction or agreement. The limited preamble discussion states that the agency would consider whether price differences based on the cost of acquiring or handling are disclosed “equally” to all producers. Although that concept is, alone, problematic given the logistical challenges of notifying all producers, the language in the proposed rule is broader and again raises the question of whether the rule imposes an affirmative obligation on a packer to provide such information to all producers or to know how to do so instantaneously on a real time basis throughout a buying day. If so, absent posting in a public forum, e.g., on the packer’s website, the terms at issue, it is virtually impossible for a packer to disclose “information regarding acquiring, handling, processing, and quality of livestock” to all producers. Indeed, even that vehicle does not satisfy the rule’s requirement for producers without access to the internet. In short, the rule as written exposes a packer to an enforcement action by the agency or, in the alternative, a private lawsuit, if a producer can show he or she was not provided information about “acquiring, handling, processing, and quality of livestock,” whatever that means.

Finally, subsection 201.211(b), which includes as a criteria “whether price premiums based on standards for product quality, time of delivery and production methods are offered in a manner that does not discriminate against a producer or group of producers that can meet the same standards” is problematic for a different reason. In that regard, the proposed rule would read out of the statute the terms “undue” or “unreasonable.”

The PSA allows packers, swine contractors, and live poultry dealers to give preferences and advantages. It does not allow the giving of undue or unreasonable preferences or advantages. Likewise, the Act does not allow a person to be subject to any “undue or unreasonable prejudice or disadvantage.”<sup>80</sup> The proposed rule deletes the words undue and unreasonable from the standard when referencing discrimination and offering price premiums. In doing so, the proposed rule establishes a

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<sup>80</sup> 7 USC 192(b).

different, lesser standard provided by the statute and for that reason conflicts with the Act and should be withdrawn.

**The Proposal will Adversely Affect Competition by Requiring Dealers to Purchase Livestock for a Single Packer.**

Proposed section 201.212(a) provides that “dealers who operate as packer buyers must purchase livestock only for the packer that identifies that dealer as its packer buyer.”<sup>81</sup> Related to that limitation, subsection (b) would preclude a packer from entering into an exclusive arrangement with a dealer unless the packer has identified that dealer and reported that relationship to GIPSA on approved forms. These requirements ignore the economics of livestock acquisition and rather than foster competition will adversely affect it. Moreover, given the agency’s existing authority, the provisions are unnecessary.

The issue of joint livestock purchasing or shared agents has been a topic of discussion by GIPSA for a number of years. Indeed, several annual assessments that GIPSA has published over the years reference this topic. GIPSA’s *Assessment of the Cattle and Hog Industries Calendar Year 2000* prepared in June 2001 discussed what GIPSA characterized as shared agents. Specifically, the report said

It is a common practice for one buyer to represent more than one packer at an auction sale, especially in sales involving cull livestock. Auction market owners and livestock sellers have raised concerns that the use of common buyers, or shared agents, reduces the number of competing buyers. This practice has the potential for reducing competition. However, the issue is complicated by a general lack of buyers at many auctions. Sharing a buyer may result in packers purchasing livestock at auctions where the packers otherwise would not be active. P&SP continues to investigate complaints about shared agents at livestock markets.<sup>82</sup>

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<sup>81</sup> 75 *Fed. Reg.* at 35352.

<sup>82</sup> *Assessment of the Cattle and Hog Industries Calendar Year 2000*, p.30 (Emphasis added) (Attachment D).

This discussion, acknowledging the potential risk, highlights the problem created by the proposed rule. Ten years ago there were not enough buyers at auctions, and it was not economical for packers to send individual buyers to every location. Those economic challenges are more acute today, and several packers have advised AMI unequivocally that this proposed rule will limit even further their ability to procure livestock that best suits their purchase criteria. Contrary to the agency's assertion in the preamble that the proposal will increase participation in the cow and bull slaughter market, simply put, if the proposed rule becomes final, although the number of people at auctions may not change much, there likely will be fewer buyers and less competition at many of those locations.

The above discussion demonstrates that the proposed rule will have adverse effects on packers, auctions, and producers. That the proposed rule is ill-advised is further highlighted by the fact that the agency already has tools to address the "problem" that the agency asserts it is attempting to address and GIPSA has acknowledged it possesses those tools.

In its *Assessment of the Cattle, Hog, and Poultry Industries Calendar Year 2004* GIPSA again acknowledged that concerns had been raised about joint livestock purchasing and even went so far as to say that the activities identified were "potential violations of the P&S Act."<sup>83</sup> GIPSA's response included an assertion that the agency investigates complaints concerning shared agents, *etc.*, as well as an acknowledgement that whether such activity violates the Act "depends on the circumstances of each case."<sup>84</sup> Significantly, GIPSA cited two existing regulations, sections 201.69 and 201.70, which give the agency the authority to investigate the types of activities complained about and to take action against a packer, dealer, or market agency if appropriate. AMI presumes that GIPSA, in fact, has investigated complaints received and, where appropriate, has taken the necessary steps to preclude or address anticompetitive behavior or actions. That GIPSA activity is proof that the proposed rule is unnecessary.

Given the adverse impact shown above and the fact that GIPSA has the authority to address concerns about collusion and price manipulation, proposed subsections 201.212(a)-(b) should be withdrawn.

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<sup>83</sup> *Assessment of the Cattle, Hog, and Poultry Industries Calendar Year 2004*, p. 16. (Attachment E)

<sup>84</sup> *Id.*

**The Prohibition on Packer-to-Packer Livestock Sales is a *De Facto* Ban on Packer Ownership of Livestock and will Adversely Affect Consumer, Producers, and Packers**

The proposal, if finalized, would impose an indirect ban on packer ownership of livestock and in doing so will adversely affect producers and packers. Specifically, subsection 201.212(c) provides that a packer “shall not purchase, acquire, or receive livestock from another packer or another packer's affiliated companies, including but not limited to, the other packer's parent company and wholly owned subsidiaries of the packer or its parent company.”<sup>85</sup> In the preamble the agency asserts that this section is necessary to “limit the ability of packers to manipulate prices.”<sup>86</sup> The agency, in attempting to address a purported issue of concern, *i.e.* alleged price manipulation, either fails to appreciate or simply ignores several significant considerations in proposing this ill-conceived and unnecessary provision.

