



November 18, 2010

Ms. Tess Butler
GIPSA
United States Department of Agriculture
1400 Independence Avenue, S.W.
Room 1643-S
Washington, DC 20250-3604

RE: Farm Bill Comments of the National Cattlemen's Beef Association (NCBA) on Proposed Farm Bill Regulations, 75 Fed. Reg. 35338-35354 (June 22, 2010)¹

Dear Ms. Butler:

We are writing on behalf of the National Cattlemen's Beef Association and its members to present their comments on the proposed rules contained in Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act (the "Proposed Rules"). The Proposed Rules assert that they have been issued by the Grain Inspection, Packers and Stockyards Administration ("GIPSA") pursuant to the provisions of the Packers and Stockyards Act, 1921 (the "PSA"), 7 U.S.C. § 181 et seq., and Title XI of the Food, Conservation and Energy Act of 2008, P.L. 110-246 (the "Farm Bill").

The NCBA is a national association representing nearly 139,000 members and 45 affiliated state associations. NCBA members include cow-calf producers; seed stock operators; commercial feedyard operations; and beef producers/shareholders of processing facilities. NCBA's mission is to increase profit opportunities for cattle and beef producers by enhancing the business climate and building consumer demand. NCBA works to protect the business of beef, which is a vital part of the US economy. In 2009 the total value of the United States cattle and calf production was \$31.8 billion; the retail equivalent value of the beef industry was \$73 billion; and the total retail value of beef consumed was \$80.6 billion.²

The NCBA and its members believe the Proposed Rules, if adopted, "would drastically change the way that producers, packers, dealers and contractors raise, buy, and sell livestock and poultry"³ without apparent consideration of the effect of the Proposed Rules upon the industry or appreciation of the differences between the multiple species of livestock and the effect of such differences on the production and marketing of livestock. By combining concepts of marketing agreements with production contracts, placing huge regulatory burdens on the use of marketing agreements, redefining terms to eliminate business justification defenses to allegations of market place improprieties, and overtly attempting to rewrite the PSA and judicial precedent, GIPSA has

¹ Notice of Proposed Rulemaking, Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act ("NPRM").

² See USDA Economic Research <http://www.ers.usda.gov>.

³ The National Agricultural Law Center, www.nationalaglawcenter.org/gipsawworkshops (9/10/2010).

created a regulatory quagmire that will stifle beef trade, placing beef producers at a competitive disadvantage to other protein suppliers. In addition to being unwise policy, the Proposed Rules are arbitrary and capricious and exceed the authority granted GIPSA by Congress.

Specifically, the NCBA opposes the Proposed Rules for at least the following substantive reasons:

- A. GIPSA lacks authority to declare that no showing of injury to competition is necessary to establish a violation of sections 202(a) and (b) of the PSA.
- B. The Proposed Rules are arbitrary and capricious because they hinder, rather than advance, the purposes of the PSA, are not supported by an adequate record or economic analysis, and ignore GIPSA's own industry studies.
- C. The Proposed Rules violate the Data Quality Act and GIPSA's own implementing guidelines for the Act.

OVERVIEW OF THE BEEF INDUSTRY¹

The beef industry is the largest livestock and meat production industry in the United States. The industry comprises a large number of interrelated sectors that encompass numerous producers, stockers, feeders, packers, processors, distributors, retailers and exporters across a large number of geographic locations.

A. Beef Cattle Production

The majority of cattle operations are relatively small in scale. More than 97% of all beef cattle operations have less than 500 head, and approximately 79% have less than 100 head.² Despite the large proportion of small cattle operations, almost half of U.S. cattle come from large operations. Operations with 500 or more head maintain 42% of cattle inventories, and half of those cattle are held on operations with 1,000 or more head. Figure 1 below outlines the stages of growth for beef cattle.

¹ See generally GIPSA Livestock and Meat Marketing Study, RTI Project Number 0202230, Volume III, (January, 2007) (hereinafter the "GIPSA LMMS"). A copy of the GIPSA LMMS can be found on GIPSA's website at <http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=lmp&topic=ir-mms>.

² USDA, 2006 Agricultural Statistics Annual (2006) available at http://www.nass.usda.gov/Publications/Ag_Statistics/2006/index.asp.

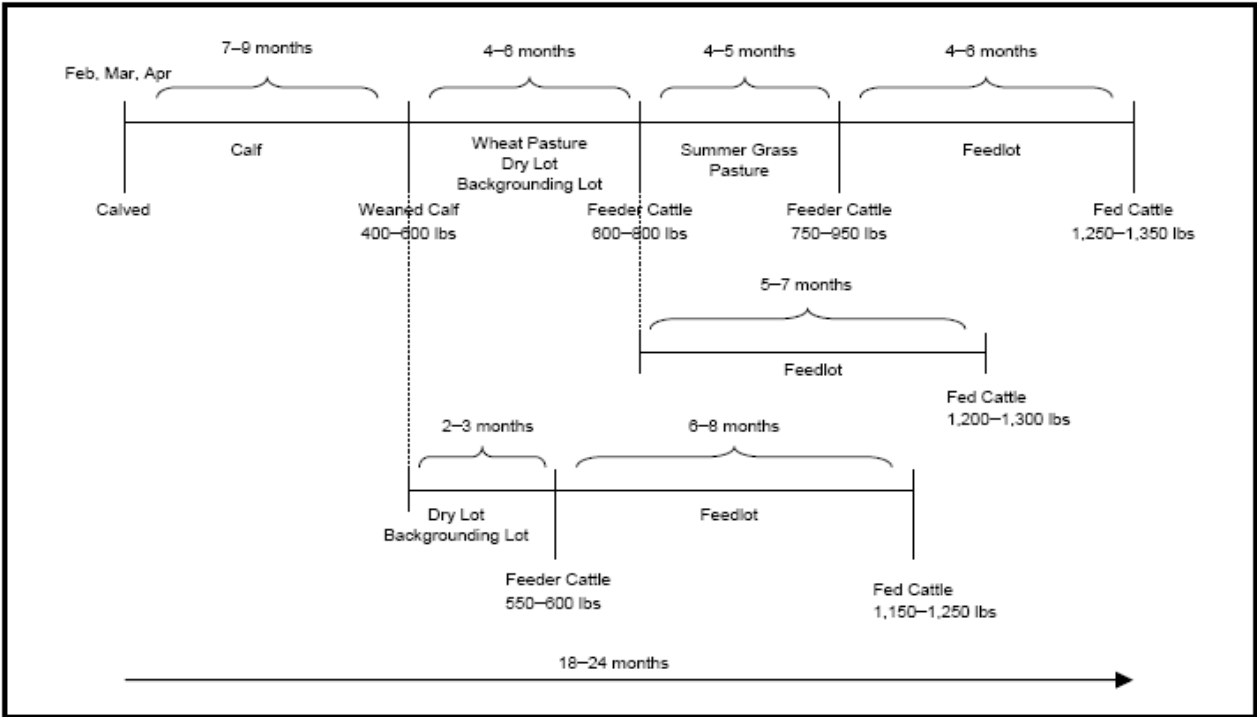


Figure 1³

1. Cow-calf, Stocker, and Backgrounding Operations.

In many regions of the country, beef calves are born primarily in the spring and graze pasture with the cow during the summer. Calves are weaned during the fall of their birth year and marketed at 400 to 600 pounds. These animals are referred to as calves or weaned calves in the marketing system. Some female animals (about 16% of total inventory) are held back or are not marketed and become breeding stock replacements. The method of raising cattle can vary depending on the available resources and the desired finished weight.

The marketed weaned calves are placed in preconditioning lots, grown in backgrounding operations, or placed on winter wheat pasture. Animals may or may not be confined in a lot with other animals. Preconditioning lots and backgrounding lots may involve confinement, but pasture systems do not. Calves are fed forage or hay and some nutritional and protein supplements in confined operations. Grazing largely involves open-range feeding and some supplements. Backgrounding operations use inexpensive feed to add weight to the animal. At this stage, the animal primarily grows bone frame and some muscle, as opposed to heavy muscling and fat of later feeding stages. Animals sold from these backgrounding enterprises are referred to as feeder cattle, yearlings, or stocker cattle. At that time, the feeder cattle enter a feedlot or are placed onto summer pasture.

Throughout the growing of calves, producers, not packers, own the livestock. Cow-calf and backgrounding or stocker operations are widely distributed across the US. The majority of

³ GIPSA LMMS, *supra* note 4, at E-1-5.

operations are concentrated in the Midwest and southern U.S. where climates are mild and forage plentiful. Cow-calf operations are also predominant and highly valued in the western US.

2. Cattle Feeding (feedyards or feedlots).

Animals that enter the feedlot are fed a high-energy ration for 4 to 6 months. The length of the feeding period depends on the cost of feeder cattle, the cost of feed, the price of fed animals, the premiums or discounts associated with meat quality, and the size of the animal entering the feedlot. Corn or corn byproducts are the main cattle feed, but sorghum and barley also are often used. The diet also contains some forage to support the ruminant animal stomach and some high-protein feed, such as soybean meal. Again, a large variety of roughage feeds is used, including grass hays, corn silage, green-chopped hays, sugar beet pulp, and citrus and other fruit pulps. Cattle-feeding operations tend to locate near inexpensive sources of forage feeds and energy feeds.

Cattle-feeding operations (also called feedyards) are concentrated in the southern Plains States, High Plains States, and the Midwest. The arid weather conditions of the Plains coupled with grain and forage supplies are ideal conditions for animal growth performance and management of animal waste. Cattle-feeding operations are specialized operations. These feedlots grow a portion of their feed supplies, such as corn silage and other forages, but also purchase grain. Many cattle-feeding operations own several feedyards. These feedyards are operated by on-site management, but central management may make decisions and capture economies in feed purchasing, feed manufacturing, animal procurement and marketing, financing, and risk management. Ownership of livestock within a feedyard varies. Feedyards typically feed livestock for customers who own the cattle. Other feeding arrangements exist wherein the feedyard and a customer may share an interest in the livestock. Feedyards often feed some cattle that they own completely. The types of arrangements depends upon markets, financing, and customer preference for assumption or shifting of risk.

