

ALLEGED MISCONCEPTION

The provision on competitive injury would allow producers to sue companies without having to show competitive injury.

USDA EXPLANATION

The proposed rule will bring clarity to an issue that caused problems for growers, packers and industry because key terms have been incompletely defined. To fully understand this issue, it is important to first be clear as to what competitive harm and the likelihood of competitive harm mean and how they impact. The proposed rule defines competitive injury and likelihood of competitive injury. Competitive injury occurs when an act or practice distorts competition in the market channel or marketplace. How a competitive injury manifests itself depends critically on whether the target of the act or practice is a competitor (*e.g.*, a packer harms other packers), or operates at a different level of the livestock or poultry production process (*e.g.*, a packer harms a producer).

The likelihood of competitive injury occurs when an act or practice raises rivals' costs, improperly forecloses competition in a large share of the market through exclusive dealing, restrains competition among packers, live poultry dealers or swine contractors or otherwise represents a misuse of market power to distort competition. The likelihood of competitive injury also occurs when a packer, swine contractor, or live poultry dealer wrongfully depresses prices paid to a producer or grower below market value or impairs the producer 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.

The proposed rule embraces the concepts of competitive harm and likelihood of competitive harm in certain instances; the proposed rule states that whether proof of harm or the likelihood of harm to competition is necessary depends on the nature and circumstances of the challenged conduct.

If a producer filed a claim on matters dealing with practices that could cause competitive harm, such as manipulation of prices, the producer would need to show harm or the likelihood of harm to competition. But some unfair practices do not have any implication on competition for a marketing region. If a producer filed a claim on matters that do not involve competitive harm, such as retaliatory conduct, using inaccurate scales, or providing a grower sick birds, proof of competitive injury or the likelihood of competitive injury would not apply. Such a requirement would be like having a car stolen, but before the police act, one would need to prove how the theft of the car impacts all of the neighbors. As detailed in the proposed rule, USDA feels this standard thwarts the purposes of the Act.

RESPONSE

The Explanation simply ignores the plain language in the proposed rule. Proposed subsection 201.3(c) provides that "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) without a finding of harm or likely harm to competition." 75 *Fed. Reg.* 35351 (June 22, 2010) (Emphasis added). The very vague

definitions of “competitive injury” and “creates a likelihood of competitive injury” are much broader than proving harm to competition, and if proven are deemed by the regulations to be unfair.

However, USDA’s explanation above acknowledges that in some cases producers will not have to show injury to competition. Missing from the proposed rule, the preamble, and the Explanation above is any discussion or guidance regarding when that requirement would not apply or is waived. In virtually every case brought, a trial lawyer representing a plaintiff in a Packers and Stockyards Act case will argue that there is no need for the plaintiff to show injury to competition. (See discussion regarding the following Alleged Misconceptions as to the impact this proposal would have.)

The clarification offered in the Explanation is nothing more than a statement that a producer or grower would have to prove competitive injury or likelihood of competitive injury in cases where there could be competitive injury and likewise would not have to prove competitive injury when there is no competitive injury. Not only is this position contrary to the law in eight federal appellate circuits, it would always stack the deck in favor of a plaintiff by only requiring proof of competitive injury when the plaintiff can meet that burden. This certainly will result in an increase in litigation by private litigants.

ALLEGED MISCONCEPTION

The proposed rule will cause increased litigation due to the provision on competitive injury or harm.

USDA EXPLANATION

The lack of clarity on the issue of competitive injury currently causes litigation. The proposed rule seeks to clarify the issue and is intended to reduce litigation.

One of the reasons the courts in recent years have ruled that proof of competitive injury or harm is necessary is because the Department has not articulated its position in regulation.

Out of the twelve Circuit Courts of Appeal, seven circuits have *not* made clear rulings that affirmatively require a finding of harm to competition or likely harm to competition for a violation of the Act. Also, several district courts have held that an anticompetitive effect is *not* necessary to establish a claim for a violation of the Act.

RESPONSE

The issue is and has been clear for many years – just not in a manner satisfactory to USDA. The most recent interpretation of the Packers and Stockyards Act (PSA), this time from the United States Court of Appeals for the Sixth Circuit in *Terry v. Tyson Farms, Inc.* No. 08-5577, raises to eight the number of separate 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.¹ 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 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 (11th 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).” *Terry v. Tyson Farms, Inc.* No. 08-5577, United States Court of Appeals for the Sixth Circuit (May 10, 2010) p. 7.

