January 17, 2022

S. Brett Offutt
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Packers and Stockyards Division
Fair Trade Practices Program
Agricultural Marketing Service
United States Department of Agriculture
1400 Independence Ave., SW
Washington, DC 20250

Re: Docket No. AMS–FTTP–21–0045; RIN 0581–AE05; Proposed Rule; *Inclusive Competition and Market Integrity Under the Packers and Stockyards Act*; 87 *Fed. Reg*. 60010 (Oct. 3, 2022).

Dear Mr. Offutt:

The North American Meat Institute (NAMI or the Meat Institute) submits these comments regarding the above-referenced proposed rule (proposal or rule). The Meat Institute is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products and NAMI member companies account for more than 95 percent of United States output of these products. The Meat Institute provides regulatory, scientific, legislative, public relations, and educational services to the meat and poultry packing and processing industry.

As NAMI expressed in the October 5, 2022, letter requesting an extension of the comment period, the proposal, along with the agency's previously published June 8 proposed rule (June 8 rule) and its subsequent Advance Notice of Proposed Rulemaking (ANPR), which the Agricultural Marketing Service (AMS or the agency) has described as a "suite of major actions under the Biden Administration to create fairer marketplaces for poultry, livestock and hog producers" should be withdrawn. The agency should withdraw all proposals and publish the entire "suite" of rules together, with a comment period sufficient to allow stakeholders to consider the overlapping impact of the proposals and comment after all proposals have been shared publicly.

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Nonetheless, NAMI has several general observations followed by more extensive comments.

- The agency steadfastly refuses to accept the well-established precedent in the eight federal appellate circuits that have addressed the issue: to prevail in a Packers and Stockyards Act (PSA or the Act) case brought under section 202 of the Act a plaintiff must show the action or behavior is harmful, or likely harmful, to competition.

- In addition to concerns whether proposed § 201.304(a) is properly within the confines of the PSA, the discussion and definition of who would qualify as a "market vulnerable individual" is so vague that a regulated entity, *e.g*., a packer, would not be able to know what is permissible under the Act and for that reason the definition should be withdrawn and reproposed.

- The elements of proposed § 201.304(b) are outside the scope of the PSA and in part addressed under the Agricultural Fair Practices Act.[1]

- Proposed § 201.306 is outside the scope of the PSA because it would turn every tort or contract dispute into a federal case. Such matters are better addressed in state court rather than burdening the federal judiciary.

A more detailed discussion follows.

The Agency Continues to Ignore the Well-Established Precedent that Sections 202(a) and (b) Require an Adverse Effect on Competition – Precedent Congress Has Declined to Overturn Through Legislation.

A. Through the Preamble, the Agency Seeks to Accomplish a Regulatory End Run Around Well-Established Legal Precedent.

A review of proposed sections 201.34 and 201.36 finds no reference to longstanding precedent that a plaintiff in a PSA section 202 case must show injury, or likelihood of injury, to competition to prevail. The agency's preamble, however, is a different story and is littered with statements to the contrary, which suggests AMS believes simply saying something enough times is sufficient to overturn the precedent established by eight federal appellate circuits. In at least seven separate locations in the preamble AMS asserts an individual need not "show market-wide harm to secure relief under the Act."

[1] 7 U.S.C. 2301 *et. seq*.

> The historic Executive order issued by the Biden-Harris administration, Executive Order (E.O.) 14036—Promoting Competition in the American Economy (86 FR 36987; July 9, 2021), … E.O. 14036 also underscored that an individual should not have to show market-wide harm to secure relief under the Act. AMS has considered that direction in undertaking this rulemaking. (Emphasis added)[2]

This new parade of statements, here embedded in the preamble no less, is not the first time the agency has taken this position. In a previously failed rulemaking the agency said a violation of sections 202(a) or (b) of the PSA "can be proven without proof of predatory intent, competitive injury, or likelihood of injury."[3] Indeed, in that 2010 effort the agency proposed a rule that said "[c]onduct can be found to violate § 202(a) and/or (b) of the Act without a finding of harm or likely harm to competition."[4] Likewise, in 2016 proposed rules the agency clung to the idea that a plaintiff seeking to establish a claim under sections 202(a) or (b) need not demonstrate actual or likely harm to competition.

But in its 2017 notification AMS's predecessor agency, the Grain Inspection, Packers and Stockyards Administration (GIPSA), acknowledged the great weight of judicial precedent against that position when it said

> First, the interpretation of 7 U.S.C. 192(a)–(b) embodied in the IFR [Interim Final Rule] is inconsistent with court decisions in several U.S. Courts of Appeals, and those circuits are unlikely to give GIPSA's proposed interpretation deference.[5]

And in its 2020 rulemaking the agency indirectly addresses the legal standard issue by saying the following.