3. Packers or Processing Facilities.

After feeding on a high-energy ration, fed cattle are marketed as fed or finished steers and heifers. These cattle are marketed to packers through the cash market or marketing agreements. The decisions as to how, when and on what terms the cattle are marketed are made by producers. Generally, title to the livestock does not pass to the packer until delivery and slaughter. Packers are businesses that specialize in the slaughter of live animals, production of beef carcasses, and processing and marketing of animal by-product. Most packers are combined with fabrication enterprises that process the carcass into cuts that are a portion of the carcass or specific muscles, but both parts of the enterprise are likely separate profit centers. Cuts are referred to as boxed beef and are vacuum sealed in plastic bags and packaged in cardboard boxes.

Carcasses are inspected for wholesomeness by the U.S. Department of Agriculture's (USDA's) Food Safety and Inspection Service (FSIS) or by a state government inspection system and may be quality graded by USDA's Agricultural Marketing Service (AMS). Federal inspection by FSIS is required for shipment of meat in interstate trade. Grading is not required but is usually performed.

Carcasses are quality graded and yield graded. Quality grade refers primarily to carcass maturity and amount of intramuscular fat. Mature carcasses cannot receive a high-quality grade. USDA Quality Grades are Prime, Choice, Select, and Standard. Cattle that will grade Standard are typically not graded and are referred to as “No-Roll.”⁴ Connective tissue in meat is more substantial in older animals, and meat flavor may be stronger and “gamier.” Intramuscular fat, the fat tissues that are within the muscle as opposed to fat layers between muscles, impart mild flavors and hold moisture in cooking. Thus, intramuscular fat is desirable and results in a higher quality grade. Yield grade is the amount of meat or salable meat in the carcass. USDA Yield Grades are numbered 1 through 5. Increases in the amount of fat cover between the hide and carcass and fat deposits close to edible organs result in a lower yield grade. Smaller muscles also result in lower yield grades.

Cattle slaughtering and processing operations are located close to cattle-feeding regions. Given advances in technology, it is more economical to move meat to people than to move cattle to people. Meatpacking operations that are not located close to cattle-feeding operations are located in regions with larger numbers of beef and dairy herd animals. Most cow slaughter plants are located in Wisconsin and Pennsylvania to be close to dairy production in the Northeast and Southeast.

B. Economic Realities of the Current Beef Industry⁵

The NCBA believes any regulatory activity affecting the beef industry must include a recognition and analysis of economic realities. At the request of NCBA Professor Stephen R. Koontz of Colorado State University prepared a summary of the current issues affecting the beef industry.

Cattle Inventory: The cattle inventory in the US grew strongly from the 1930s through the mid-1970s and peaked at over 130 million head. From 1980 to 2009 there has been a loss of approximately 20 million animals from inventory.

Importance of Marketing Agreements:⁶ The definition of marketing agreements, often referred to as Alternative Marketing Agreements (AMAs), may include many different types of transactions between a variety of parties. Marketing agreements between producers and processors are often referred to as “formula” contracts and account for 30-60% of cattle marketing. Marketing agreements have provided improved efficiency to producers and packers; have been used to improve beef demand, provide risk management, and have reduced transaction costs. Marketing agreements are the preferred method of coordination of cattle production and marketing so that higher value and value added beef products can be sold to consumers that value and demand these products. Reduced costs and improved demand results in higher beef prices, higher fed cattle prices, and higher feeder cattle and calf prices.⁷

⁴ The term “No-Roll” originated from an earlier practice in which the USDA Quality Grade was rolled on the fat along the length of the carcass using an ink wheel. Carcasses that were “No-Roll” did not receive a quality grade.

⁵ For a more detailed discussion of these economic realities see Stephen R. Koontz, *Economic Factors Impacting the Cattle Industry, the Size of the Beef Cow Herd, and Profitability and Sustainability of Cow-Calf Producers*, at (November 11, 2010) (an unpublished comment) (attached and incorporated as Appendix A).

⁶ For a more detailed discussion of marketing agreements and the Proposed Rules, see Section II.A. below.

⁷ See generally Koontz, *supra* note 8.

Beef Demand: Between 1980 and 1998, United States consumers' demand for beef declined by half. The industry responded by establishing the Beef Checkoff to research and promote beef. If this trend had continued, prices today would likely be 20 to 30% less.

Beef Production: Through improved genetics, adoption of new technologies, and improved animal nutrition, the industry has increased production per animal by 150 pounds. In 1980 beef production per animal was approximately 500 pounds. In 2010 that number is 650 pounds, which is a 30 % increase from 1980.

Trade: In the early 1980s, trade played a minor role in cattle and beef markets. Less than 2% of production was exported and imports amounted to less than 4% of consumption. During the 1980s and 1990s trade grew and became a focal point of the beef industry. By the late 1990s, net exports added \$1 billion to \$2.5 billion annually to the beef industry. This new money disappeared in 2004 with the discovery of bovine spongiform encephalopathy (BSE) in the US and the closing of world markets to US beef. Several important markets reopened immediately but trade of beef in 2010 has not yet returned to the levels established prior to 2004. The collapse of the beef export market in 2004 was devastating to beef producers since the lost opportunities for sales abroad represents wealth that can never be recovered.

Drought: In only two or three of the past ten years has there not been drought within areas of the US with significant beef cow numbers. Persistent drought is also a permanent economic loss to the cattle industry. During times of drought, beef cows are sold and producers often exit the industry not to return.

Price of Corn and Feed: With the exception of the 1995 drought year, the corn market prior to 2006 was predictably between \$1.50 and \$2.40 per bushel. Since 2006, prices have averaged well above \$3.00 per bushel. This is a price that affects all of animal agriculture and depresses prices paid to all cattle producers. Corn prices and the demand for corn-based ethanol that drove corn prices higher had a considerable impact on cattle feeding enterprises and on prices paid for calves and feeder cattle.

Oil Prices: Prior to 2000, \$40 per barrel was a problem for the national economy since such a high price would result in a slowing economy and a strong chance for a recession and decreased demand. In 2008-09 \$40 per barrel continued to present a problem because it meant that the economy was not growing and was in recession. This fundamental change in energy prices intensifies input costs and has a substantial impact on production agriculture, including cattle production.

Interest Rates and Credit: Finally, while interest rates are at historical lows and have been since the early 2000s, there remains a credit crisis and difficulty financing high risk enterprises such as production agriculture and the cattle industry.

Meatpacking Concentration: The four largest firms slaughter and fabricate into boxed beef slightly more than 80% of the industry totals. Economies of size play a key role in the profitability of processing facilities. The largest of the plants can slaughter and fabricate close to 2 million head per year and costs are approximately \$120 per head. The smallest of the

commercially viable plants can slaughter and fabricate approximately 1 million head per year and costs are approximately \$140 per head.⁸

Importance of Branded Products: “Branded” according to the United States Department of Agriculture refers to boxed beef cuts produced and marketed under a corporate trademark or boxed beef cuts produced and marketed under one of the USDA’s Meat Grading and Certification Branch, Certified Beef programs. Since 2002 premiums for branded beef have ranged from \$3/cwt to nearly \$25/cwt over non-branded beef. On a per head basis, the calculated premiums have varied from \$24 per head to \$190 per head. Premiums have averaged \$72 per head. In addition, it is estimated that nearly 41% of beef sold at retail is “branded”. Where producers and processors are able to delineate specific product differences, consumers have been willing to pay premiums and these premium dollars have flowed back to the cattle producer.⁹ These programs have been critical to increasing beef demand.

Current Prices: CattleFax summarizes the current and long term outlook for beef as follows:¹⁰

- The beef cow herd continues to shrink. The beef cow herd has contracted in 12 of the past 14 years and is at the smallest level since 1963. Beef production has been much more stable as productivity gains have offset much of the decline in inventory. Carcass weights are expected to continue to increase as the industry focuses on improved genetics, animal nutrition and animal health practices. These productivity gains have offset the need for 4.8 million head of beef cows since 1997. Per capita beef supplies are declining. From 1990-2007 beef consumption averaged between 65-68 pounds in the U.S., consumption will decline to 59.6 pounds in 2010 and further reductions are expected to occur in 2011-2012.
- Beef demand is growing again in 2010 following the significant losses from 2007 through 2009. Both U.S. and global demand reeled from the economic collapse and lack of credit availability. Retail beef demand dropped 9 percent from 2007 to the end of 2009.
- Exports are rising and imports are declining, which is reducing domestic net beef supplies. Currency valuation is having a major impact. In 2010, exports are up about 20 percent and will be at the highest level since the peak in 2003. Global beef supplies have declined for three consecutive years and global demand is on the rebound as world economies are once again growing. The lack of access to important global market destinations for U.S. beef has cost U.S. producers billions of dollars since 2004. Beef exports are expected to post year over year growth again in 2011.

⁸ See generally Koontz, *supra* note 8; Brian L. Buhr, *Evaluating the Economic Consequences of Proposed Rules for Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act Considering the Role of Vertical Coordination in Livestock Market Development* (November 5, 2010) (attached and incorporated as Appendix B).

⁹ See An Estimate of the Economic Impact of GIPSA’s Proposed Rules, Informa Economics, November 8, 2010, at 32, 24 (attached and incorporated as Appendix C) (the “Informa study”).

¹⁰ CattleFax, Long Term Outlook, Special Edition, July 23, 2010.