An interesting, and perhaps telling, indicator of the agency’s stubborn refusal to abide by the repeated court rulings against the position GIPSA articulated in proposed subsection 201.3(c) is the fact that in footnote 31 in the preamble to the proposed rule GIPSA does not even acknowledge the *Terry* holding, referencing only that the case was argued in March 2010. *Terry*, however, was decided on May 10, 2010 – six weeks before the proposal published on June 22. In short, USDA’s Explanation conflicts with the recent ruling above from the Sixth Circuit, as well as a December 2009 decision from the 5th Circuit, *Wheeler v. Pilgrim’s Pride Corp.* with its lengthy recital of the various appellate court holdings contrary to GIPSA’s position.

USDA states in the Explanation that “one of the reasons the courts in recent years have ruled that proof of competitive injury or harm is necessary is because the Department has not articulated its position in regulation.” This assertion conveniently ignores the fact that USDA has argued its position on a number of occasions to these Courts through *amicus* (friend of the court) briefs, and still the Court’s have not agreed with the USDA position.

ALLEGED MISCONCEPTION

The provision on packer to packer sales will eliminate marketing agreements or other value added activities and take away the incentive to produce meat products that consumers prefer.

USDA EXPLANATION

The proposed rule seeks to prevent collusion and price manipulation caused by the sharing of pricing information between packers. It does not ban packers from owning their own livestock. When a packer sells livestock to another packer, the information signals important market information about price and supply levels. With high levels of consolidation and vertical integration, firms may be able to affect the prices of sales on the open market. In recent years, the open market has become thinner and more volatile. This open market helps determine the price of most formula contracts.

There is nothing in this provision that limits or eliminates marketing agreements. Instead, the proposed rule would provide integrity in the market to prevent manipulation of prices on the open market and in marketing agreements.

RESPONSE The Alleged Misconception exposes a fundamental misunderstanding on the part of USDA about the intended and unintended consequences of the proposal. The above Alleged Misconception inappropriately and confusingly mixes concerns about the packer-to-packer sale prohibition (see next Alleged Misconception) and the very real danger to the use of marketing agreements caused by the threat of litigation created by proposed subsection 201.3(c) and its elimination of a plaintiff's obligation to show injury to competition in a lawsuit. The threat of litigation will be presented by disgruntled plaintiffs who are not offered the opportunity for a marketing agreement for legitimate business reasons. There also will be a threat of litigation from plaintiffs who sell livestock in the cash market, do not want to use marketing agreements but who will contend that the very existence and use of marketing agreements between packers and other producers distorts the markets and prevents a cash seller from realizing a "reasonable expected full economic value from a transaction." (See the definition of "likelihood of competitive injury.") This concern is not hypothetical as the latter scenario was the basis for *Pickett v. Tyson Fresh Meats, Inc.*, 432 F.3rd 1272 (11th Cir. 2005).

In addition, the Explanation asserts that the packer-to-packer sales ban is needed to prevent collusion and price manipulation caused by sharing pricing information between packers but neither the Explanation nor the preamble that accompanied the proposal provide even a scintilla of evidence that this type of behavior has, in fact, happened. To the contrary, the absence of cases brought by USDA suggests strongly that no such behavior has occurred.

ALLEGED MISCONCEPTION

The packer to packer provision will now require packers to sell livestock across the country to other packers willing to buy livestock.

USDA EXPLANATION

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

RESPONSE

Unfortunately, in characterizing the purported misconception USDA does not grasp the nature of the very legitimate concern posed by the packer to packer livestock sale prohibition. Proposed 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.” In a real life example that is not all that unique, a beef packer with its only packing plant in Washington State and who owns cattle in Kansas feedlots will be precluded from selling those cattle to a number of packers with plants in Kansas or Nebraska as it has done historically. Instead, that packer will be forced to do one of two things with the Kansas cattle: 1) transport those cattle a distance of more than 1500 miles, over the Rocky Mountains to the Washington plant or 2) sell them to the various individuals, market agencies, *etc.* cited by USDA in its Explanation. The first option is cost prohibitive and even if it were not a trip of that length would endanger the cattle. The second option introduces unnecessary costs and inefficiencies into the market. In essence, the packer would sell the cattle to a dealer who in turn would sell them to the very same packers in Nebraska and Kansas only with added costs involved caused by additional and unnecessary transactions. USDA’s rationale for this prohibition ignores the fact that packer to packer transactions are all reported to USDA through the mandatory price reporting program and if USDA believes some illegal activity is occurring it today has the power to take enforcement action. Yet, it has not done so in the past or in this current administration.