> In past cases, courts have considered whether a specific preference or advantage would be a violation of the Act if the preference or advantage did not harm competition. However, AMS does not intend to create criteria that conflict with case precedent, so PSD expects that court precedents relating to competitive harm are likely to remain unchanged.[6]

Whether directly in a failed proposed rule, or here in a preamble that lacks the force of law, regardless of how often AMS or its predecessor agency makes this assertion,

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[2] *Id*. at 60014. See also pages 60010, 60013, 60018, and 60026
[3] 75 *Fed. Reg*. 35338, 35340 (June 22, 2010).
[4] *Id*. at 35351, proposed section 201.3(c).
[5] 82 *Fed. Reg*. at 48596 (Oct. 18, 2017).
[6] 85 *Fed. Reg*. at 1774 (Jan. 13, 2020).

it cannot change the well-established precedent that a plaintiff in a PSA case must show harm, or likelihood of harm, to competition.[7]

B. The statute is best read to require showing harm or likely harm to competition.

As the Supreme Court explained, the PSA was focused on preventing harm to competition: "The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer, who buys."[8] Congress enacted the statute "to combat restraints on trade" and to "promote healthy competition" in the livestock industry.[9]

The PSA built on existing antitrust statutes by providing a special statute for the meatpacking industry.[10] In enacting this special statute, Congress "incorporate[d] the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation."[11] That "general outline of long-time antitrust policy" incorporated in the PSA "distinguish[es] between fair and vigorous competition on the one hand and predatory or controlled competition on the other."[12] And that understanding follows the settled principle that an antitrust plaintiff must show antitrust injury – a harm that the antitrust laws were designed to prevent.[13] To prove an antitrust injury, it is not enough for the plaintiff to show it was harmed by the defendant's conduct; rather, the plaintiff must prove that competition was harmed from the defendant's conduct.[14] Interpreting Section 202(a) and (b) to require proof of actual or likely harm to competition furthers the statute's key purpose, which is to protect competition in the meat packing industry.

Although Congress was spurred to action by the conditions in the meat packing industry, it did not intend to discourage regular, healthy business competition. During Congressional debate on the Act, "everyone from the Secretary of Agriculture to Members of Congress testif[ied] to the need of this statute to

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[7] The agency's citation to an Executive Order that cannot amend the law also is unavailing. See 87 *Fed. Reg*. 60014.
[8] *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922).
[9] *Wheeler v. Pilgrim's Pride Corp*. 591 F.3d 355, 361 (5th Cir. 2009) (*en banc*); *see* H.R. Rep. No. 85-1048, at 1 (1957) (Act's purpose was to "assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry").
[10] *Armour & Co. v. United States*, 402 F.2d 712, 721 (7th Cir. 1968).
[11] *De Jong Packing Co. v. United States Dep't of Agric*., 618 F.2d 1329, 1335 n.7. (9th Cir. 1980), cert. denied, 449 U.S. 1061 (1980).
[12] *Armour & Co.*, 402 F.2d at 717, 722.
[13] *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).
[14] *See, e.g.*, *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 83 (3d Cir. 2010); *see also Brunswick*, 429 U.S. at 488 ("[A]ntitrust laws …were enacted for 'the protection of competition not competitors.").

promote healthy competition."[15] And the Senate Report expressed "caution . . . against stifling the initiative of the industry."

The PSA's judicial history confirms Congress knew, and intended to incorporate, the meanings of key terms and the eight federal courts of appeals that have considered this issue have unanimously concluded that a plaintiff must show actual or likely harm to competition to make a claim under Section 202(a) or (b) of the PSA.[16] That rejection of USDA's interpretation included in previously proposed rules and expressed in the proposal's preamble is best captured in the *en banc* decision from the United States Court of Appeals for the Fifth Circuit, *Wheeler v. Pilgrim's Pride Corp*. which began as follows.

> 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.[17]

Writing for the majority, Judge Reavley said:

> We conclude that an anti-competitive 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.[18]

And the Sixth Circuit said it best.

> 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

[15] *Wheeler*, 591 F.3d at 361.
[16] *Wheeler,* 591 F.3d at 369-70 (explaining that the House Report, H.R. Rep. No. 67-77, at 2-10 (1921), included a "detailed exposition of Supreme Court decisions on the meaning and constitutionality of those earlier acts").
[17] *Wheeler* 591 F3d at 357.
[18] *Id.*

> 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).[19] (Emphasis added.)