- During 2010, the cattle feeding segment will post solid profits. Improved domestic demand and growing beef exports along with a positive basis (relationship between cash and futures) have supported the turnaround. When demand grows there is more money in the system to share and support profit margins and the opposite is true when demand contracts.
- Average returns for cow/calf operations improved significantly during 2010 as calf prices averaged about \$12/cwt. higher. Profit margins were very narrow in 2008-2009. Calf prices and profit margins are expected to improve during the next 2-3 years which should lead to more stability in cow numbers. Stocker operators had another solid year of profits in 2010.
- Energy and feed costs are below the record high price levels experienced during 2008, but ending stocks are tight and prices may once again have to climb to record high levels to ration demand. The livestock markets have been punished by sharply higher feed and protein prices during the last four years. Ethanol has created new demand for corn. Feed and energy costs will remain at historically high price levels and the result will be higher food costs for consumers around the globe.

It is clear that, while current prices for cattle are high by historical measurements, there is a great deal of uncertainty facing the cattle industry due to the dramatic decline in demand for beef. Cattle producers and their trade organizations have invested significant time and resources to address this decline in demand. The Proposed Rules will likely create additional uncertainty for the industry and impact the very tools (marketing agreements) the industry has used to enhance consumer demand and return profits to cattle producers.

C. Beef, Pork, and Chicken Industry Differences.

The Proposed Rules treat all livestock as if it is produced and marketed in the same manner creating practical application problems for producers of cattle and swine. Treating all livestock the same ignores the species and animal differences that drive production and marketing of the various protein sources. NCBA submits that species differences should be acknowledged and considered in the formulation and application of regulations in this area.

Species differences have been cited repeatedly by economic researchers as a key factor in explanations of industry structure, operation, and market impact.¹¹ Structural characteristics differ for each of the three industries, beef, pork, and chicken. As a result, coordination among segments of each industry differs as well. There are basic physical and economic production characteristics of the three industries.

Biological Production Cycle: The time from conception to market for beef, pork, and broilers varies widely; from about 5 months for broilers, to 12 months for hogs, to 24 months for cattle. Time periods affect the incentives and disincentives and the ease or difficulty for increasing coordination. There is more incentive to vertically integrate in an industry which has a shorter

¹¹ See Clement E. Ward, *Beef, Pork, and Poultry Industry Coordination* (Oklahoma Cooperative Extension Service piece) (attached and incorporated as Appendix D). See also Buhr, *supra* note 11; Koontz, *supra* note 8.

biological process and in which genetic changes can be made more quickly. The shorter biological process increases the likelihood of accurately predicting expected profits, thus carrying less risk for the firms involved.

Genetic Base: The genetic base for broilers is relatively narrow. Only a few breeds or genetic lines are used and they ultimately provide the vast majority of final products. Both the short biological process and more uniform animals resulting from a relatively narrow genetic base are important for managing the production process and production costs. These factors also affect managing costs in processing and delivering consistent products to consumers. The genetic base for hogs has narrowed considerably in recent years to where just a few specialized firms provide the breeding stock for nearly all large hog operations. Genetic changes can be made more quickly than for cattle but not as quickly as poultry. The genetic base in the beef industry is quite wide. The biological process is a serious deterrent to quickly changing the genetic base, since one cow produces only one calf per year and it takes about 24 months to learn whether or not the breeding process resulted in beef with more or less desirable eating characteristics.

Industry Stages and Coordination: The broiler industry has two primary production stages, hatching and growing. The pork industry also has two primary production stages, farrowing and finishing. While the pork industry is similar to the broiler industry in that there are some production contracts, there are also marketing contracts. In both cases, the method of payment varies significantly from that of the broiler industry. Pork producers are paid in a variety of methods, from negotiated cash prices to risk-sharing contractual arrangements.

The beef industry is at a relative disadvantage compared with chicken or pork. The production process for cattle consists of three stages, cow-calf, stocker or growing, and feeding. This third production stage increases transaction or transfer costs for the industry. Typically, each production stage is located in a separate location, meaning calves move twice from the ranch where they were born to stocker operations and again to cattle feedlots. Each production stage has different resources and management needs and thus increases the difficulty of vertical coordination in the marketing channel.

Geographic Concentration in Production: The geographic concentration of broiler, pork, and beef production differs significantly by industry.

Broiler production is geographically concentrated in the Southeastern United States covering an area from eastern Oklahoma and Texas to southern Maryland. Geographic concentration has arisen from economies of scale in broiler production and harvesting, which leads to large operations. Reductions in transportation costs for chicks, feed, and market-ready broilers have resulted in concentrated facilities. Turkey production, a much smaller portion of the poultry industry, is more dispersed with pockets of concentrated production in several states including the Midwest and west.

Hog production for years was concentrated in Iowa and surrounding corn belt states where corn and soybean production was concentrated. While that area is still significant in that region, pork production has increased sharply in North Carolina and the mid-Atlantic states as well as in Oklahoma and southern plains states. The growth areas in hog production are those which are

more accepting of contract production systems, both culturally and legally, partly due to the presence of integrated poultry operations in some of those areas.

Cattle production, again, is distinctly different. A major reason is the significant land and forage base required for cattle production. Beef and dairy cattle, both of which contribute to the supply of beef, are geographically concentrated in different states. The largest cow-calf producing states are in the southern plains, far southeast, and mountain west states. Cattle stocker or growing operations are quite diverse and are concentrated in three southern plains states, Oklahoma, Texas, and Kansas. Cattle feeding has increased in geographic concentration and involves some of the same states where there are large numbers of cows and stocker operations, primarily in the plains states. However, because of the geographic dispersion combined with an added production stage, the beef industry incurs significant transactions costs moving animals from dispersed cow-calf operations to more concentrated stocker or growing areas and to still more concentrated cattle feeding areas.

Capital Requirements: Capital requirements in production vary widely among the three industries and the stages of production within each industry. The poultry industry is predominantly organized in a manner that limits the capital needs of the integrator, though capital requirements are still quite large for buildings and equipment. Still, capital requirements are shared between the integrator and grower. One form of coordination in the pork industry has followed the broiler model. Swine production contract growers, those engaged in farrowing and finishing, provide part of the capital requirements, especially for buildings and equipment. Thus, capital requirements are shared between the swine producer and the contract grower.

Capital requirements in the beef industry vary widely from cow-calf, stocker, to cattle feeder and from smaller to larger producers. One deterrent to outright integration is the immense capital required to integrate three production stages on a significant scale, especially when considering the land requirements for cowherd operations.

D. Coordinating Quantity, Quality, Consistency.¹²

Market structure and coordinating methods affect how an industry can influence quantity, quality, and consistency of products. Each is tied to production characteristics, especially the biology of the species and genetic base, and the opportunity or difficulty in developing value-added, branded products.

The broiler industry, being the most tightly coordinated, has better managed the quantity of output in a vertical channel by responding quickly to market signals to expand or contract, while simultaneously controlling quality and consistency. Narrow genetics, fewer production stages, capital-sharing and risk-sharing contracts, tight management specifications, the linkage between product differentiation and brand loyalty, and other related factors have all contributed to poultry's success.

Integrators tightly control broiler chicken production. Integrators operate processing plants, feed mills, and hatcheries. They contract with growers to grow broiler chickens to market weight.

¹² See generally Ward, *supra* note 14.

Integrators may also contract with or own primary breeder companies and may contract with other operators to produce broiler eggs for their hatcheries. Integrators provide to growers chicks, feed, veterinary services, and other inputs. Growers provide labor and must invest in specialized poultry housing and equipment. They may need to have hired labor and must pay for all utility costs. Decisions to produce represent a long-term commitment, which may be ten years or more.

Historically, broiler industry production contracts were often for a short duration, often varying from flock to flock. Thus they are renewed frequently. Longer contracts are typically for larger, newer grower operations. Many production contracts also have a distinctive payment arrangement. Growers are often paid on the basis of their performance relative to other growers who deliver broilers to the integrator within a given time period. Under such “tournament systems” growers receive a base fee and then are rewarded or penalized for the pounds of broiler meat per chicks placed. Higher production is rewarded and poorer production is penalized. Differences in relative performance are dependent on chick mortality and feed efficiency. Relative performance can have a very significant effect on the per pound payment, with highest payments being 50% more than the lowest payments. Finally, growers may be required to follow certain production practices. These in turn affect grower costs and the fees received from the integrator.

The pork industry followed the poultry model to a limited extent, but there are significant differences. The more delayed biological response to market signals results in larger swings in quantities produced and marketed. Regulations on contract farming in some states limit development of one form of a tightly coordinated industry, unlike the case with poultry which may enjoy exemptions from such regulation.¹³

Beef continues to face the biggest coordination challenges for several reasons. Quantity is dependent on the decisions of a large number of mostly smaller cow-calf producers geographically dispersed throughout the U.S. and the sum of their independent decisions affects the marketplace for two or three years. Such disperse, independent decision making makes it very difficult to closely influence the quantity supplied and to narrow the quality and increase the consistency of products produced.

Regardless of the industry, it is important to note the nature of the contractual arrangements between the parties. There are fundamental differences between a “marketing agreement” and a “production contract” which affect the nature of the relationships. The Proposed Rules appear to use “forward contract,” “marketing agreement,” “marketing arrangement” and “production contract” seemingly interchangeably.¹⁴ A marketing agreement is a sales contract. Under a marketing agreement the owner of the livestock sells the animals to a packer. A marketing agreement is governed by Article 2 of the Uniform Commercial Code which fills any gaps in the

¹³ See, e.g., Minnesota Statutes § 500.24, subd. 2(a) (excluding “the production of poultry or poultry products” from the definition of “farming”).