First, GIPSA has tools available to help ascertain whether any illegal activity is occurring and if so it has the tools to take action.<sup>87</sup> Significantly, there is no discussion in the preamble about the fact that every packer-to-packer sales transaction is required to be reported pursuant to the provisions of the mandatory price reporting program administered by GIPSA's sister agency, the Agricultural Marketing Service. This fact alone makes the reason proffered by GIPSA for the prohibition dubious at best.

The agency's rationale for the rule is even less compelling when one considers the price monitoring program that GIPSA has in place to address these issues. In that regard, GIPSA's 2009 Annual Report, published in March 2010, just three months before the proposed rule was published, discusses the fed cattle and hog market price monitoring program that GIPSA has in place. That program, initiated because of concerns about the cattle market in the wake of the 2003 case of bovine spongiform encephalitis (BSE) in the United States, “includes a weekly internal reporting regime and a detailed work plan to conduct in-depth investigations into possible violations of the Act if the initial regulatory reviews of price differences do

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<sup>85</sup> 75 *Fed. Reg.* at 35352.

<sup>86</sup> *Id.* at. 35342.

<sup>87</sup> Indeed, the provision can be viewed as, and perhaps it is, a tacit admission that the agency is incapable of preventing or addressing instances of purported price manipulation.

not clarify whether they were caused by external market factors.”<sup>88</sup>  
According to the report, the

model is run weekly, and any price outlier that is not caused by certain technical statistical factors triggers a regulatory review by P&SP. If the regulatory review does not determine that the price outlier was caused by certain external factors or readily observable market conditions, then a formal investigation is initiated to determine the cause of the price outlier. The formal investigation involves deeper examination of the price data and cattle characteristics, and interviews with buyers, sellers, and other market participants.<sup>89</sup>

That GIPSA has in place a program, about which the agency appears quite proud of its rigor and effectiveness, to monitor pricing in order to prevent the very threat that this packer-to-packer ban is intended to help preclude speaks volumes about how unnecessary the proposed rule is. This conclusion is particularly compelling in light of the fact that, during the time the monitoring program has been in effect, the agency has not brought any price manipulation cases, suggesting that the packer-to-packer sales ban is a solution in search of a problem.

Not only is the packer-to-packer sales ban provision unnecessary, its impact will be detrimental to packers and producers because of the various inefficiencies it will introduce into the marketing system and the displacement of livestock that will occur. In that regard, there are numerous examples of transactions that will be prohibited that make the livestock procurement system efficient. A few examples are presented below.

### **Example One**

The most glaring example of how this proposed provision would adversely affect a packer was presented during the July 20, 2010 hearing before the House Agriculture Subcommittee on Livestock, Dairy and Poultry. At that hearing USDA officials were apprised that a packer with a slaughter

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<sup>88</sup> 2009 Annual Report, Packers & Stockyards Program, United States Department of Agriculture Grain Inspection, Packers and Stockyards Administration, p. 13.  
[http://archive.gipsa.usda.gov/pubs/2009\\_psp\\_annual\\_report.pdf](http://archive.gipsa.usda.gov/pubs/2009_psp_annual_report.pdf) (Attachment F)

<sup>89</sup> *Id.*

facility in Washington State also has feedlots more than 1500 miles away in Kansas. For obvious logistical and animal welfare reasons it is not practical to transport the cattle in the Kansas feedlot to Washington for harvest so those animals typically are sold to one of several packers with plants in Kansas or Nebraska.<sup>90</sup> Yet, the proposed ban leaves the Washington packer with two options: ship the cattle across the Rocky Mountains or sell them to an independent entity who in turn can sell the cattle to the very same packers who buy the Kansas feedlot cattle.

The first option, as the agency must be aware, is simply not feasible and could result in unnecessary injuries to livestock.<sup>91</sup> The second option, which the agency advanced in its ill-considered and misleading *Misconceptions and Explanations* document provided the following simplistic, and economically unrealistic, solution:

#### **EXPLANATION**

The proposed rule prohibits only direct sales of livestock between packers. A packer could sell to individuals, market agencies, dealers or other buyers.<sup>92</sup>

The proffered explanation ignores, or misunderstands, the realities of the market by suggesting that introducing an independent third party into the mix does anything other than introduce inefficiencies and costs into the system. Clearly, the Washington packer with the Kansas cattle will incur costs that competing feedlot operators not owned by packers will not suffer, putting the Washington packer at a competitive disadvantage. In the long run, the Washington packer's incentive will be either to divest the Kansas feedlot(s) or divest the slaughter establishment.

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<sup>90</sup> In this circumstance the agency's purported reason for the proposed ban, limiting price manipulation, is wholly inapplicable given that the Washington state packing plant does not in any meaningful way compete for the purchase of cattle with the plants that buy the Kansas feedlot cattle.

<sup>91</sup> See *Ag Department Proposal Threatens Animal Welfare*, *Huffington Post*, Oct. 20, 2010, [http://www.huffingtonpost.com/temple-grandin/ag-department-proposal-th\\_b\\_769717.html](http://www.huffingtonpost.com/temple-grandin/ag-department-proposal-th_b_769717.html). (Attachment G).

<sup>92</sup> <http://archive.gipsa.usda.gov/psp/rulefacts.pdf>. P. 3.

### **Example Two**

The above discussion, although extreme in some respects, is not an isolated example. For example, an AMI member Company X operates a hog slaughter facility in California. That facility harvests approximately 1.8 million hogs annually. The majority of these hogs are obtained from a facility owned or affiliated with another packer. The proposed rule would prohibit those hogs from being sold to Company X. There are, however, not enough non-packer-affiliated hog production facilities near this slaughter facility to supply sufficient replacement hogs. Moreover, environmental, political, and capital constraints make it highly unlikely that independent producers would enter the area to provide a supply of hogs. If the proposed provision goes into effect that circumstance leaves Company X with the following options.