Those courts relied on the statute's use of antitrust terms of art, on the situation in the meat packing industry that prompted the statute's enactment, and on Congress's statements of its purpose in the legislative record. Although no courts were asked to defer to a final USDA rule interpreting the statute, two courts affirmatively volunteered they would *not* defer to an agency rule that eliminated the element of harm to competition because Congress's contrary intent is so clear.[20] In short, although the agency, or its predecessor, has at times waffled on this issue, the courts have not, routinely rejecting the idea that a plaintiff need not show harm to competition.

C. The Major Rules Doctrine Confirms Proving Harm to Competition is Necessary.

Changing the harm to competition standard requires Congressional action and that fact is highlighted by the Supreme Court's recent decision in *West Virginia v. EPA*.[21] In that decision the Supreme Court invoked explicitly the "major questions doctrine," which requires Congress to speak clearly when authorizing agency action in certain cases.

The "major questions doctrine" turns on several considerations, including whether: the agency discovered in a "long-extant statute an unheralded power" that significantly expands or even "transform[s]" its regulatory authority; the claimed

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[19] *Terry v. Tyson Farms, Inc.,* 604 F.3d 272, 277 (6th Cir. 2010)
[20] See *Wheeler,* 591 F3d. at 362; *London*, 410 F3d. at 1304.
[21] *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); see also *NFIB v. OSHA,* 142 S. Ct. 661 (2022) (per curiam); *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (2021)

authority derives from an "ancillary," "gap-filler," or otherwise "rarely used" provision of the statute; or the agency adopted a regulatory program Congress had "conspicuously and repeatedly declined to enact itself." [22] The Court is particularly skeptical where an agency seeks to promulgate adopt a rule "that Congress has conspicuously and repeatedly declined to enact itself."[23]

Section 202 has long been understood as a statute grounded in principles of antitrust law. AMS cannot use its rulemaking authority to remake the statute into a broad prohibition on whatever AMS views to be unfair. And Congress has considered and rejected attempts to remove the competitive-harm requirement from the statute. Congress has similarly declined to adopt a general prohibition on discrimination in contracting, other than for race discrimination under Section 1981. AMS cannot use this rulemaking to implement a "legislative work-around."

Where an agency has long administered a statute, the "lack of historical precedent, coupled with the breadth of authority that the [agency] now claims, is a telling indication that the mandate extends beyond the agency's legitimate reach."[24] Section 202 of the Act can hardly be called an ancillary or rarely used provision of the statute and given Congress has amended section 202 multiple times over the decades, when it considered amending the statute to articulate the standard AMS promotes, Congress declined to do so.

Specifically, in the very Farm Bill that led to this rulemaking Congress considered and rejected a proposal to amend section 202(a) to state that a business practice can be found to be "unfair, unjustly discriminatory or deceptive" "regardless of whether the practice or device causes a competitive injury or otherwise adversely affects competition and regardless of any alleged business justification for the practice or device."[25] Senator Harkin, who sponsored the bill in the Senate, explained that the legislation would overturn court rulings that "producers need to prove an impact on competition in the market in order to prevail" in cases alleging that packers or dealers engaged in "unfair" or "unjustly discriminatory" practices.[26] But the legislation did not pass in either the Senate or the House. The failure of Congress to amend section 202 "after years of judicial interpretation supports adherence to the traditional view" that a finding of harm or likely harm to competition is required.[27] This conclusion is particularly true given Senator Harkin's efforts were part of the Congressional consideration of the bill that

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[22] *West Virginia v. EPA*.
[23] *West Virginia v. EPA* at 2610.
[24] *NFIB*, 142 S. Ct. at 666 (quotation marks omitted).
[25] See Competitive and Fair Agricultural Markets Act of 2007, S. 622, 110th Cong. § 202 (2007); see also H.R. 2135, 110th Cong. § 202 (same).
[26] 153 Cong. Rec. S2053 (daily ed. Feb. 15, 2007).
[27] *Wheeler*, 591 F.3d at 362 (quoting *Gen. Dynamics v. Cline*, 540 U.S. 581, 593-94 (2004)).

ultimately, when enacted, directed the Secretary to promulgate the regulations regarding undue preferences.

And 2007 was not the only instance Congress rejected efforts to change the harm to competition standard. Between 1921 and 2002, Congress amended section 202 of the PSA seven times, but it never disrupted the courts of appeals' statutory interpretation.[28] Congressional inaction in the face of the decisions of the appellate courts suggests that it has accepted that settled understanding.