¹⁴ For example, proposed § 201.213(a) includes production contracts within its description of “marketing arrangement[s]” notwithstanding that a production contract does not involve the transfer of ownership or title to livestock. See also Section II.A.1 and 2 of these comments.

terms of the contract between the producer/seller and packer/buyer. Marketing agreements are typical in the cattle and swine industries.

In contrast, a production contract is not a sales contract and is not subject to the Uniform Commercial Code. A production contract does not result in a sale or transfer of title to livestock. Rather, the grower generally provides facilities, equipment and labor for the production of the livestock. The rights, duties and responsibilities of the parties to a production contract must be set forth in the contract. Production contracts are common in the swine and poultry industries.

NCBA COMMENTS ON THE PROPOSED RULES

The NCBA and its members have serious concerns relating to many of the Proposed Rules. In promulgating the Proposed Rules, GIPSA has ignored Congress, the long-standing legal precedent established by the federal courts, industry economics, the marketing desires of producers and the public interest.

As a part of the reconciliation of competing bills during consideration of the Farm Bill, Congress directed GIPSA to promulgate certain regulations under the PSA. Specifically, GIPSA was directed to “establish criteria that the Secretary will consider” in determining:

- (a) whether an undue or unreasonable preference or advantage has occurred in violation of [the] Act;
- (b) 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;
- (c) when a requirement of additional capital investments over the life of the poultry growing arrangement or a swine production contract constitutes a violation of [the] Act; and
- (d) 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.¹⁵

In addition, the Secretary was directed to promulgate regulations to “establish criteria that the Secretary will consider in determining whether the arbitration process provided in a contract provides a meaningful opportunity for the grower or producer to participate fully in the arbitration process.”¹⁶

¹⁵ Title XI of the Food, Conservation and Energy Act of 2008, P.L. 110-246, § 11006.

¹⁶ Title XI of the Food, Conservation and Energy Act of 2008, P.L. 110-246, § 11005.

The Proposed Rules purport in part to respond to the mandate of Congress in the Farm Bill. However, GIPSA has also proposed several additional regulations purportedly in reliance upon its general rulemaking authority under the PSA.

The NCBA has no comments on those provisions of the Proposed Rules which affect suspension of delivery of birds to poultry growers, capital investments required of poultry growers or swine production contract growers, or cure periods for the termination of poultry growing arrangements or swine production contracts. However, the NCBA has serious concerns with the agency's rewriting of the PSA and long-standing case law.

I. GIPSA LACKS AUTHORITY TO DECLARE THAT NO SHOWING OF INJURY TO COMPETITION IS NECESSARY TO ESTABLISH A VIOLATION OF SECTIONS 202(a) and (b) OF THE PSA.

A. PSA § 407 and the Farm Bill Contain Limited Authorizations to GIPSA to Issue Proposed Rules Under the PSA.

The PSA was enacted in 1921, to regulate the business of packers. As noted by the United States Supreme Court in upholding the constitutionality of the PSA:

The object to be secured by [the PSA] is the free and unburdened flow of live stock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still as livestock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market.

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. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil which it sought to provide against by the act, was exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of the live stock through the stockyards, all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers on the other. Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. Any unjust or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce.

Stafford v. Wallace, 258 U.S. 495, 514, 42 S.Ct.397, 401 (1922).

In keeping with the fundamental purpose of the PSA, § 202 of the PSA provides, in relevant part:

[I]t 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
- (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; . . .

7 U.S.C. § 192(a) and (b).

The PSA may be enforced by any person damaged by the conduct of a regulated party by means of a private cause of action.¹⁷ Section 308 of the PSA provides:

- (a) If any person subject to this act violates any of the provisions of this act, or of any order of the Secretary under this Act, relating to the purchase, sale, or handling of livestock, the purchase or sale of poultry, or relating to any poultry growing arrangement or swine production contract, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.
- (b) Such liability may be enforced either (1) by complaint to the Secretary as provided in Section 309, or (2) by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

7 U.S.C. § 209.

The PSA grants limited rulemaking authority to the Secretary of Agriculture and GIPSA. Section 407(a) of the PSA authorizes the Secretary of Agriculture to “make such rules, regulations and orders as may be necessary to *carry out the provisions of this Act*” 7 U.S.C. § 407(a) (emphasis added).

¹⁷ The fact that a violation of the PSA may give rise to a private cause of action distinguishes the PSA from the Federal Trade Commission Act, 15 U.S.C §§ 41-58, as amended, which does not provide for such a private cause of action.

B. The Federal Courts of Appeals Have Held Consistently and Correctly That Proof of Injury to Competition or the Likelihood Thereof is a Prerequisite to Finding a Violation of Sections 202(a) and (b).

For several decades, the federal courts of appeals have consistently and correctly ruled that Sections 202(a) and (b) are violated only if the practice in question has had, or is likely to have, an adverse effect on competition as understood in the antitrust context. Numerous circuits have so held: “All told, seven circuits—the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits—have now weighed in on this issue, with unanimous results.” *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 277-79 (6th Cir. 2010).¹⁸ The consistency with which the federal appellate courts have required a showing of likely injury to competition in cases under Sections 202(a) and (b) is undeniable and striking. It reflects, above all, the courts’ understanding of the intent of Congress in enacting and amending the PSA: that it should serve to protect competition in the livestock industry, not that the Secretary of Agriculture should be free to ban any practice he might think “unfair.”

By the Proposed Rules, GIPSA now attempts to repeal the PSA’s established competition standard and ignore the rulings of eight Courts of Appeals.¹⁹ The Proposed Rules expressly provide that proof of injury to competition is no longer an essential element of a claim under Sections 202(a) and (b). *See* proposed § 201.3(c), which provides in part: “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.”²⁰ The Proposed Rules then go on to carry out GIPSA’s new policy by declaring that several specified practices constitute violations of Section 202(a), without requiring proof that they have harmed, or are likely to harm, competition.²¹

In addition, the Proposed Rules ignore the direction provided by Congress in the Farm Bill. Those portions of the Proposed Rules addressing the PSA’s injury to competition requirement have not been issued pursuant to any Congressional directive contained in the Farm Bill. Rather, they have purportedly been issued under the general rulemaking authority of the agency. However, Section 407 of the PSA, which grants general rulemaking authority to the agency, authorizes GIPSA to issue rules to carry out the PSA, not to change its meaning.

¹⁸ *See Wheeler v. Pilgrim’s Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (en banc); *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, 126 S.Ct. 1619, 164 L.Ed.2d 333 (2006); *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir.2005), *cert. denied*, 546 U.S. 1034, 126 S.Ct. 752, 163 L.Ed.2d 574 (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); *De Jong Packing Co. v. United States Dep’t of Agric.*, 618 F.2d 1329, 1336-37 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061, 101 S.Ct. 783, 66 L.Ed.2d 603 (1980); and *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir.1976).

¹⁹ The Sixth Circuit Court of Appeals concurred in *Terry*.

²⁰ 75 Fed. Reg. at 35351.

²¹ Proposed § 201.210(a)(1)-(7); (a)(8) is discussed in Section I.C. below. The specified practices include certain breaches of contract; certain fraudulent representations; terminating a production contract for a violation of law that had not been reported immediately to the authorities; and failure to document justification for a premium paid. The rule does not assert that any of the practices harms competition, or proscribe them only if they are likely to do so.

The Proposed Rules plainly exceed GIPSA's statutory authority. They are therefore not entitled to any deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

1. The PSA incorporates long-standing antitrust policy.

The judicial rulings confirming the principle that a likelihood of injury to competition must be shown to prove a violation of Sections 202(a) and (b) have been issued in a wide variety of settings. Some courts have applied the principle in affirming the dismissal of a claim under Section 202 for want of an allegation or proof of injury to competition. *London v. Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir. 2005); *Terry v. Tyson Farms, Inc.*, 604 F.3d 272 (6th Cir. 2010). The principle was also applied in an answer to a certified question in an interlocutory appeal under 28 U.S.C. § 1292(b). *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (en banc). The injury to competition requirement has been applied in an appellate court's affirmance of the legal standard adopted by the district court (*Been v. O.K. Industries, Inc.*, 495 F.3d 1217 (10th Cir. 2007)) and of instructions given to a jury (*Philson v. Goldsboro Milling Co.*, 1998 U.S. App. LEXIS 24630 (4th Cir. Oct. 5, 1998) (not for publication)). Finally, in *Armour and Co. v. United States*, 402 F.2d 712 (7th Cir. 1968), the court of appeals applied the competitive injury requirement in setting aside an order of a Judicial Officer of the Department of Agriculture.²²

It is widely accepted that "long-time antitrust policies . . . formed the backbone of the PSA's creation." *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1304 (11th Cir. 2005). Congress felt a "need for specialized regulation [by the Department of Agriculture] of the many-tiered packing industry," but "the legislative history does not show that the Secretary was to have carte blanche in prohibiting whatever practices he pleased." *Armour*, 402 F.2d at 721. "[I]n 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." *Id.* at 722. Moreover, "the purpose behind the act 'was not to so upset the traditional principles of freedom of contract,' as to require an entirely level playing field for all." *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999) (citation omitted.)

2. Competitive injury must be shown even though the scope of the PSA may be somewhat broader than the antitrust statutes.