1. Ship market hogs from the Midwest. The costs and logistics of transporting such a large number of hogs make this option infeasible. As undesirable as it is to ship cattle more than 1500 miles across the Rocky Mountains, it is even less desirable to transport hogs a like distance, particularly from an animal welfare standpoint.
2. Limit the harvest to company-owned hogs only. Because there are currently an insufficient number of company-owned hogs to fill the plant, Company X would have two options: the company could expand its farm operations to become completely vertically integrated, which is contrary to the proposed rule's purported intent to benefit independent producers; or reduce the harvest to company-owned hogs only at current production levels, supplemented with any other independently produced hogs. This option, however, is infeasible because it would result in a harvest reduction such that the plant would fail to cover costs. In that case, Company X would be forced to cease harvest operations at that plant, which would leave independent hog producers who sell to that slaughter facility with no outlet for their pigs.

Compounding that problem is the fact that more than 900,000 hogs that previously went to the Company X plant from the other packer owned hog production facility now have nowhere to go because there are not other proximate hog slaughter facilities capable of processing that number of hogs.

In short, the proposed provision will have introduced inefficiencies into the livestock procurement system to address a perceived problem that the agency has been monitoring using other resources and about which it has never brought a case during the several years it has engaged in such monitoring.

### **Example Three**

In another circumstance, a group of hog producers are members of a cooperative packing operation, *i.e.*, Packer A. Packer A can process about half the hogs its cooperative members produce. The other 50 percent of the hogs are sold by the producer members to other packers. Unclear from 201.212(c), which provides that a “packer shall not purchase, acquire, or receive livestock from another packer or another packer’s affiliated companies, including but not limited to, the other packer’s parent company and wholly owned subsidiaries of the packer or its parent company” is the scope of prohibition with respect to “affiliated companies.”<sup>93</sup> The qualifying language “including but not limited to,” coupled with absence of any discussion in the preamble about the scope of the prohibition creates considerable uncertainty regarding its effect on this group of producers. GIPSA’s sister agency, the Agricultural Marketing Service, does not consider these producers to be packer affiliates.

If other packers are prohibited from purchasing these hogs, the member producers of Packer A have two choices: (1) reduce their herds to remain within the capacity of Packer A processing operation; or (2) increase Packer A’s capacity so it can accommodate all the hogs the members produce. In any case, the result is complete vertical integration. Conversely, if the agency concludes that the scope of 201.212(c) does not extend to the producer owners of Packer A the agency has provided a notable and distinct competitive advantage to Packer A. Indeed, the agency has distorted the market, benefitting one packer at the expense of others.

Ironically, given the uncertainty caused by the broad language of the ban and the absence of any discussion in the preamble, some of the producer owners of Packer A who currently do business with other packers are requesting longer-term contracts in hopes of delaying the effect of the ban on packer-affiliated sales. Such actions are only band aids on the bleeding that would be caused by this proposed ban, and in the long run the ban would

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<sup>93</sup> 75 *Fed. Reg.* at 35352.

fundamentally alter the way the member producers do business and force other packers to find other sources of supply, likely leading at least in part to further vertical integration among packers.

#### **Example Four**

The proposed ban also is problematic for packers that are largely vertically integrated. For example, one such packer numerous times throughout the year will sell excess market hogs to another packer. This excess could be due to a plant breakdown, a legitimate scheduling decision or any number of other business reasons. Although the provision would allow a packer to apply for a waiver in the case of a catastrophe, natural disaster, or other emergency, this exception does not sufficiently recognize the many legitimate reasons packers buy from one another.

Further, some packers have ongoing procurement agreements and engage in spot market purchases from other packers. Whether on a current or prospective basis the proposed rule limits a packer's ability to purchase market hogs that may satisfy preferred product quality objectives, because the rule likely would make it more costly for such packers to procure other market hogs due to having to haul them a further distance to a plant. These considerations could spur further vertical integration.

In addition, the proposed ban would, in some circumstances, likely "displace" hogs sold by independent producers. For example, Packer D has a plant near Guyman, Oklahoma. A different packer, Packer E, with a plant 450 miles away in Nebraska, owns hogs at a facility located close to the Guyman plant. Absent introducing the economically nonsensical inefficiencies and costs involving a third party dealer, the proposed ban would force those hogs to be hauled an incremental 450 miles to Packer E's plant in Nebraska. These hogs would then "displace" market hogs raised by producers nearer the Nebraska plant who historically have sold their hogs to that facility. The newly displaced hogs would then need to be transported either that same 450 miles to the Guyman plant or elsewhere. The result is that both operations would not only incur incremental freight costs and inefficiencies but also have a larger impact on the environment, *etc.* Ultimately, these costs may be passed on to consumers.

The proposed ban would also adversely affect vertically integrated packers in selling cull sows. Today, integrated packers typically cannot process cull sows because they are markedly different from the market hogs processed in their plants. So the integrated packer usually sells cull sows to other packers who specialize in harvesting hogs of that type and producing the items they can yield. The proposed ban would end those transactions and force the integrated packer to sell its cull sows to a third party dealer who in turn will sell them to the very same cull sow processor the integrated packer sells to today. Again, the net effect of the proposed ban is to place the integrated packer at a competitive disadvantage to others who sell cull sows directly to the cull sow processor and to introduce unnecessary costs and inefficiencies into the system.

In addition, one the country's largest procurers of cull sows is a subsidiary business of a packer. In explicable, with evidence of any price manipulation, the proposed ban would render this business relationship illegal and force the packer to divest its cull sow buying business.