Indeed, if anything, Congressional action supports the conclusion that the standard set by the appellate courts is the proper one. Proposed section 201.3(c) of the failed 2010 rulemaking would have attempted to overrule the standard established by the courts, *i.e.*, "[c]onduct can be found to violate § 202(a) and/or (b) of the Act without a finding of harm or likely harm to competition."[29] But appropriations bills passed for fiscal years 2012 through 2015 all included language prohibiting the agency from expending any funds to "publish a final or interim final rule in furtherance of, or otherwise implement, proposed sections 201.2(l), 201.2(t), 201.2(u), 201.3(c), 201.210, 201.211, 201.213, or 201.214 of Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act (75 Fed. Reg. 35338 (June 22, 2010))." This behavior suggests Congress thought proposed section 201.3(c), along with others, was not the proper standard. The ultimate question is one of Congress's intent, and here, all signs point toward Congress intending to require proof of actual or likely harm to competition under sections 202(a) and (b). The agency's attempt to get around this standard through a preamble conversation flatly contravenes Congress' intent and exceeds the authority granted by the PSA.[30]

D. The Proposed Rules are Tethered to Sections 202(a)-(b) and are Subject to the Same "Harm to Competition" Standard.

That these rules are arguably unique and not previously proposed does not exempt them from the harm to competition standard of proof. The agency goes to great lengths to try to establish a nexus between what it has proposed and sections 202(a)-(b) of the Act, presumably to justify the proposal. Although that nexus is questionable regarding some of the proposed rules, if they are tethered to sections 202(a)-(b), then they are also bound to the well-established judicial precedent

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[28] *See Wheeler*, 591 F.3d at 361-62; *see also General Dynamics Land Sys., Inc. v. Cline*, 594, 599 (2004) explaining that "congressional silence" in the face of "years of judicial interpretation" suggests that Congress has accepted the judicial consensus.

[29] 75 *Fed. Reg.* 35338 (June 22, 2010).

[30] See *Louisiana PSC v. FCC*, 476 U.S. 355, 375 (1986) ("an agency literally has no power to act . . . unless and until Congress confers power on it").

regarding proving harm to competition, just as plaintiffs in other cases brought under those sections have had to in the past.

There Must be an Intelligible Standard for Definitions.

The Due Process Clause requires laws to provide adequate notice of what they prohibit. A "vague law is no law at all" and here the proposal cannot satisfy that standard.[31] Indeed, the proposal includes unfamiliar terms so vague that if they are adopted, it would be impossible for a regulated entity to know how to comply.[32] Two terms in particular stand out.

First, the agency proposes the term, "market vulnerable individual," which AMS would define as a

> person who is a member, or who a regulated entity perceives to be a member, of a group whose members have been subjected to, or are at heightened risk of, adverse treatment because of their identity as a member or perceived member of the group without regard to their individual qualities. A market vulnerable individual includes a company or organization where one or more of the principal owners, executives, or members would otherwise be a market vulnerable individual.[33]

This definition is so vague, and the preamble discussion associated with it so wide ranging, a regulated entity could not begin to know what actions to take or policies to implement even to attempt to ensure compliance. In fact, the definition raises more questions than it answers.

For example, how will a regulated entity know the race and ethnicity of a producer with whom it deals and whether that individual, or a cooperative with such an individual as a member, meets the definition?[34] In some cases, the answer may be obvious but, in many cases, not. Is the regulated entity empowered or even required to ask? And how would a regulated entity know whether an individual has, for example, a certain ethnicity. e.g., American Indian, from earlier generations. Is that producer arguably market vulnerable? And are all producers in a "group," *e.g.*, Native Hawaiian, market vulnerable individuals, regardless of their success or prowess as a producer? Likewise, should the agency conclude

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[31] *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019)
[32] *Timpinaro v. SEC*, 2 F.3d 453, 460 (D.C. Cir. 1993)
[33] 87 *Fed. Reg*. 60054, proposed section 201.302.
[34] As part of the explanation about how the term was developed and what it purportedly attempts to cover, the preamble discusses differences in the number and percentage of contracts by race and ethnicity. Specifically, Figure 2 focuses on contracts with the following groups: American Indian; Asian; Black; Hispanic; Native Hawaiian; and White, offering data that purportedly highlights "additional vulnerability for particular groups in the sector."

LGBTQ individuals are market vulnerable individuals, how would a regulated entity know a covered producer is in one of those categories? Again, would the regulated entity be permitted, or required, to ask to help ensure compliance? Indeed, the agency listed a plethora of specific classes it proffered as potential market vulnerable individuals.

> The agency is considering whether this regulation should ban discrimination against specific classes, such as on the basis of race, color, national origin, religion, sex, sexual orientation, gender identity, age, disability, marital status, or family status. Such an approach would differ from the market vulnerable individual approach and would instead more closely follow the civil rights laws that prohibit prejudicial discrimination against certain protected classes.[35]

This definition is extraordinarily vague and imprecise it would introduce massive uncertainty into the affected industries and enmesh the participants in litigation, including enforcement actions, over virtually any type of commercial dispute—imposing substantial and pervasive costs that the proposal completely ignores.