A number of courts have indicated that the PSA may be somewhat broader than the antitrust statutes from which it was derived. They have stressed, however, that this means only that a practice may be found to violate the PSA even if it would not be found to violate the Sherman Act owing to the lack of some collateral element required under that statute, such as the degree of intent, or the power to exclude competitors, or market power, or whether injury to competition had yet occurred; a showing of the fundamental element of likely injury to competition is nonetheless required in cases under Sections 202(a) and (b). For example, *Been v. O.K. Industries, Inc.*, 495 F.3d 1217 (10th Cir. 2007), involved a claim under Section 202(a) against an alleged monopsonist for its contracting practices. The court afforded the plaintiff the benefit

²² The USDA itself has challenged practices under Sections 202(a) and (b) on the basis of their alleged effects on competition. *See, e.g., De Jong Packing Co. v. USDA*, 618 F.2d 1329 (9th Cir. 1980) (conspiracy against auction stockyards); *IBP, Inc. v. Glickman*, 187 F.3d 974 (8th Cir. 1999) (packer's use of right of first refusal).

of a less demanding standard than under the Sherman Act, but held that Section 202(a) required proof of likely injury to competition:

. . . Congress intended the PSA to have a broader scope than the antitrust laws. The antitrust requirement that monopoly power be acquired willfully and include the power to exclude competitors does not apply in the context of the PSA. By holding that § 202(a) requires proof that a practice has injured or is likely to injure competition, we have not required a showing that the defendant engaged in the unfair practice with the intent to cause the injury or other unlawful effect. Instead, the Growers need only prove that specific practices have the *effect* of injuring competition or are likely to do so. . . .

Been, 495 F.3d at 1231 (emphasis in original).

Similarly, in *De Jong Packing Co. v. USDA*, 618 F.2d 1329, 1335-37 and n.7 (9th Cir. 1980), in which the government challenged under Section 202(a) an alleged packer conspiracy to change auction stockyards' terms of sale, the court held that a violation of Section 202 could be found even if "petitioners' lack of market power would preclude our finding that they had violated the Sherman Act" and even if competitive harm had not yet actually occurred but was reasonably likely. The court noted that "[w]hile § 202 of the Packers and Stockyards Act 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."

In *Armour and Co. v. United States*, 402 F.2d 712, 717 (7th Cir. 1968), the court held that the coupon promotion program at issue "does not violate Section 202(a), absent some predatory intent or some likelihood of competitive injury." The court noted that the scope of the PSA was sufficient to confer on the Secretary "broad powers under Section 202(a) with regard to trade practices which are 'unfair' in that they conflict with the basic policies of the various antitrust statutes, even though the practices may not actually violate those statutes." The court emphasized that the broader scope accorded the PSA was not intended to sever it from the policies of the antitrust laws but to further those policies and protect competition:

When viewed together, the antitrust laws, although not completely harmonious and frequently overlapping, express a basic public policy distinguishing between fair and vigorous competition on the one hand and predatory or controlled competition on the other. Normally the twin solvents for determining when the boundaries of fair competition have been exceeded are the existence of predatory intent and the likelihood of injury to competition The fact that a given provision [of a statute] does not expressly specify the degree of injury or the type of intent required, does not imply that these basic indicators of the line between free competition and predation are to be ignored. Surely words such as 'unfair' and 'unjustly' in Section 202(a) and '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 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).

Armour and Co., 402 F.2d at 717.

3. The competitive injury requirement is consistent with Congress' intent and the words Congress used.

The consistent rulings of the appellate courts requiring proof of likely injury to competition in cases under Sections 202(a) and (b) have been acquiesced in by Congress. As the court stated in *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 361-62 (5th Cir. 2009) (en banc) (footnote and citation omitted):

After 1921 [when the PSA was enacted] and up to 2002, Congress has amended [Section 202] seven times without making any changes that would affect the many court interpretations cited above. It is reasonable to conclude that Congress accepts the meaning of [§ 202(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.”

Most recently, in passing the 2008 Farm Bill, Congress rejected an invitation to adopt the very standard that GIPSA now proposes. During consideration of the Farm Bill, Senator Harkin introduced an amendment (the “Harkin Amendment”) which would have added “regardless of whether the practice or device causes a competitive injury” to section 202(a) of the PSA.²³ Under the Harkin Amendment, that section would have read:

[i]t 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 regardless of whether the practice or device causes a competitive injury.

The Harkin Amendment was rejected by conference committee and was not enacted.²⁴

The courts' rulings have been faithful to the words Congress used in Sections 202(a) and (b) and to their intended meaning. Concurring in *Wheeler*, Chief Judge Jones explained:

The words we are asked to interpret were terms of art, and their meanings were fixed by judicial definition and consistent usage Read in the proper context,

²³ H.R. 2419, Amendment No. 3667, 110th Cong. (2007).

²⁴ H.R. Rep. No. 110-627, at 469-477 (2008) (Conf. Rep.); Title XI of the Food, Conservation and Energy Act of 2008, P.L. 110-246, § 11006.

these provisions concern only those business dealings that have an actual or potential effect on competition.

* * *

“Unfair” was not an inkblot in 1921. Congress could not have expected, then, that its use of the term would occasion a free-ranging inquiry into the equities of business practices; rather, Congress intended, and made plain by its choice of language, that injury to competition would be an element of the inquiry.

* * *

In sum, the evidence of Congress’ intent, while not itself dispositive, confirms, and does not repudiate, the view that the broad words of § 202 were to be considered in light of their established meanings, as terms of art limited to competitive wrongs.

Wheeler, 591 F.3d at 364, 367, 370 (Jones, C.J., concurring).

The consistent rulings of the courts of appeals that a claim under Sections 202(a) and (b) requires a showing of a likely adverse effect on competition are correct. GIPSA’s attempt to nullify that requirement exceeds the authority given to it by Congress.

C. **“Competitive injury” as Redefined by GIPSA Does Not Satisfy the Injury to Competition Requirement of Sections 202(a) and (b).**

Although they purport to eliminate the injury to competition element of an offense altogether, the Proposed Rules also contain a provision that declares any act causing or threatening “competitive injury” as redefined by GIPSA to be an “unfair, unjustly discriminatory and [sic] deceptive practice or device” under Section 202. Proposed § 201.210(a)(8); § 201.2(t),(u). On their face, these provisions may seem consistent with Congress’ mandate. In fact, however, they do not satisfy the PSA’s injury-to-competition requirement, for two distinct reasons.

First, all claims under Sections 202(a) and (b) require a showing of injury to competition. The Proposed Rules do not incorporate such a requirement; indeed, they expressly repudiate it. See Proposed § 201.3(c). Specifically, the rule does not stipulate that all claims under Sections 202(a) and (b) require a showing of “competitive injury” even as that term is newly defined by GIPSA. Thus, under the Proposed Rules, no showing of an adverse effect on competition, however defined, would be required. GIPSA lacks the authority to promulgate such a rule.

Second, the term “competitive injury” as used in the Proposed Rules bears little resemblance to the antitrust law approach to competition that has been held to be embedded in the PSA. Therefore, even if a showing of “competitive injury” as newly defined by GIPSA was mandatory, it would not meet the statutory standard.

The Supreme Court has made it clear that antitrust law protects competition, not competitors. Thus, the “competitive injury” with which the Court (and antitrust law) is concerned is injury to the overall functioning of markets, not some form of disadvantage to particular market participants. Accordingly, in determining whether an alleged restraint of trade causes this kind of “competitive injury,” a court applying antitrust’s basic Rule of Reason typically analyzes three

issues. First, what are the relevant product and geographic markets in which the restraint's effect on competition should be assessed? Second, does the defendant have a high share of the relevant market, and would the restraint enhance that market power? Third, do the restraint's adverse effects on competition outweigh the offsetting competitive benefits of the restraint, such as facilitating risk management, creating operating efficiencies, enhancing or controlling quality, or increasing consumer choice? Only if the adverse effects predominate is the restraint unlawful. This assessment calls for a very careful and discerning inquiry because, without a proper balancing of competitive interests, antitrust law could come to stifle the innovation and efficiency that Congress intended it to promote. *See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007).

In contrast, GIPSA's redefinition of "competitive injury" does not appear to share the fundamental aim of antitrust law -- protection of competition, not particular competitors -- or to ask any of these three basic questions, let alone all of them. Rather, the rule seems to implement GIPSA's present view of what constitutes "unfair" treatment of particular market participants, not a concern with the effect of such treatment on the market as a whole.²⁵ Thus, it turns antitrust's basic objective on its head. GIPSA's new "competitive injury" scheme would not provide the accommodation of potential pro-competitive arrangements required under Sections 202(a) and (b) even if it were made mandatory for all claims under those sections.²⁶

D. GIPSA's Attempted Removal of the Injury-to-Competition Requirement From Sections 202(a) and (b) is Not Entitled to Chevron Deference.

In some circumstances, an agency's interpretation of a statute it administers is entitled to judicial deference under the principles of *Chevron*. Those circumstances do not exist here.

As an initial matter, where an agency's own statutory authority is at issue, as here, *Chevron* does not apply at all. *See United States v. Mead Corporation*, 533 U.S. 218, 226-27 ("administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority") (2001); *Am. Library Ass'n v. FCC*, 406 F.3d 689, 699 (D.C. Cir. 2005) ("crucial threshold consideration" in determining the applicability of *Chevron* deference is "whether the agency acted pursuant to delegated authority"); *AT&T v. FCC*, 323 F.3d 1081, 1086 (D.C. Cir. 2003) (*Chevron* deference is warranted "only when 'Congress has left a gap for the agency to fill pursuant to an express or implied 'delegation of authority to the agency'" (quoting *Railway Labor Executives Ass'n v. NMB*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc); *MPAA v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) ("The agency's interpretation of [a] statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue. . . . *Mead* reinforces *Chevron's* command that deference to an agency's interpretation of a statute is due only when the agency acts pursuant to 'delegated authority.'" (emphasis in original)). As shown above, Congress has not delegated to GIPSA the general authority to police

²⁵ *See* § 201.2(u), listing seven practices included within GIPSA's term "likelihood of competitive injury"; § 201.210, enumerating eight practices said to violate Section 202(a).