The agency's purported purpose for the proposed ban on packer-to-packer sales is to limit opportunity for price manipulation by packers, which the Act in subsection 202(e) clearly makes illegal. Yet, packer-to-packer sales of livestock occur everyday and have for many years. Nonetheless, the agency has not brought any price manipulation cases involving packer-to-packer sales utilizing the tools and authority available. To suggest, as the agency does in the preamble, that this proposed ban is needed to prevent behavior that is prohibited but which the agency has never found it necessary to pursue an enforcement action suggests that a different, yet unstated, reason to preclude packer ownership of livestock is the true motive behind the proposal.

**The Requirement that each Unique Contract be Submitted to GIPSA for Posting on the Agency's Website is an Inappropriate Intrusion into Private Contracts.**

Section 201.213 would require packers, swine contractors, and live poultry dealers to submit GIPSA each "unique type of agreement or contract."<sup>94</sup> This proposed rule is ill-considered for several reasons. First, publishing contracts could well have the long-term effect of encouraging live

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<sup>94</sup> *Id.*

poultry dealers or processors to grow their own birds or packers to raise their own livestock. Rather than be subject to the intrusions inherent in this rule, becoming more vertically integrated eliminates the necessity of submitting the multitude of contracts and agreements that will have to be filed and updated and limits the ability of private plaintiffs to mine the contracts posted as a means to file a lawsuit alleging an unfair practice or an undue preference.

Second, at a minimum the proposal is an unnecessary and inappropriate intrusion into private transactions that is not contemplated by the PSA. In that regard, section 223 of the PSA provides for the establishment of a swine contract library and providing information about those contracts. It is noteworthy that this library is limited to swine contracts only. The proposed rule, would in effect, expand the scope of a contract library into areas and species that Congress has not chosen to capture. Given that the Congress in 2008 amended the Act in several respects, it did not direct the agency to broaden the scope of the existing contract library. For the foregoing reasons, this section should be withdrawn.

**The Capital Investment Requirements and Prohibitions are Beyond the Scope of the Act and Will Encourage Greater Vertical Integration.**

Section 201.217 provides that any requirement that a live poultry grower or swine production contract grower make an initial or additional capital investment “must be accompanied by a contract duration” to allow the grower “to recoup 80 percent of the cost of the required capital investment.”<sup>95</sup> This provision is problematic for several reasons. First, this provision is tantamount to the agency requiring that packers pay a grower a price that ensures a certain rate of return. There is no authority within the Act that permits the agency, in effect, to take such action and guarantee a return on investment to a grower. Thus, the proposal fails for lack of statutory authority.

Second, the proposed rule makes no exception for capital improvements that are necessary to comply with changes that may be required by law. For example, an investment required by a statutory or regulatory change (e.g., gestation crate bans) is less optional than an

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<sup>95</sup> *Id.* at 35353.

investment contracted for by a packer in order to improve efficiency, although both should be considered as lawful. In addition, although the agency documents released publicly, as well as statements made by USDA officials refer to this provision as requiring an “opportunity” for the grower to recoup 80 percent of the investment, the word “opportunity” is not found in either the preamble or, more importantly, the regulatory language. Therefore, although this provision has been “pitched” by various USDA officials as only requiring an opportunity to recoup 80 percent, the plain language of the rule and the preamble establish a hard requirement of 80 percent.

Finally, this 80 percent recoupment requirement likely will stifle innovation in the industry. Risk is a necessary component of innovation. And that risk must necessarily be shared by both sides – the packer who seeks to improve quality and the producer who seeks to increase his efficiencies. If the risk of innovation is disproportionately shifted to one side of the equation then, given the price equity requirements imposed by the proposed rules, there is no incentive for the producer to improve and the risk is too high for the packer to require improvements. At a time in which the meat industry as a whole faces pressures to address everything from health and wellness to antibiotic usage to animal welfare, the industry cannot afford a regulatory requirement that provides a disincentive to innovation.

**The Proposed Rule’s “Reasonable” Period of Time to Remedy a Breach of Contract Does Not Consider Circumstances that Warrant Faster Action.**

Section 201.218 of the proposed rule prescribes “reasonable” times to notify, rebut, and cure a breach of contract. In that regard, the rule, in essence, would set a minimum of 14 days for a grower to rebut the allegations included in a notice of breach of contract. The proposed rule fails to provide a contractor the ability to act quickly in certain circumstances.

For example, neglect or intentional abuse of livestock or birds, or poor animal husbandry practices by a grower, is a serious issue that a packer, processor, or contractor should be permitted to address immediately. The proposed rule, however, does not allow the packer, processor, or contractor to suspend deliveries or terminate the contract, even though the grower’s actions may violate the law and are a clear breach of contract. Indeed, under the proposal a contractor would be required to continue to do business with

such a grower, thereby creating the possibility that the harm to the animals or birds could continue, while perpetuating harm to the packer's or processor's reputation in the marketplace. Immediate termination must be permitted in such circumstances. Failure to allow the contractor to act could result in damage to the contractor's assets in those cases where the contractor owns the livestock or birds and could damage the reputation of the packer and the reputation of the industry as a whole.

Similarly, a packer, processor, or contractor should be able to take immediate action regarding a grower who acts in a manner that jeopardizes food safety or the environment. The proposed contract termination rules emasculate a contractor's ability to act quickly if a grower fails to observe required drug withdrawal periods or discharges emissions in violation of environmental regulations. If a grower fails to observe the required drug withdrawal period, and those animals are harvested, a food safety issue exists for end consumers that likely will result in a recall of the affected food products. The grower could be liable under the contracts for damages sustained by the packer as a result of the recall. The proposed rules, however, do not allow a contractor to suspend deliveries or terminate a contract, even though the grower's actions would be a clear breach of contract. Requiring the continuation of deliveries raises the threat of additional recalls and the possibility of additional monetary claims against the packer, processor, or contractor and the grower.