Because the market vulnerable individual definition is so vague, and preamble discussion so wide ranging, after receiving comments AMS should consider those comments and republish a new definition that presumably would offer more insight into who would be in the market vulnerable individual category and afford stakeholders another opportunity to comment.

The proposal also would define "livestock producer" as

> any person engaged in the raising and caring for livestock by the producer or another person, whether the livestock is owned by the producer or by another person, but not an employee of the owner of the livestock.[36]

This definition is also vague and so broad it is unworkable. For example, under this definition a 14-year-old boy or girl who shows cattle or hogs owned by his or her parents at the county fair as a 4H participant is a livestock producer, and by extension a covered producer. Likewise, an employee of a cattle feeder who works in the pens is a livestock producer and by extension a covered producer. Neither of these people own livestock, contract with a regulated entity, or have any business relationship with one. The "purpose of the Packers and Stockyards Act of 1921 is to protect competition and, therefore, only those practices that will likely affect

[35] *Id*. at 60017.
[36] *Id*. at 60054.

competition adversely violate the Act." Given that, this definition needs to be withdrawn or amended accordingly.[37]

Proposed Section 201.304(a) is at Odds with the Act and Ignores a Statutory Requirement.

A. The Proposal is Outside the PSA's Scope.

Proposed section 201.304(a) is an attempt to regulate outside the scope of the Act. As discussed before, Congress enacted the PSA "to combat restraints on trade" and to "promote healthy competition" in the livestock industry.[38] Proposed section 201.304(a), on the other hand, seems intended to carve out special protection for certain categories or classes of people, and for some inexplicable reason, cooperatives. According to AMS

> The intent of the proposed regulation is to help break down barriers that may serve to exclude or disadvantage certain covered producers, while leaving room for differential treatment based on legitimate business purposes.[39]

In an attempt to link the proposed section 201.304 to PSA section 202 the agency AMS offers several citations to support its proposal, including the Statement of General Policy Under the Packers and Stockyards Act published by the Secretary of Agriculture in 1968. That statement references several other sections of the PSA, e.g., 304, 307, 312, but nowhere is there a reference to section 202 of the Act. AMS also cites "USDA's general regulatory prohibition against discrimination in USDA programs, which governs how USDA provides services to producers and growers."[40] But those requirements pertain to USDA behavior, not entities subject to the PSA.

That proposed 201.304(a) is outside the scope of the PSA is evidenced by the fact that Congress has seen fit in other agricultural statutes to address the issues involving socially disadvantaged farmers and ranchers. For example, in agricultural credit legislation authorizing the Secretary of Agriculture to set target participation rates for an agricultural credit program Congress defined "socially disadvantaged group" and "socially disadvantaged farmer or rancher."[41] Congress used the same term in directing the Secretary to assist farmers and ranchers

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[37] *Terry v. Tyson Farms, Inc.,* 604 F.3d 272, 277 (6th Cir. 2010) (quoting *Wheeler v. Pilgrim's Pride Corp*., 591 F.3d 355, 357 (5th Cir. 2009) (*en banc*)); see also*, e.g., Wheeler*, 591 F.3d at 358-360 (discussing precedent in other circuits).
[38] *Wheeler*, 591 F.3d at 361; *see* H.R. Rep. No. 85-1048, at 1 (1957) (Act's purpose was to "assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry").
[39] 87 *Fed. Reg*. 60015
[40] *Id*.
[41] 7 U.S.C. 2033(e).

involved in agricultural programs administered through a number of laws, including the Agricultural Act of 1949; the Consolidated Farm and Rural Development Act; the Agricultural Adjustment Act of 1938; the Soil Conservation Act; and the Domestic Allotment Assistance Act; but not the Packers and Stockyards Act.[42]

But Congress did not see fit to provide such guidance or direction to the Secretary when enacting the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill), which prompted a series of rulemakings, this one being the most recent. In fact, the 2008 Farm Bill referenced "socially disadvantaged group" or "socially disadvantaged farmer or rancher" 28 times, but never in the context of the Packers and Stockyards Act. That fact is particularly noteworthy because the 2008 Farm Bill included amendments to the PSA.

