

**CASE STUDIES IN THE POTENTIAL CONSEQUENCES OF THE GRAIN, INSPECTION,
PACKERS AND STOCKYARDS ADMINISTRATION (GIPSA) PROPOSED RULE****1. Proposal's Stated Goal:****Eliminate Proving Injury to Competition or Likelihood of
Competitive Injury as an Element in a Packers and Stockyards Act
Lawsuit**

The Proposal would have eliminated the need for a plaintiff to demonstrate injury to competition in lawsuits involving alleged unfair or undue preference activities under the Packers and Stockyards Act (PSA or the Act).

In numerous lawsuits, courts have held that proving injury to competition is a necessary element for a plaintiff to win a case filed under the Packers and Stockyards Act (PSA). For example, in *Pickett v. Tyson Fresh Meats Inc.* the company was sued by a group of producers who alleged that Tyson's use of marketing agreements with other producers was an unfair practice. The company won because the court concluded that the PSA required a plaintiff to show injury to competition or likelihood of injury to competition. The Proposal would, through rulemaking and not by Congressional action, eliminate that longstanding requirement making it easier, for example, for a plaintiff who may not be offered such an agreement by a packer to more easily bring and win a lawsuit. In addition, certain livestock groups have alleged that:

- Packer ownership of livestock affects the markets or distorts competition;
- Agreements between a feedlot and a packer adversely affect the market; and
- Allowing packers to process in more than one species, e.g., beef company having poultry interests, can adversely affect the market.

Transactions and agreements such as these would all be subject to a greater threat of litigation if this element of the Proposal was finalized.

Such a change would have had a dramatic and adverse impact on the industry, as evidenced by a GIPSA commissioned study conducted in 2007 by the Research Triangle Institute (RTI). That study found that reducing by 25 percent the number of marketing agreements would cost feeder cattle producers \$5.1 billion, fed cattle producers \$3.9 billion, and consumers \$2.5 billion over a 10 year period. In addition, the RTI study found that if marketing agreements were eliminated, over 10 years, the cumulative losses for producers and consumers would total \$60 billion.

2. Proposed Rule's Stated Goal:**Ensure Producers are not Subject to Unfair Practices**

The proposed rule would have defined "likelihood of competitive injury" to be any action that "impairs a producer's or grower's ability to compete with other producers or growers or impairs a producer's or grower's ability to receive the reasonable expected full economic value from a transaction ..." and such a finding would constitute an unfair practice.

That definition is unworkably vague and would have resulted in excessive litigation. For example, a packer that needs 1000 head of cattle to cover the next day's operations and gets only 500 head on the

first offer may/will likely have to "pay up" to get the next 500 head. This action could result in paying two producers that operate next door to each other different prices, perhaps within the same hour. The vague, broad definition above would expose that packer to litigation brought by a producer who would contend that packer impaired the "producer's or grower's ability to receive that reasonable expected full economic value from a transaction in the market channel or marketplace." How would a livestock purchaser know and should that purchaser's entire business potentially be left to the vagaries of a jury of 12 people to decide?

Similarly, if a beef packer has three or four cattle buyers in the field (e.g., in the same state or region) at the same time and all four buyers negotiate different prices for the packer to pay for livestock, what is necessary to substantiate the differences in the prices, which the proposal would have required be documented? Also, do the three producers who received lesser prices have an authentic case that they did not "receive the reasonable expected full economic value from a transaction in the market channel or marketplace" if or when they find out that the fourth seller got a higher price for his livestock?

3. Proposal's Stated Goal:**Increase Competition for Livestock and Preclude Price Manipulation
by Banning a Packer's Ability to Sell Cattle to Another Packer**

The proposal would have banned a packer from buying livestock from any other packer or entity associated with a packer, such as a packer-owned feedlot or farm.

For example, a packer with its only plant in Washington State would have been forced to transport cattle it owns in Kansas more than 1500 miles, across the Rocky Mountains, to the Washington plant – rather than sell those cattle to any one or more of the numerous packing plants in the Midwest. Such a proposal would have introduced needless inefficiencies into the system in addition to subjecting the livestock to additional, unnecessary stress caused by needlessly long trips created by a bureaucratic mandate. The packer's only other option would be to sell his Kansas cattle to a broker or dealer. That dealer or broker would either mark up the price or, more likely, pay less than market value to the packer in order to sell the cattle to a Kansas or Nebraska packer. This scenario adds costs to the system and the only one who might benefit is the middle man, while the consumer ends up paying more at retail.

Similarly, a vertically integrated pork packer would not be able to sell excess market hogs or cull sows to other packers as historically has been the case. Instead, the packer would have been forced to sell the hogs to third party livestock dealers, who in turn will sell to the hogs to packers, introducing added costs and inefficiencies into the system. For example, Packer X, which owns hogs located close to a packing plant in Guymon, Oklahoma, that is owned by Packer Y would have to haul those hogs an additional 450 miles to the Packer X plant in Crete, Nebraska. These hogs would then "displace" market hogs from farmers that are located in the Crete area. The newly displaced hogs would then need to be hauled that same 450 miles to the Guymon plant or some

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other, more distant facility. The result is that both operations would not only incur incremental freight costs but also have a larger impact on the environment etc. And again, pigs, which are particularly vulnerable to transport stress would be subjected to needlessly longer hauls.

The ban would not have just introduced inefficiencies, it could have closed some operations. For example, a West Coast facility processes approximately 1.8 million hogs per year, with the majority of these hogs obtained from a producer affiliated with another packer. There are too few non-packer-affiliated hog production facilities near this plant to supply sufficient replacement hogs to operate the packing plant. Theoretically, an option would be to ship market hogs from the Midwest, but transportation costs and animal welfare considerations make this unworkable. The other option would be to limit the pigs processed to company-owned hogs only, but there are insufficient company-owned hogs to fill the plant. The company would have to expand its vertical integration (if possible) or, failing that, cease plant operations.

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