²⁶ The extent of GIPSA's departure from antitrust principles is discussed further in Section I.E below.

contracts in the absence of a showing of injury to competition and, accordingly, there is no delegation of authority here in the first place.

In addition, where an agency's interpretation of a statute raises constitutional concerns, *Chevron* does not apply. *E.g.*, *Edward J. DeBartolo Corp. v. Florida GulfCoast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574–75 (1988); *Hernandez Carrera v. Carlson*, 547 F.3d 1237, 1249 (10th Cir. 2008) (“It is well established that the canon of constitutional avoidance does constrain an agency’s discretion to interpret statutory ambiguities, even when *Chevron* deference would otherwise be due.”); *University of Great Falls v. NLRB*, 278 F.3d 1335, 1340–41 (D.C. Cir. 2002) (“the constitutional avoidance canon of statutory interpretation trumps *Chevron* deference”). Here, the agency’s construction stretches the limits of the Commerce Clause because, as the Fifth Circuit found in *Wheeler*, 591 F.3d at 357-358, 362, the Supreme Court’s decision upholding the Act in *Stafford* was predicated on the competitive purposes of the Act.

E. Even Under *Chevron*, GIPSA’s Proposed Rules Are Invalid Because Congress’ Intent is Clear And, in Any Event, the Agency’s Construction is Unreasonable in Numerous Respects.

1. Congress Clearly Intended to Require A Showing of Competitive Injury In Claims Under Section 202(a)

Even where Congress has delegated authority to an agency to act, the first step in judicial interpretation of such a delegation is to ask “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter.” *Chevron, supra*, 467 U.S. at 842. A court “must reject administrative constructions which are contrary to clear congressional intent.” *Id.* at 843 n. 9. In determining whether the intent of Congress is clear, the courts are not confined to “examining a particular statutory provision in isolation,” but should also consider the statute’s context and the likelihood that Congress would have entrusted a decision of such magnitude to the agency. *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

Under these standards, it is clear that Congress intended claims under Sections 202(a) and (b) to carry an obligation to show competitive injury, and GIPSA’s Proposed Rules to the contrary are thus contrary to the plain meaning of the statute. The unanimity of appellate court rulings on the point -- rulings that Congress has chosen not to disturb -- bespeaks the firmness with which Congress has spoken. “Because *Congress plainly intended* to prohibit ‘only those unfair, discriminatory or deceptive practices adversely affecting competition,’ . . . a contrary interpretation of Section 202(a) deserves no deference.” *London, supra*, 410 F.3d at 1304 (emphasis added; citation omitted). *See also Wheeler, supra*, 591 F.3d at 362 (*Chevron* deference is “unwarranted where Congress has delegated no authority to change the meaning the courts have given to the statutory terms”).

As Judge Jones explained in her concurring opinion in *Wheeler*,

The entirety of [Section 202(a)], as well as the specific terms ‘unfair’ and ‘deceptive are a slight variation of § 5 of the FTCA: ‘That unfair methods of competition in commerce are hereby declared unlawful.’

Not only is the language of the PSA nearly identical to that of its predecessors, but this choice of terms was deliberate. Their meaning had been firmly established in numerous court decisions that placed definite limits on the authority of, respectively, the Interstate Commerce Commission and Federal Trade Commission. . .

The words ‘unfair method of competition’ are not defined by the statute and their exact meaning is in dispute. *It is for the courts, not the commission, ultimately to determine as a matter of law what they include. . . .*

Because of their provenance, the words of § 202(a) and (b) of the Packers and Stockyards Act are susceptible to a plain meaning: To provide that a practice is ‘unfair,’ ‘unjustly discriminatory,’ or an ‘undue or unreasonable preference,’ a plaintiff must demonstrate an actual or potential adverse impact on competition.

Wheeler, 591 F. 3d at 367 (Jones, C.J., concurring) (citing *Federal Trade Commission v. Gratz*, 253 U.S. 421, 427-28, 40 S. Ct. 572, 575 (1920) (emphasis added)).²⁷

NCBA submits that it is the role of Congress to write statutes. It is the role of the judiciary to interpret those statutes. It is the role of the executive branch to implement the laws. The legislative and judicial history of the PSA affirm the requirement that a plaintiff demonstrate injury to competition. GIPSA cannot now eliminate that requirement by administrative action.

2. In any event, GIPSA’s proposed “competitive injury” scheme is unreasonable because it rejects the values and methodology of the national competition policy as reflected in the antitrust laws, and would create differing judicial and administrative enforcement schemes for claims under Section 202(a).
 - a. The Proposed Rules’ “competitive injury” scheme.

The Proposed Rules declare that “[a]ny act that causes competitive injury or creates a likelihood of competitive injury” is an “unfair, unjustly discriminatory, or deceptive practice or device” that is unlawful under Section 202(a). Proposed § 201.210(a)(8). “Competitive injury” is then defined as arising “when conduct distorts competition in the market channel or marketplace.” Proposed § 201.2(t). An act creates “a likelihood of competitive injury” when “there is a

²⁷ Contrary to the contention of the NPRM, *National Cable & Telecomm. Ass’n v. Brand X Internet Services*, 545 U.S. 967, 982-984 (2005), does *not* mean that issuance of new regulations would require “judicial reexamination of the issue.” 75 Fed. Reg at 35341. *Brand X* held that judicial precedent may not foreclose interpretation of an ambiguous statute because “*Chevron’s* premise is that it is for agencies, not courts, to fill statutory gaps.” 545 U.S. at 982. As demonstrated above, however, there has been no delegation of authority on this question to the agency in the first place, and the statutory language here is clear.

reasonable basis to believe that a competitive injury is likely to occur in the market channel or marketplace.” Proposed § 201.2(u).

The rule then specifies that the term “likelihood of competitive injury” “includes but is not limited to” seven particular situations,²⁸ those 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”;
- engages in conduct that “represents a misuse of market power to distort competition”;
- “wrongfully depresses prices paid to a producer or grower below market value”;
- “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 in the market channel or marketplace.”

b. The Proposed Rules’ “competition” policy.

Whatever is intended by this scheme, it bears little resemblance to the national competition policy embodied in the antitrust laws and (as the courts have held) constituting an integral element of Sections 202(a) and (b). The principle tool for assessing alleged unlawful restraints of trade under Section 1 of the Sherman Act is the Rule of Reason. It has three basic elements. First, the plaintiff has the burden of proving that the restraint “has had or is likely to have a substantially adverse effect on competition.” ABA Section of Antitrust Law, Antitrust Law Developments (hereinafter “ALD”), at 58 (6th ed. 2007). Second, if the plaintiff satisfies the first burden, the defendant is free “to produce evidence of the procompetitive virtues of the conduct.” Id. And third, the ultimate issue “is whether the restraint’s anticompetitive effect substantially outweighs the procompetitive effect for which the restraint is reasonably necessary.” Id.

GIPSA’s proposed “competition” regime largely dispenses with all three elements. First, it declares that seven specific situations, among others, are unlawful per se. The principal

²⁸ Proposed § 201.2(u); 75 Fed. Reg. at 35351. In fact many of the practices GIPSA condemns may actually benefit competition. *See* Jerry Hausman, Report of Professor Jerry Hausman (November 16, 2010), at 5-8 (attached and incorporated hereto as Appendix E).

characteristic that marks the Supreme Court's approach to per se rules in the antitrust field is extreme caution. This high degree of caution arises from the fact that "applying the per se rule to particular conduct risks sweeping potentially procompetitive activity within a general condemnation and may prohibit a defendant from justifying its conduct." ALD, supra, at 52. GIPSA's approach to per se rules seems untouched by the Supreme Court's spirit of caution or by the concerns that animate it. Rather, GIPSA seems to view per se rules as a convenient means of reducing the burden of proof that the agency and private litigants would otherwise confront in actions invoking Sections 202(a) and (b).²⁹

Although per se rules play a very limited and declining role under the antitrust laws,³⁰ GIPSA would put them center stage under the PSA. This approach is incompatible with the purpose of Congress in enacting the PSA.

The Proposed Rules also reflect GIPSA's abandonment of the second core element of the Rule of Reason: examination of the procompetitive virtues a practice may have. The Proposed Rules contain no requirement that the tribunal -- whether the Secretary or a district court -- must afford a defendant the opportunity to present, and must consider, the procompetitive virtues of a practice.³¹

The third departure from the Rule of Reason flows from the second. Having failed to insure consideration of a practice's procompetitive virtues, the rule also fails to stipulate that only if the adverse effects of a practice on competition clearly outweigh its procompetitive virtues may the practice be found to "distort competition." A careful balancing of favorable and unfavorable competitive effects is simply not part of the Proposed Rules' DNA.

²⁹ The basis on which GIPSA decided that the enumerated practices deserve per se condemnation (presumably because they always, or almost always, "distort competition") is not obvious. For example: Does wrongfully depressing prices (whatever that means) paid to "a producer" invariably "distort competition" in a relevant market as a whole, or in GIPSA's view is it enough that it may be unfavorable to a single producer? What about impairing a single grower's ability to compete (whatever that means)? What about depriving a single grower of its expected economic value from a single transaction -- is that invariably a distortion of competition in a market viewed as a whole? And if not, why is it given per se condemnation?

³⁰ In recent years, the Supreme Court has removed several vertical practices (those involving parties at different levels of the distribution chain, which is what we are dealing with here) from the per se unlawful category and has remitted them to the Rule of Reason. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (vertical territorial and customer restraints); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (maximum resale price maintenance); *Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877 (2007) (minimum resale price maintenance). The per se rule today has very limited reach beyond the core offenses of price fixing and market division between competitors.