ALLEGED MISCONCEPTION

Poultry Growers and Swine Production Contract Growers would be guaranteed a return of 80 percent with their production contracts.

EXPLANATION

Under the proposed rule, producers are to be offered production contracts with a sufficient period of time that provide the opportunity to recoup up to 80 percent of the cost of their capital investment. Producers would not be guaranteed an 80 percent return on investment. This rule would not affect provisions in production contracts to deal with poor performers such as termination for cause.

RESPONSE

Again , the plain language of the proposal contradicts the Explanation. Proposed subsection 201.217(a) provides that “Any requirement that a poultry grower or swine production contract grower make initial or additional capital investments as a condition to enter into or continue a growing arrangement or production contract must be accompanied by a contract duration of a sufficient period of time for the poultry grower or swine production contract grower to recoup 80 percent of the cost of the required capital investment.” 75 *Fed. Reg.* 35353 (June 22, 2010) (Emphasis added) Conspicuous in its absence in the plain language of the proposed rule is the word “opportunity” with respect to recouping 80 percent of an investment.

ALLEGED MISCONCEPTION

Companies will no longer be allowed to provide premiums to producers.

EXPLANATION

There is no provision in the proposed rule that would limit or eliminate the ability of companies to provide premiums to reward producers for providing certain quantity or quality of livestock.

The proposed rule simply requires that if differential pricing is offered, the packer, swine contractor, or live poultry dealer must maintain records to document the business justification for that pricing arrangement. The documents that would be required by this provision are those documents containing information typically used by the regulated entity.

RESPONSE

USDA's Explanation again mischaracterizes the concern regarding the proposed rule. Proposed subsection 201.94(b) would require packers, swine contractors, and live poultry dealers to maintain 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." There is, however, no guidance in the proposed rule, the preamble, or in the Explanation above regarding what is meant by standard price or contract terms.

In addition, proposed subsection 201.210(a)(5) would make it an unfair practice to engage in "paying a premium or applying a discount on the swine production contract grower's payment or the purchase price received by the livestock producer from the sale of livestock without documenting the reason(s) and substantiating the revenue and cost justification associated with the premium or discount..." 75 *Fed. Reg.* 35351 (June 22, 2010). Although this language does not prohibit packers from providing premiums to producers, it provides a strong incentive not to do so. In that regard, it would be virtually impossible for packers to know whether they are maintaining the necessary documentation in order to comply and to prevail in potential lawsuits alleging unfair pricing. Moreover, there is little to no discussion in the proposed rule, the preamble, or the Explanation on what type of "revenue or cost" documentation is required to be maintained. Furthermore, the reason for providing a premium or discount may not be cost justifiable to the penny even though there are other good business reasons for a premium or discount and documents showing the detail required are not kept in the information typically used by packers.

In short, the requirement that every transaction be documented with "revenue or cost" justification for a premium or discount is a heavy burden, particularly given the number of transaction that occurs annually. A livestock purchaser might well choose not to carry such a burden and can avoid doing so, and thereby avoid the possibility of being out of compliance, simply by buying all livestock on the average.

ALLEGED MISCONCEPTION

The proposed rule takes away producers' ability to maintain the privacy of business transactions because all transactions will have to be reviewed by GIPSA and then posted on a government website open to public access.

EXPLANATION

There is nothing in the proposed rule that suggests GIPSA would review all business transactions, nor require that all these transactions be made available on its website.

To increase transparency, GIPSA is proposing that packers, swine contractors, and live poultry dealers provide *sample* contracts and poultry growing arrangements to GIPSA. In return, GIPSA will make these sample contracts available on its website. The proposal requires the submission of sample contracts, not every transaction.

Any trade secrets, confidential business information and personally identifiable information submitted would be removed and not made available on GIPSA's website.

RESPONSE

Proposed subsection 201213(a) provides that "Packers and swine contractors purchasing livestock under a marketing arrangement including, but not limited to, forward contracts, formula contracts, production contracts or other marketing agreements, and live poultry dealers obtaining poultry by purchase or under a poultry growing arrangement must submit a sample copy of each unique type of contract or agreement to GIPSA." *75 Fed. Reg.* 35352 (June 22, 2010) (Emphasis added). The concern not addressed by the proposed rule, and the Explanation above, is that in many cases producers have unique agreements with their packer/customers, which means each of those agreements would be posted on the GIPSA website. In addition, the proposed rule seems to exclude producer input as to what constitutes confidential information in that the proposed rule provides that "[P]ackers, swine contractors and live poultry dealers must identify confidential business information when submitting contracts to GIPSA." *Id.*