And at least one district court recently considered a tangentially related question to the one presented by the proposed rule. In *Sanders v. Koch Foods*, the district court recognized the federal circuit court holdings that section 192 is intended "to protect competition and, therefore, only those practices that will likely affect competition adversely violate the Act" citing Wheeler.[43] Addressing allegations made by the plaintiffs, the district court said

> the dearth of black poultry farmers in Mississippi, the history of racism in Mississippi and Koch's alleged discrimination against black farmers including Sanders. *Id.* Much of what he says is factual, and if Koch intentionally discriminated against Sanders to eliminate one of the few remaining black growers, then its conduct would be reprehensible. But § 192 has never been used as an anti-race discrimination statute; it addresses anti-competitive conduct.[44]

The court went on to say

> For example, the pleaded facts do not plausibly suggest that eliminating one of Koch's own producers would create a competitive edge over Koch's competition. And even if Koch was attempting to increase prices by reducing its own production—something that has not been sufficiently pleaded—that would not alone satisfy the competitive-harm requirement. *In re Pilgrim's Pride Corp.,* 728 F.3d

[42] 7 U.S.C. 2279
[43] *Sanders v. Koch Foods, Inc*., Civil Action No. 3:19-CV-721-DPJ-FKB, (D. Miss.) 2020. Found at https://scholar.google.com/scholar_case?case=5526009077234380887&q=Sanders+v.+Koch+Foods,+Inc&hl=en&as_sdt=1006
[44] *Id.*

> 457, 462 (5th Cir. 2013). Accordingly, the Court finds that the Trustee has not plausibly pleaded the PSA claim asserted in Count III.h[45]

Interestingly, in a footnote, the court also raised a question presented in the proposed rule, saying "… the harder question is whether §192 covers race claims. As the Trustee acknowledges, this case would be a first. Pls. Mem. [20] at 5 (noting that no other court has recognized this theory)."[46] The court went on to conclude that "Judicial restraint counsels against unnecessarily addressing a questionable liability theory" and dismissed the race claim under §192 but doing so without prejudice.

Given the numerous statutes and programs in which concepts consistent with the proposed market vulnerable individuals are embedded in other laws administered by the Department of Agriculture and the absence of same in the PSA, it is reasonable to conclude the agency's stated goal does not fit within the PSA. And, as discussed above, even if elements of 201.304 are properly within the PSA, some terms are so vague that it would be impossible for a regulated entity to know how to comply.

B. The Proposal Conflicts with the Act, which Prohibits Undue or Unreasonable Prejudice or Disadvantage.

By introducing a novel concept under the PSA, *i.e.*, a market vulnerable individual, AMS seems to introduce what can fairly be described as special protection for those persons, and cooperatives in which those persons are members. The infirmities of the market vulnerable individual definition already have been discussed but the proposal also fails because it tries to eliminate statutory requirements.

PSA Sections 202(a) and (b) provide 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:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
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> (b) Make or give any undue or unreasonable preference or advantage to any particular person

[45] *Id.*
[46] *Id.*

> or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; (Emphasis added)[47]

Thus, the Act allows, and the courts have agreed, packers to give preferences or advantages to a buyer or seller, which may also prejudice or disadvantage a person in some cases.[48] Thus, it is permissible for a packer, integrator, or swine contractor to refuse to deal with or not renew the contract of a covered producer but that refusal to deal or not renew, however, may not be done unreasonably. And the burden to show a refusal to deal or nonrenewal was unreasonable and harmful, or likely harmful, competition rests with the plaintiff.

The proposal, however, reads that statutory qualifying language out of the law, at least with respect to market vulnerable individuals and cooperatives. Specifically, proposed section 201.304(a) says

> A regulated entity may not prejudice, disadvantage, inhibit market access, or otherwise take adverse action against a covered producer with respect to any matter related to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry based upon the covered producer's status as a market vulnerable individual or as a cooperative. (Emphasis added)[49]

Conspicuous in their absence in that section are the words "undue or unreasonable," which qualify the terms prejudice and disadvantage in section 202(b). Interestingly, in the preamble AMS recognizes the importance of the terms "undue" and "unreasonable" as a component of section 202(b) to the law, saying "AMS also seeks comment on whether, alternatively, prohibitions on undue prejudice or disadvantage or unjust discrimination would best be addressed by identifying defined protected classes, and if so, which protected classes.[50] (Emphasis added.) However, in promulgating a regulation the agency or private plaintiffs would seek to enforce, even one that would afford special protections to certain classes of

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[47] 7 U.S.C. 192(a)-(b).

[48] In *Swift & Co. v. Wallace*, 105 F.2d 848 (7th Cir. 1939), the Seventh Circuit set aside an order in which the Secretary of Agriculture found that a meat packer gave an "unreasonable preference" by extending credit to institutional purchasers on terms that were more favorable than those extended to 95 percent of its customers. The "evidence establishe[d] beyond any question" that the packer extended the preferred credit terms to compete for the institutional purchasers' business, and other vendors granted similar preferences to institutional purchasers. *Id.* at 854.