³¹ Nor does any such inference arise from the rule's use of the term "distorts competition." The inadequacy of GIPSA's statement, in the NPRM, that it "would consider . . . whether there is a legitimate justification" for a pricing disparity (75 Fed. Reg. at 35343) is discussed below. It is very unlikely that Congress would approve of ignoring a practice's procompetitive effects. Congress has stipulated that, under Section 5 of the Federal Trade Commission Act, an act or practice may not be declared "unfair" by the FTC and therefore unlawful "unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n). Considering procompetitive effects should promote the public interest and would seem even more in order under the PSA, which authorizes private rights of action, than under the FTC Act, which may be enforced only by the FTC.

c. The Proposed Rules' protection of competitors, not competition.

This wholesale rejection by GIPSA of the analytic approach of the Rule of Reason is not accidental. It reflects a fundamental divergence -- indeed, opposition -- between the established national antitrust regime and GIPSA's proposal: the former seeks to protect competition, while the latter seems focused on protecting certain groups of competitors, irrespective of the effect of that protection on competition as a whole.³²

A buyer becomes dissatisfied with Supplier A and replaces it with Supplier B. No matter how costly the switch may be to Supplier A, Supplier A ordinarily has no antitrust claim; the substitution may have injured a competitor, but it did not injure competition.³³ Indeed, the substitution was presumably made to enhance competition.

By contrast, GIPSA seems bent on helping certain producers and growers at the expense not only of packers, but of competition in the livestock market itself. To take but one example: The Proposed Rules make it unlawful under Section 202 for a packer, "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." This provision is not comprehensible,³⁴ but its objective is evident: to regulate the terms of every covered transaction so as to protect only the interests of producers and growers, not those of packers. The Proposed Rules put GIPSA squarely in the position of picking and giving advantage to one segment of the meat industry over another. In short, to protect certain competitors, not competition -- the very antithesis of the national antitrust policy. This is also contrary to the purpose of the PSA: "[T]he PSA was not enacted to protect the independence of producers from market forces The PSA was enacted to ensure that the market worked, and markets are notoriously unromantic." *Pickett*, 420 F.3d at 1287.

d. The Proposed Rules' treatment of commercial discrimination.

Similarly, in enumerating the criteria the Secretary "may consider" in evaluating preferences with respect to contract terms, price provisions or information in order to decide whether they are "unreasonable" under Section 202(b), the Proposed Rules opt for a basic egalitarian standard: make the same terms and information available to all.³⁵ Missing from the enumerated criteria are the standards developed over 70 years under the Robinson-Patman Act, the principal federal antitrust law dealing with commercial discrimination.³⁶ Moreover, this same-deal-for-all

³² See Hausman, *supra* note 31, at 5.

³³ See, e.g., *NYNEX Corp. v. Discon, Inc.*, 528 U.S. 128, 137 (1998) ("freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage"); *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 804-05 (6th Cir. 1988) (terminated distributor had no Sherman Act Section 1 claim against manufacturer that "jilted" it to award exclusive distributorship to another).

³⁴ For example: What is meant by "impair . . . ability to receive"? "Receive" from whom? "Reasonable" to whom, and measured by what standard? "Expected" by whom, and when and how is that expectation to be evidenced? Does "full" value mean something different from "reasonable" value, and if so, what is the difference? Does GIPSA assert that impairment of a grower's receipt of proper value from a transaction invariably produces a likelihood of competitive injury as defined by GIPSA? If so, how and why? How, if at all, would the provision be applied to commercial arrangements that involve more than single purchase and sale transactions?

³⁵ Proposed § 201.211; 75 Fed. Reg. at 35352.

³⁶ Under Section 2(a) of the Robinson-Patman Act (15 U.S.C. § 13(a)), price discrimination in the sale of commodities may be unlawful only if it may substantially injure competition, that is, "where the effect of such

impulse is foreign to the objectives of the PSA. As the Court of Appeals for the Eighth Circuit stated in *IBP*, 187 F.3d at 977:

. . . [T]he purpose behind the Act “was not to so upset the traditional principles of freedom of contract,” as to require an entirely level playing field for all. *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995) (finding that the Act does not statutorily create an entitlement to have the same type of contract as that offered to other independent growers). . .

e. The prospect of two conflicting “competition” regimes under the PSA.

Finally, GIPSA’s refashioned “competitive injury” scheme threatens to generate confusion in the administration of the PSA. A party seeking to enforce Sections 202(a) and (b) would have at its disposal two conflicting “competition” regimes: GIPSA’s new one, and the traditional one the courts have held is embedded in the statute. GIPSA as well as private litigants could invoke either, or even both: GIPSA has not foresworn its right to use traditional antitrust concepts when it suits GIPSA’s purposes; it only denies having an obligation to use them in every case under Sections 202(a) and (b). Efforts by persons covered by the PSA to comply with their statutory duties would be correspondingly challenging. Sorting it all out would fall to the federal courts and, in administrative proceedings, to the Secretary. To have two conflicting “competition” regimes operating under the same statute, a statute that authorizes both agency and private enforcement action, is a recipe for confusion.

For all these reasons, the new “competition” regime for the PSA proposed by GIPSA not only exceeds GIPSA’s authority but is unreasonable. Accordingly, it does not enjoy *Chevron* deference.

II. THE PROPOSED RULES ARE ARBITRARY AND CAPRICIOUS.

A. The Proposed Rules Hinder, Rather than Advance, the Purposes of the PSA in Numerous Ways.

The purpose or purposes of the PSA have been described by the courts in various forms. According to the Ninth Circuit, the primary purpose of the PSA is “to assure fair competition and fair trade practices in livestock marketing. . .” *Spencer Livestock Com'n v. Dept. of Agriculture*, 841 F.2d 1451, 1455 (9th Cir. 1988). According to the Sixth Circuit, the purpose of the PSA is simply to protect competition. See *Terry*, 604 F.3d at 277, 279 (stating only those practices that

discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.” By statute and case law, several defenses to a charge of unlawful price discrimination are available: meeting competition, cost justification, changing conditions and functional availability. (See *ALD, supra* at 507-20.) The Proposed Rules do not indicate that the Secretary will or a court should consider any of these elements of Robinson-Patman price discrimination law in determining whether an undue preference under Section 202(b) has occurred (§ 201.211), although GIPSA appears to acknowledge in the NPRM to the Proposed Rules that there may be some unspecified “legitimate justification” for a pricing disparity (75 Fed. Reg. at 35343.)

will likely affect competition adversely violate the Act). According to the Eighth Circuit, one of the purposes of the PSA is to “protect the owner and shipper of live stock, and to free him from the fear that the channel through which his product passed, through discrimination, exploitation, overreaching, manipulation, or other unfair practices, might not return to him a fair return for his product.” *United States v. Donahue Bros.*, 59 F.2d 1019, 1023 (8th Cir. 1932). The Eighth Circuit also held that one of the purposes “behind § 202 of the PSA . . . was not to so upset the traditional principles of freedom of contract. The PSA was designed to promote efficiency, not frustrate it.” *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *I.B.P., Inc. v. Glickman*, 187 F.3d 974 (purpose behind the Act was not to so upset the traditional principles of freedom contract, as to require an entirely level playing field for all). With these concepts in mind, the NCBA submits that the Proposed Rules hinder, rather than advance, these purposes of the PSA.

1. The Proposed Rules Will Likely Limit Marketing Options Available to Producers.
 - a. The significance of marketing agreements.

While the Proposed Rules do not expressly preclude the use of marketing agreements in the cattle industry, it is clear that GIPSA has targeted such agreements. In explaining the Proposed Rules, GIPSA made this apparent:

In recent years, there has been an increased use of contracting in the marketing and production of livestock and poultry by entities under the jurisdiction of the P & S Act. This increased contracting coupled with the market concentration has significantly changed the industry and the rural economy as a whole, making proposed regulation necessary, especially in those situations in which packers, live poultry dealers or swine contractors use their market power to harm producers or impair private property rights of growers and producers.³⁷

However, such agreements are critical for cattle producers, packers, retailers and consumers. As recognized by the GIPSA Livestock and Meat Marketing Study (“GISPA LMMS”), the use of alternative marketing arrangements (“AMAs”),³⁸ including marketing agreements, is beneficial to the entire beef industry: “In 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.”³⁹ In fact, James E. Link, GIPSA’s Administrator at the time of the release of the GIPSA LMMS on February 28, 2007, concluded “use of AMAs in the livestock and meat industries provides benefits to not only meat packers, but also to livestock producers and meat

³⁷ 75 Fed. Reg. at 35338.

³⁸ Under the GIPSA Livestock and Meat Marketing Study, alternative marketing arrangements are defined as “[p]urchase or sales methods other than the cash or spot market. These include procurement or marketing contracts, production contracts, forward contracts, marketing agreements, packer-fed/owned arrangements, custom feeding/backgrounding, and custom slaughter.” See GIPSA LMMS, *supra* note 4, Glossary of Terms, at 3.

³⁹ GIPSA LMMS *supra* note 4, Volume III, at ES-3; see also Stephen R. Koontz, *What Does the RTI Study Say About Captive Supplies in the Cattle and Beef Industry?*, Department of Agricultural and Resource Economics – Colorado State University (July 9, 2010) (attached and incorporated as Appendix F).

consumers. Restricting their use would have negative economic consequences on most segments of the industry.”⁴⁰ The conclusions of the GIPSA LMMS for beef illustrate the desirability and scope of AMA use.⁴¹ Producers and packers use marketing agreements as a means to buy/sell higher quality cattle, improve supply management, manage risk, and obtain better prices.⁴²

Packers have indicated that should this regulation be finalized, they will totally discontinue, or greatly reduce their use of AMAs. The GIPSA LMMS outlines what the implications of a 25% or 100% decrease in use of AMAs will mean to producers and consumers. The study notes that “. . . even if the complete elimination of AMAs would eliminate market power that might currently exist, the net effect would be reduction in prices, quantities, and producer and consumer surplus in almost all sectors of the industry because of additional processing costs and reduction in beef quality.”⁴³

The chart below depicts the short-run (one year or the year that cost increases and demand changes are all incorporated into the markets) and long-run (cumulative impact over 10 years) impacts of removing AMAs from the beef industry. The long term impact of the loss of AMAs in the cattle and beef industry is projected to be nearly fifty billion dollars.