**IV. THE PROPOSAL WOULD INHIBIT THE U.S. LIVESTOCK AND MEAT INDUSTRIES' ABILITY TO SERVE INTERNATIONAL MARKETS, LEADING TO LOSS OF COMPETITIVENESS, EXPORTS, REVENUE, AND JOBS IN THE UNITED STATES.**

In addition to the above-discussed consequences and problems, the proposed rule would adversely affect international trade in that it would restrict, and in many cases preclude, U.S. exporters of beef, pork, and poultry from meeting the demands for high quality products requested by international customers. Specifically, an erosion of the U.S. position in Asian and European premium meat markets likely would result from the implementation of this rule.

U.S. exports of red meats and poultry totaled \$11.7 billion in 2009. Maintaining and increasing export sales is vital to the health and sustainability of U.S. meat and poultry industry because U.S. per capita meat consumption has leveled off in recent years.

As international markets have become more sophisticated, international customers want to know about livestock origin and the processing of the meat they are purchasing from the United States. Knowledgeable foreign customers will pay high premiums to purchase the highest quality specialty meat produced from grain-fed livestock available from U.S. livestock producers and packers. These customers are willing to work with producers and packers, especially on pre-harvest conditions and post-harvest unique processing techniques, to obtain the type and quality of beef, pork, and poultry they need in their specialty markets. The very high premiums paid for this meat cannot be earned in the U.S. domestic market and represent the additional income needed to keep U.S. ranchers and processors in business.

The proposed rule would largely eliminate the marketing agreements that offer the incentives to develop and maintain these customized meat production programs including:

- European Union beef business (certified hormone free; 45,000 MT quota for each of the next three years);
- Natural beef business;
- Each packer's "Premium Program" beef;
- Meat from age-verified livestock; and
- Specialized production systems such as "Certified Angus Beef."

Some countries demand meat production programs with strict parameters, such as requiring no beef tallow and/or no meat and bone meal in feeds, or imposing specific age restrictions and traceability to the producer. Specialized diet requirements used with cattle from superior genetic stock and breeding must also be met.

Use of unique feeds and customized feed rations drive the quality of the final meat product and ability of the producer and processor to add value in creating taste and quality characteristics. Livestock operations and processors must be able to guarantee the quality of the meat produced from cattle raised under these strict feeding regimes. The significant disincentive to enter into marketing agreements because of the threat of litigation caused by the proposed rule's waiver of the proving competitive injury and its definition of likelihood of competitive injury will inhibit all of these programs.

The impact will also be felt in foreign countries that require meat produced from age verified (AV) cattle. Processors and exporters must be able to predict the supply of AV cattle destined for specific markets or the business will be lost. International customers pay a premium to U.S. producers and packers to meet these requirements and producers benefit from participating in these specialty programs. The proposed rule would remove the incentives to enter into these specialty programs and contracts. The inability to differentiate products, create brands, and market unique end product characteristics would result in significant loss of income and jobs throughout the livestock and meat processing industry.

Some producers and processors note that high value international markets are serviced with customized systems blending the highest quality genetics, feed formulations, intricate concentrated feed management, livestock hauling and handling. The resulting meat products are created in such a way, special to each producer and process, to allow promotion and marketing which cannot be matched by our competitors.

International meat buyers and importers are now requiring traceability of the livestock in purchase contracts and have limited or strict tolerances for feed additive and veterinary drug residues. Meeting these specifications becomes nearly impossible without source information. The proposed rule will virtually ensure that the specifications cannot consistently be maintained, will erode the quality of U.S. meat products, lower meat standards for all domestic and foreign consumers, and eliminate the competitive advantages the U.S. currently benefits from at home and overseas in producing the best meat in the world.

In short, if the proposed rule is enacted, the U.S. would lose international markets because competitive suppliers in other countries will not face similar restrictions or public disclosure of contracts. The inability to produce and guarantee the meat characteristics in demand overseas would turn U.S. beef and pork cuts into commodity cuts with lower values and lower returns to producers and packers throughout the production and marketing chain. The proposed rule, thought to create economic activity and jobs, would do just the opposite when considering international meat demand — the inability of the U.S. to meet overseas specifications will lower demand for quality livestock, reduce the quality of meat production, eliminate jobs throughout the industry, and lead to shifts in production to U.S. competitors.

**V. THE PROPOSED RULE VIOLATES EXECUTIVE ORDER 12866 AND IS NOT SUPPORTED BY THE NECESSARY, COMPREHENSIVE ECONOMIC IMPACT ANALYSIS.**

**Executive Order 12866 Requires a More Comprehensive Assessment than the Cost-Benefit Analysis Conducted as Part of the proposed Rule**

The 2008 Farm Bill directed GIPSA to promulgate regulations to address five distinct areas related to livestock and poultry marketing:

- the arbitration process,
- criteria that GIPSA would use to determine what constitutes undue or unreasonable preference,
- notice regarding suspension of the delivery of birds,
- additional capital investment requirements in growing contracts, and
- the time producers and growers are given to remedy a breach of contract.

The proposed rule, however, goes far beyond the scope of this mandate, proposing additional regulations that would, among other things:

- require packers to maintain records justifying differences in price and contract terms,
- prohibit specific conduct alleged to be unfair without regard to its competitive effects,

- prohibit packer to packer sales
- prohibit packer buyers from purchasing livestock for more than one packer
- require packers to guarantee that producers recoup capital investment costs and
- require packers to make available to GIPSA copies of contracts and agreements that they have with producers.

Against this statutory background GIPSA must satisfy the parameters of Executive Order 12866 (EO) and the Regulatory Flexibility Act. The EO requires regulatory agencies to conduct an economic impact analysis of any “significant” rule, with special consideration given to small entities. Specifically, agencies are required to demonstrate the need for any proposed significant regulatory action, assess the costs and benefits of that action, and make those assessments available for public review and comment. Here, the agency has failed to properly conduct a thorough economic impact analysis as required. That failure compels the agency to perform that analysis and then propose a rule consistent with its analysis.

Specifically, the EO provides, in pertinent part, that

Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider.<sup>96</sup>

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<sup>96</sup> Executive Order 12866 Section 1(a).