[49] 87 *Fed. Reg*. 60054. Proposed section 201.304(a) would define "prejudice or disadvantage" for this subsection to include: (i) offering contract terms that are less favorable than those generally or ordinarily offered; (ii) refusing to deal; (iii) differential contract performance or enforcement; or (iv) terminating a contract or not renewing a contract.

[50] 87 *Fed. Reg*. 60015.

producers, AMS attempts to simply read "undue or unreasonable" out of the proposed definition. AMS may not do that.

Section 201.304(b) Suffers Similar Infirmities as Section 201.304(a) and Elements are Unnecessary.

Proposed section 201.304(b), which would prohibit certain actions the agency characterizes as "retaliation" in response to what AMS calls "protected activities," is simply a revised version of what was proposed in 2010. Specifically, the proposal prohibits a regulated entity, *e.g.*, a packer, from retaliating "or otherwise tak[ing] an adverse action" because of a covered producer's participation in certain activities.[51] Those protected activities are:

- communicating with a government agency regarding "any matter related to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry or petitions for redress of grievances before a court, legislature, or government agency;
- asserting rights granted under the PSA or its regulations or contract rights;
- forming or joining a producer or grower association or organization, or collectively process, prepare for market, handle, or market livestock or poultry;
- communicating or cooperating with a person to improve production or marketing of livestock or poultry;
- communicating or negotiating with a regulated entity to explore a business relationship; and
- supporting or participating as a witness in a PSA proceeding or a proceeding related to an alleged violation of law by a regulated entity.

The proposal then identifies "retaliation," which includes:

- terminating or not renewing contracts;
- engaging in adversely, differentially performing or enforcing a contract;
- refusing to deal with a covered producer; or
- interfering in farm real estate transactions or contracts with third parties.

[51] 87 *Fed. Reg.* 60054, proposed section 201.304(b)(1).

These concepts are not new. Nor are they properly within the confines of the PSA. In 2010, then GIPSA proposed section 201.201(a)(2); which said:

> A retaliatory action or omission by a packer, swine contractor, or live poultry dealer in response to the lawful expression, spoken or written, association, or action of a poultry grower, livestock producer or swine production contract grower; a retaliatory action includes but is not limited to coercion, intimidation, or disadvantage to any producer or grower in an execution, termination, extension or renewal of a contract involving livestock or poultry.[52]

Section 201.210 was one of the sections paused for several years by Congress, and for good reason. The courts have consistently rejected claims that the PSA makes a federal offense out of breaches of contract or retaliatory actions that have no adverse effect on competition. In *London v. Fieldale Farms* the Eleventh Circuit found no section 202 violation based on allegations that a poultry dealer committed a breach of contract and terminated a grower's contract in retaliation for the grower's testimony against the dealer in a separate lawsuit.[53] Likewise, the Sixth Circuit rejected claims that an alleged retaliatory act by a poultry dealer violates the PSA in the absence of harm, or likelihood of harm, to competition.[54] But here, the proposed rule, and the accompanying preamble discussion, seem to suggest that the harm to competition standard need not apply.[55]

Also troubling is the agency's statement in the preamble that the "retaliation" may be broader than the activities listed. Although the proposal lists several specific actions, with no qualifier, in the preamble the agency says it

> expects that prohibited retaliation <u>would include, but not be limited to</u> termination of contracts, non-renewal of contracts, refusing to deal with a covered producer, and interference in farm real estate transactions or contracts with third parties. The proposed rule is designed to prohibit all such actions with an adverse impact on a covered producer.[56]

And this statement conflicts with another regarding 201.304(b), also in the preamble.

> Accordingly, the proposed rule is designed to prohibit a variety of adverse actions. <u>However, the proposed regulations are also narrowly tailored,</u>

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[52] 75 *Fed. Reg*. 35351 (June 22, 2010).
[53] *London v. Fieldale Farms Corp*., 410 F.3d 1295, 1303 (11th Cir. 2005)
[54] *Terry v. Tyson Farms, Inc*., 604 F.3d at 279
[55] See discussion at 87 *Fed. Reg*. 60015.
[56] 87 *Fed. Reg*. 60026.

> requiring the adverse action to be linked to specific protected activities. **Adverse actions not tied to the activities proposed would not be regulated under this proposal**. (Emphasis added)[57]

These two statements are irreconcilable and, if the proposal was finalized as written, would leave regulated entities without useful guidance about what is permissible, what is not and leading to one conclusion -- the rule is arbitrary and capricious.

The Recordkeeping Provisions in Section 201.304(c) Require Clarification and are Burdensome.

The recordkeeping requirements in section 201.304(c) are vague and burdensome. The proposal says a regulated entity must retain "… all records relevant to its compliance with paragraphs (a) and (b) of this section for no less than 5 years from the date of record creation" and goes on to provide examples, including

> "… if any, policies and procedures, staff training materials, materials informing covered producers regarding reporting mechanisms and protections, compliance testing, board of directors' oversight materials, and the number and nature of complaints received relevant to this section." (Emphasis added)[58]

This language, particularly, the words "if any," creates uncertainty about a regulated entity's obligations. In the preamble the agency says

> Vital to such an effort will be AMS's ability to inspect relevant records, as they may exist, such as policies and procedures, staff training and producer information materials, data and testing, board of directors' oversight materials, and other relevant materials. (Emphasis added)[59]

The "as they may exist" phrase strongly suggests a regulated entity need not create the examples provided but must keep them if they are created. This interpretation should be included explicitly in the regulation to eliminate doubt about a regulated entity's obligation. In response to question 32 posed by AMS the answer is no. It is one thing for a company to create one or more records because it will enhance their operations. It is another, and inappropriate under the PSA, to require creating records simply for the sake of complying with a rule that is outside the scope of the PSA in the first place.

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[57] *Id*. at 60024.
[58] 87 *Fed. Reg*. 60054.
[59] *Id*. at 60029.

In addition to clarifying that regulated entities need not affirmatively create records the proposal should be amended to require be kept for two years. A five-year requirement is unnecessary and unduly burdensome.

Section 201.306 Exceeds the Scope of the PSA, which Was Not Intended to Federalize Every Contract Dispute or Regulate Transactions or Business Practices that Present No Likelihood of Harm to Competition.

Section 201.306 also is a reorganized and arguably more tailored version of the agency's 2010 proposal, then section 201.210(a)(1). Compare proposed 201.306, which prohibits a packer, swine contractor, or poultry dealer from engaging in these practices by employing a pretext, false or misleading statement, or omitting a material fact to make a statement not false or misleading:

- Making or modifying a contract;
- Performing or enforcing a contract;
- Terminating a contract or taking any other adverse action against a covered producer; and
- Providing false or misleading information to a covered producer or association of covered producers concerning a refusal to contract[60]

with 2010 proposed section 201.201(a)(1), which provided 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.[61]

Proposed 201.306 exceeds the agency's statutory authority by federalizing breach of contract claims and giving AMS authority to regulate minute details of transactions or business practices that present no likelihood of harm to competition. If Congress had intended to give the agency broad-ranging authority over every contract and practice regardless of effect on competition, it would have said so explicitly, because Congress "does not, one might say, hide elephants in mouse holes."[62] But Congress made no such statement in the PSA and it has had opportunities, including the 2008 Farm Bill that is the genesis of this

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[60] *Id*. at 60054.
[61] 75 *Fed. Reg*. 35351 (June 22, 2010).
[62] *Whitman*, 531 U.S. at 468; see also, *e.g., FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 160 (2000) (declining to find that Congress "intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion").

rulemaking and Farm Bills that followed. Moreover, 2010's proposed section 201.210 was one of the provisions Congress specifically defunded for several years and was subsequently abandoned by the agency in 2016 and 2020.

Not only were there opportunities, but Congress also rejected proposals to broaden the PSA to cover contractual matters traditionally regulated by state law. In addition to eliminating the competitive injury requirement, Senate Bill 622 and its counterpart, House Resolution 2135, provided that in determining whether a practice is "unfair, a court may consider whether" the practice "may violate standards established by Federal or State law (including common law and regulations)."[63] Congress's refusal to enact these bills lends further support to the conclusion that the PSA does not give the Secretary authority to regulate the equities of every business practice in the industry.

And the courts have followed. In *London*, the court explained that "[e]liminating the competitive impact requirement would ignore the long-time antitrust policies which formed the backbone of the PSA's creation. 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."[64] And the Tenth Circuit in *Been* said "Not to require a showing of competitive injury or likelihood thereof would make a federal case out of every breach of contract. Nothing in the PSA suggests that Congress intended this result."[65] In short, proposed section 201.306 is outside the scope of the PSA and if not, would require a plaintiff to show injury, or likelihood of injury, to competition.

[63] S. 622, § 202(c)(2); see also H.R. 2135, § 202(c)(2) (same).
[64] *London at* 1304.
[65] *Been*, 495 F.3d. at 1229.

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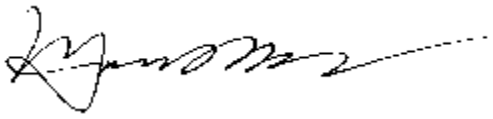
The Meat Institute appreciates the opportunity to submit these comments regarding the proposal and welcomes the opportunity to meet with the agency to discuss possible ramifications of any regulatory changes. If you have questions or would like to discuss the issues or points presented, please contact me.

Respectfully submitted,



Mark Dopp
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cc: Julie Anna Potts
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