As part of a rulemaking agencies are directed to “ensure that the agencies’ regulatory programs are consistent with the philosophy set forth above, agencies should adhere to the following principles, to the extent permitted by law and where applicable.”<sup>97</sup> Specifically, each agency is to

identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions) that warrant new agency action, as well as assess the significance of that problem, to enable assessment of whether any new regulation is warranted; ...

identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public; ...

assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs; ...

base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation or guidance document; ...

tailor its regulations and guidance documents to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; and

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<sup>97</sup> *Id.* at section 1(b).

draft its regulations and guidance documents to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.<sup>98</sup>

The EO also defines a “significant regulatory action” as any “regulatory action that is likely to result in a regulation that may: (1)[H]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.”<sup>99</sup>

Furthermore, the EO imposes certain additional responsibilities on agencies regarding rulemaking. In that regard, the EO provides that

(B) For each matter identified as, or determined by the Administrator of OIRA to be, a significant regulatory action, the issuing agency shall provide to OIRA:

(i) The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need; and

(ii) An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President’s priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.

(C) For those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action within the scope of section 3(f)(1), the agency shall also provide to OIRA the following additional information developed as part of the agency’s decision-making process (unless prohibited by law):

(i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and

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<sup>98</sup> *Id.* at section 1(b)(1, 3, 6, 7, 11, 12).

<sup>99</sup> *Id.* at section 3(f)(1) (Emphasis added).

private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;

(ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and

(iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives. (Emphasis added)<sup>100</sup>

Although GIPSA identified the proposed rule as a “significant regulatory action,” because the agency did not conduct the assessments required in EO section 6(a)(3)(C), it did not make them available as required by subsection (E). Accordingly, GIPSA either erroneously concluded that the proposed rule is not a significant regulatory action within the scope of section 3(f)(1) or failed to meet its obligations under the EO. Specifically, it appears that GIPSA improperly viewed the proposed rule’s economic impact as narrowly as possible in an effort to avoid having to conduct the above-referenced assessments.

In several parts of the preamble GIPSA discusses the “adjustment costs” that packers will incur because of changed packer behavior driven by the proposed rule. Because of the lawsuits that were previously filed against packers regarding their past use of marketing agreements, about which GIPSA was fully aware, the agency knew or should have known and therefore should have considered how the proposed changes regarding proving

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<sup>100</sup> *Id.* at section 6 (3)(B),(C), and (E).

competitive injury or the likelihood of competitive injury would increase the risk of litigation and affect packers' behavior.

In that regard, any reasonable analysis of the industry and the proposed rule would have led to the conclusion that the "annual effect on the economy" would exceed \$100 million and just as relevant that the proposed rule would "adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs."<sup>101</sup> To that end, an analysis done by John Dunham and Associates examining the impact of the proposed rule and the fact that it will significantly alter and lessen the use of marketing agreements by packers yielded a conclusion that implementation of the proposed rule as written will cause the loss of approximately 104,000 jobs and adversely affect GDP by \$14 billion.<sup>102</sup> In addition, the Dunham analysis shows that implementation of the proposed rule would cause consumers to pay 3.3% (approximately \$2.7 billion) more for meat and poultry than they do under the current structure. By several measures included in the EO this analysis requires GIPSA to conduct the more complicated assessments mandated in section 6(a)(3)(C).<sup>103</sup>

Similarly, another study conducted by Informa also demonstrates that the economic impact of the proposed will easily exceed the \$100 million threshold, which triggers the requirement that GIPSA conduct the more comprehensive analysis provided in section 3(f)(1).<sup>104</sup> Specifically, the Informa analysis concluded that the proposed rule would cause the loss of approximately 22,900 jobs, cause a loss of annual GDP of \$1.5 billion, and result in lost annual tax revenues of \$389 million. Informa's analysis also found that the proposed rule would impose one time direct costs on the meat and poultry sector totaling \$136 million, direct annual ongoing costs to the beef, pork and poultry industries of \$169 million, and annual indirect losses to the beef, pork, and poultry industries in the amount of \$1.341 billion. In addition, Informa estimated that because of the proposed limitation on buyer/packer representation at auction barns, approximately 150-200 of the

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<sup>101</sup> *Id.* at section 3(f)(1).

<sup>102</sup> *The American Meat Institute Meat Demand Study; The Impact of Proposed Grain Inspection, Packers and Stockyards Administration Proposed Rule*; John Dunham and Associates, Inc.; August 24, 2010; see pages 1-2 (Attachment H).

<sup>103</sup> *Id.*

<sup>104</sup> *An Estimate of the Economic Impact of GIPSA's Proposed Rules*; Informa Economics, Inc. November 8, 2010 (Attachment I).

smallest auction barns will go out of business.<sup>105</sup> Similarly, a study commissioned by the National Chicken Council and conducted by FarmEcon LLC evidenced a cost the chicken industry of more than \$1 Billion over the first five years.<sup>106</sup>

Whether using the Dunham analysis or the Informa study, in either event, the impact of the proposed far exceeds the \$100 million threshold that triggers a 3(f)(1) assessment. The agency failed to do so and such an assessment must be done in order for GIPSA, the affected industries, and the public to understand the significant and adverse impact this proposed rule would have.

**The Proposed Rule does not Comply with Executive Order 12866 with Respect to Numerous Proposed Provisions.**

In addition to failing to conduct the necessary assessments, GIPSA fails to provide information or evidence to substantiate many assertions in the proposed rule. In that regard, absent from GIPSA's EO analysis is any documentation or other empirical evidence that supports the vague generalizations used to justify many of the proposed sections. GIPSA provides no evidence that the producer complaints cited as justification for the rule have been verified or documented nor has the agency taken enforcement actions against a packer based on those assertions.

Similarly, the agency does not provide any data or empirical evidence that increased contracting or purported market concentration has adversely affected the industry or the economy, or that packers have used their alleged "market power" to harm producers, impair property rights of growers or producers, or injure consumers. Nor does GIPSA provide any evidence to support its assertions that transparency, competition, and the financial integrity of the markets have lessened. The agency's failure to provide any tangible, documented support beyond unsubstantiated claims from a few disgruntled producers on any of these issues proves that the proposed rule does not satisfy the EO. A careful review of whether GIPSA met the EO requirements unquestionably leads to the conclusion that the agency has

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<sup>105</sup> *Id.*

<sup>106</sup> *Proposed GIPSA Rules Relating to the Chicken Industry: Economic Impact*; FarmEcon LLC, November 11, 2010 (See Attachment J).

failed to comply in numerous respects with the EO. A fuller explanation of specific failures and why the proposed rule should be withdrawn follows.

GIPSA has failed to comply with EO section 6(a)(3)(E). GIPSA identified the proposed rule as a significant regulatory action and section 6(a)(3)(E) provides that

- (E) After the regulatory action has been published in the *Federal Register* or otherwise issued to the public, the agency shall:
- (i) Make available to the public the information set forth in subsections (a)(3)(B) and (C);
  - (ii) Identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and
  - (iii) Identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.

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The agency, however, has not identified for the public the “substantive changes between the draft submitted to OIRA for review and the action subsequently announced” (ii) nor has the agency “identified for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA” (iii).

In addition, the preamble discussion regarding the EO fails to discuss, or inaccurately identifies, several significant elements of the proposed rule. Notable is the preamble discussion pertaining to proposed “Terms Defined.” The EO preamble discussion regarding newly defined terms says

Proposed new section 201.2(l) through (t), “Terms Defined,” would contain definitions for eight terms used in the proposed regulations. These definitions are of commonly used terms in industry and enter into the cost analysis through the proposed regulations.<sup>108</sup>

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<sup>107</sup> See 75 *Fed. Reg.* at 35345.

<sup>108</sup> *Id.*

The proposed rule, however, contains 10 new definitions. Unclear from the preamble discussion is whether the agency is attempting to sweep under the rug any required analysis regarding two very significant newly defined terms, “competitive injury” 201.2(t) and “likelihood of competitive injury” 201.2 (u), or whether GIPSA has simply failed to recognize and consider the ramifications of these terms – or both. In that regard, the agency’s assertion that the cost-benefit analysis of “commonly used” but newly defined terms such as “production contract” (201.2(s)) or forward contract (201.2(q)) “enters into the cost analysis through the proposed regulations” is dubious with respect to an accurate EO analysis.

More importantly, however, unlike terms such as “forward contract” and “production contract” the terms “competitive injury” and likelihood of competitive injury” are not commonly used in the industry and, in light of the their importance to the rule and the potential for significant amounts of litigation involving those terms, the agency’s new minting of these terms warranted a thorough cost-benefit analysis of at least those two terms. For this reason alone the EO requirements have not been met.

The agency’s analysis also fails to satisfy other elements of the EO requirements. In that regard, section 1(b)(12) of the EO requires an agency to “draft its regulations and guidance documents to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.” As discussed below in Section III of these comments, many aspects of the proposed rule are anything but simple and easy to understand and are an open invitation to litigation.

For example, the newly defined term “likelihood of injury to competition” includes several elements that almost defy definition. Specifically, an element of likelihood of injury to competition is whether situations that “impair a producer’s or grower’s ability to receive the reasonable expected full economic value from a transaction in the market channel or marketplace.”<sup>109</sup> The preamble recites almost verbatim the language in the proposed rule, providing no explanation or discussion regarding what the phrase “reasonable expected full economic value” means. This amorphous phrase is the epitome of creating a “potential for uncertainty and litigation” and thus at odds with the intent and direction of section 1(b)(12) of the EO.

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<sup>109</sup> Proposed section 201.2(u), 75 *Fed. Reg.* at 35351.

The agency also has not identified a need for some of the proposed rules. For example, section 201.212(c) would impose a ban on packer to packer livestock sales. In the preamble the agency states that the proposed section is necessary to “address situations where a packer (or group of packers) is able to manipulate prices paid for livestock, such as where a packer-to-packer sale signals the price that packers will pay producers or whether a packer purchases cattle through exclusive arrangements.”<sup>110</sup> Missing from the discussion, however, is any evidence or supporting documentation that the behavior the proposed rule seeks to curb has occurred. Nor does the agency explain in the EO discussion why an absolute ban is necessary when the agency is currently empowered to take enforcement action on a case-by-case basis.<sup>111</sup> To take necessary enforcement actions on an as-needed basis rather than a blanket ban on packer to packer livestock sales is far more in keeping with EO sections 1(b)(7) and (11) than imposing a ban that will disrupt not only the operation of so many packers but many producers as well. (See discussion in Section III) This is particularly true considering all packer to packer transactions are currently reported to USDA through USDA’s mandatory price reporting program and GIPSA has a program that monitors every transaction.<sup>112</sup>

The EO analysis is replete with vague and unsupported generalities about the benefits that what will accrue from the proposed rule. In that regard, GIPSA states that

Potential benefits include gains from having market prices for commodities or grower services more accurately reflect supply-demand conditions; from making decisions based on more accurate price signals and from remedying anticompetitive conduct and minimizing associated dead weight losses and other inefficiencies.”<sup>113</sup>

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<sup>110</sup> 75 *Fed. Reg.* at 35342.

<sup>111</sup> The agency fails to cite to a single instance where an enforcement action was brought against a packer because its transactions with other packers allegedly resulted in price manipulation.

<sup>112</sup> 2009 Annual Report, Packers & Stockyards Program, United States Department of Agriculture Grain Inspection, Packers and Stockyards Administration, p. 13.

<sup>113</sup> 75 *Fed. Reg.* at 35345. (Emphasis added).

Setting aside the fact that GIPSA characterizes the above as “potential” benefits, nowhere in the discussion and as required by the EO, however, does GIPSA provide any evidence that: (1) market prices do not currently reflect supply-demand conditions, (2) decisions are not based on accurate price signals, or (3) that there is anticompetitive conduct that needs to be addressed.

Also lacking is any meaningful, accurate evaluation of the costs attendant to this proposed rule. GIPSA seems to dismiss with a wave of the hand the costs attendant to proposed sections 201.210 and 201.211, which would define “unfair practice” and “undue preference” under subsections 202(a) and (b) of the Act. For both proposed sections GIPSA simply asserts that “because these regulations merely clarify existing requirements, any such cost must be incurred regardless of whether the regulations are issued and are therefore not costs associated with the regulations themselves.” From an Executive Order 12866 perspective this assertion is flawed for several reasons. First, the proposed sections do not merely clarify existing requirements – in some circumstances, e.g., proposed section 201.210(a)(5), they impose substantive new obligations on packers and other regulated entities. Ironically, other elements of the proposed sections, e.g., 201.210(a)(8), violate the EO because they are so vague that the only certainty associated with the rule is the litigation that will ensue.

Second, not only does the agency provide no support for its cost assertions, but they conflict with the agency admission in the preamble that the new regulations would “constitute a material change in circumstances” by removing the requirement to prove competitive injury or likelihood of injury for violations of sections 202(a) and (b) of the Act.<sup>114</sup> Because the conduct set forth in sections 201.210 and 201.211 would now be in violation of the Act without a showing of competitive harm, proposed sections 201.210 and 201.111 would impose new requirements, with costs associated thereto.<sup>115</sup>

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<sup>114</sup> 75 *Fed. Reg.* at 35341.

<sup>115</sup> Also noteworthy is GIPSA’s reliance on the Interim Report done by RTI. Nowhere does GIPSA discuss the GIPSA Livestock and Meat Marketing Study done by RTI. *See* United States Dept. of Agriculture. Grain Inspection, Packers and Stockyard Administration. *GIPSA Livestock and Meat Marketing Study*. Vol. 1. Research Triangle Park: RTI International, 2007.

Because the EO analysis conducted by GIPSA fails to meet the criteria established by Executive Order 12866, the proposed rule should be withdrawn.

## **VI. THE PROPOSED RULE FAILS TO SATISFY THE REQUIREMENTS OF THE DATA QUALITY ACT**

The Proposed rule also fails to comply with the restrictions and guidelines imposed by the Data Quality Act (DQA).<sup>116</sup> Pursuant to the DQA and USDA's Information Quality Guidelines (Guidelines), in addition to the comments filed herein, AMI submits a request for correction of information contained in the Notice of Proposed Rulemaking, published in the *Federal Register*. The DQA and the Guidelines are intended to ensure the quality of the information used by GIPSA, including the information's utility, objectivity and integrity.

Specifically, this request pertains to certain information used in support of and in partial justification for the proposed rule. In the preamble the agency refers to public meetings held in October 2008, in Arkansas, Iowa, and Georgia. These meetings purportedly were used to gather comments, information, and recommendations from interested parties. In addition to the meetings, GIPSA contends that it gathered data concerning market participants. According to GIPSA, the proposed rule is "based on comments, information, and recommendations received in the previously mentioned meetings, along with GIPSA's expertise, experience, and interactions in the livestock and poultry industries."<sup>117</sup>

GIPSA purports to rely on the information described above, but to the best of AMI's knowledge, that information has not been made available to the public nor is it included in the proposed rule. There is no specific information that would allow AMI or the public to determine whether the drastic changes in the implementation of the PSA that would occur if the proposal is implemented are warranted. Until GIPSA can justify these changes, the proposed rules is arbitrary, capricious, and not in accordance with law.

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<sup>116</sup> 44 U.S.C. § 3516.

<sup>117</sup> 74 *Fed. Reg.* at 35339.

GIPSA, through the preamble or the record, has failed to provide any evidence to support this sweeping overhaul of the PSA. The federal government should not, indeed cannot, change a 90-year old statute to suit a perceived need without support. The DQA and the Guidelines were implemented to prevent just this type of misuse of administrative authority.

Significantly, the information used by GIPSA to justify the proposed rule violates many of the “Regulatory” or “Influential Regulatory” standards provided under the Guidelines. For example, the Guidelines require the agency to use “reasonably reliable data and information,” which includes data from surveys, compiled information, and/or expert opinion. In the proposed rule, however, GIPSA relies on data and information provided at what are, in effect, “town hall meetings.” Information gathered at such meetings can only be described as inherently unreliable. Moreover, utilizing the aforementioned meetings as well as the general “expertise” of the agency provides no transparency into any analysis conducted by GIPSA, nor does it clearly identify sources of uncertainly affecting data quality.

Because this rulemaking is *significant* pursuant to EO 12866, the information used to justify the proposed rule is considered *influential*. Influential information should, in pertinent part, “(i) use the best science and supporting studies conducted in accordance with sound and objective scientific practices, including peer-reviewed science and studies where available; and use data collected by accepted methods or best available methods.”<sup>118</sup> The information gathered meetings and the “general expertise” of the GIPSA simply does not conform to these standards.

Because the agency has failed to comply the DQA and EO 12866, AMI cannot know or understand GIPSA’s justification or rationale for the proposed rule. More importantly, AMI and its members will be harmed by the proposed rule, particularly if the rule is promulgated using biased or faulty information.

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<sup>118</sup> *USDA Information Quality Activities, Regulatory Guidelines*, [http://www.ocio.usda.gov/qi\\_guide/regulatory.html](http://www.ocio.usda.gov/qi_guide/regulatory.html)

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For the foregoing reasons, AMI respectfully requests that the proposed rule be withdrawn and that the agency repropose a rule consistent with Congressional direction in the Farm Bill and consistent with longstanding judicial precedent.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark D. Dopp", with a long horizontal flourish extending to the right.

Mark D. Dopp  
Senior Vice President, Regulatory  
Affairs and General Counsel

Enclosures