Net Impacts from Eliminating AMAs in the Cattle and Beef Industry⁴⁴

| Impact (Billion \$2003) | Short-Run | Long-Run |
|-------------------------|-----------|-----------------|
| Consumers | -\$1.9 | -\$10.5 (4.4%) |
| Retailers | -\$0.5 | -\$6.1 (1.9%) |
| Wholesalers | -\$0.8 | -\$7.0 (5.0%) |
| Fed Cattle Producer | -\$2.8 | -\$15.3 (6.8%) |
| Feeder Cattle Producer | -\$5.4 | -\$21.2 (13.8%) |
| Total of All Producers | -\$9.5 | -\$49.5 (5.9%) |

The GIPSA LMMS found that prohibition of alternative marketing agreements for beef will result in a net loss to the beef industry. The improvement in efficiency and demand owing to

⁴⁰ GIPSA’s press release of February 16, 2007, noted that the GIPSA LMMS study found that the use of AMAs “increased the economic efficiency” of cattle, hog and lamb markets, and that these “economic benefits” are distributed to consumers, as well as to producers and packers. A copy of GIPSA’s press release of February 16, 2007 can be found at http://www.gipsa.usda.gov/GIPSA/newsReleases?area=home&subject=mc&topic=nr&type=detail&item=nr_20070216_lmms_2207.html.

⁴¹ GIPSA simply ignored this study in promulgating the Proposed Rules. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(agency action is arbitrary and capricious if the agency “offered an explanation for its decision that runs counter to the evidence before the agency.”). According the Supreme Court in *State Farm*, a rule is arbitrary if the agency:

relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. (*Id.*)

⁴² See Informa Study, *supra* note 8, at 32.

⁴³ GIPSA LMMS, *supra* note 4, Volume III, atES-8. See also Hausman, *supra* note 31, at 9-11; Koontz, *supra* note 42.

⁴⁴ GIPSA LMMS, *supra* note 4, Volume III, at ES-12.

improved quality is substantially larger than losses assumed to be associated with market power. The short-run losses to all producers are estimated at \$9.5 billion. The short-run losses to consumer are \$1.9 billion. The long-run losses to all producers are \$49.5 billion. The long-run losses to consumers are estimated to be \$10.5 billion.

A recent report prepared by Informa Economics illustrates losses to the beef industry resulting from burdens of the Proposed Rules. The report outlines the long-standing economic factors affecting the beef industry and notes the industry has spent the past 20 years developing a broad range of quality-based programs that provide consumers the products they desire and return premiums to producers.⁴⁵ These value-based programs are centered on marketing agreements. Informa projects that the Proposed Rule will result in the following losses: one time direct costs at \$38.7 million; ongoing direct costs at \$61.5 million; cost increases due to efficiency loss at \$401.9 million; and revenue lost due to quality/demand impacts at \$377.7 million. Informa estimates losses to the beef supply chain at \$879.9 million. The Proposed Rules' impact on marketing agreements is reflected in the projected inefficiency and quality/demand losses outlined by Informa.

In addition, Congress recently rejected attempts to amend the PSA to restrict the use of marketing agreements. Bills were introduced in the last Congress to ban marketing agreements and forward contracts unless they contained a "firm base price that may be equated to a fixed dollar amount on the day on which the forward contract is entered into." S. 1017, 110th Cong., 1st Sess. § 2(a)(6)(A); *see also* H.R. 2213, 110th Cong., 1st Sess. § 2(a)(6)(A) (2007). The bill also sought to prohibit forward contracts that were (1) "not offered for bid in an open, public manner under which— '(i) buyers and sellers have the opportunity to participate in the bid'; '(ii) more than 1 blind bid is solicited;' and '(iii) buyers and sellers may witness bids that are made and accepted' or that are based on a formula price. S. 1017 at § 2(a)(6)(B)-(C); H.R. 2213 at § 2(a)(6)(B)-(C). The bill also would have limited the number of livestock covered by such an agreement to 40 cattle or 30 swine. S. 1017 at § 2(a)(6)(D); H.R. 2213 at § 2(a)(6)(D). Neither bill passed, indicating that Congress did not intend the PSA to be used as a mechanism that restrains agreements that are beneficial to competition.

b. The Proposed Rules and marketing agreements.

By discouraging the use of marketing agreements by packers, the Proposed Rules ignore the industry reality that these marketing agreements have been initiated by producers as a means to capture returns on investments in innovation.⁴⁶ Several provisions of the Proposed Rules, when implemented together, will discourage the use of marketing agreements, specifically, by packers.

Proposed § 201.94(b) provides as follows:

A packer, swine contractor or live poultry dealer must maintain written records that provide justification for differential pricing or *any* deviation from standard

⁴⁵ See Informa Study, *supra* note 8, at 33 (outlining premiums paid to producers, which average \$72.00 per head); Koontz, *supra* note 42.

⁴⁶ *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1275-76 (11th Cir. 2005) (discussion of marketing agreements).

price or contract terms offered to poultry growers, swine production contract growers, or livestock producers. . . (Emphasis added.)

Under this section, packers will be required to keep and maintain written documentation to explain any differences in price, no matter how small, for livestock purchased from different producers.

Proposed § 201.210(a)(5) would render “[p]aying 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” an unfair, unjustly discriminatory or deceptive practice or device under § 202(a) of the PSA. Oral agreements and handshake deals have been the hallmarks of cattle trading since the 19th century. However, under this provision, any price differences for livestock must be justified by a cost or revenue explanation.⁴⁷ Prior course of dealing, reliability, volume, negotiating skill, food safety considerations, or other intangible factors are not an appropriate justification under this rule.⁴⁸

Proposed § 201.211(b) would require any such price premiums to be offered in a “manner that does not discriminate against a producer or group of producers that can meet the same standards.” This section will require that packers make available all premiums to all producers. Any requirement that a packer must deal with groups of producers in the same manner in which it deals with a single producer will result in additional costs for the packer. Such a requirement will, by definition, require multiple negotiations and more complex scheduling, thereby eliminating market efficiencies.

c. Immediate impacts of the Proposed Rules upon packers and beef producers.

The Proposed Rules are thus very clear: any deviation in prices or terms must be “justified” by a packer on a cost or revenue basis.⁴⁹ Failure to so justify any such deviation will be deemed to be an “undue or unreasonable preference” by GIPSA and may result in liability under the PSA to either GIPSA or a disgruntled producer. The Proposed Rules will likely cause packers to withdraw marketing agreements from the beef industry.⁵⁰ As stated earlier, any reduction in marketing agreements will have a negative impact on the industry.

As an initial matter, the Proposed Rules will require additional documentation to be kept by all packers to justify any price differentials or variance in contract terms. GIPSA has intimated a “legitimate business reason” *may* constitute the “justification” required by Proposed §§ 201.94 and 201.210(a)(5):

⁴⁷ No other industry that NCBA is aware of is required to produce this type of justification for every transaction.

⁴⁸ The net effect for cattle producers is to extinguish their accumulated goodwill.

⁴⁹ In fact, under the Proposed Rules a livestock purchaser which buys livestock at a public auction would be required to maintain written documentation justifying the difference in prices paid for two lots of livestock even if the price differential was based only on the buyer’s willingness to outbid the competing bidders.

⁵⁰ See Hausman, *supra* note 31, at 13.

If a packer, swine contractor, or live poultry dealer believes it can justify disparate treatment of poultry growers, swine production contract growers or livestock producers, it must have a legitimate business reason for that differential treatment. GIPSA is proposing to add a new paragraph (b) to Sec. 201.94 that would require packers, swine contractors or live poultry dealers to maintain records that justify their treatment of poultry growers, swine production contract growers, or livestock producers. This 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. For example, a packer's participation in a branded program for a particular type of beef that returns a premium to the packer could be used to justify a higher price paid to producers that sell the type of cattle that meets the specifications of the branded program. In general, the data needed to justify a different treatment would identify those pecuniary costs and benefits associated with the treatment that demonstrate its decreased costs or increased revenues from a standard business practice. Therefore, GIPSA would consider the particular circumstances of any pricing disparity in determining whether a violation of the P&S Act occurred, including whether there is a legitimate justification for the disparity.⁵¹

Unfortunately, the Proposed Rules do not reflect the agency's more benign description of the documentation necessary to sustain differences in pricing or contract terms set forth in the NPRM. And such declarations are not binding upon any private plaintiff which asserts a cause of action based upon perceived discrimination. Accordingly, packers will be required to attempt to comply with the Proposed Rules in the face of an absolute declaration from the agency that any such differentials are presumptively invalid under the PSA. It is reasonable to assume their responses will be very conservative lest they be sued for providing an "undue or unreasonable preference".⁵²

The Proposed Rules are unworkable for several other reasons. Proposed § 201.94 requires packers to maintain written records that provide justification for differential pricing or any "deviation from standard price or contract terms...offered to livestock producers." This provision raises several practical questions that need clarification for the industry. What will be "justifications" for a price differential? Will any of the following factors be justifications:⁵³

⁵¹ 75 Fed. Reg. at 35344.

⁵² Indeed, the only safe harbors available to a packer under the Proposed Rules are to either (i) pay the same price for all cattle since it does not appear such a payment program would violate the rules; (ii) purchase all cattle on a "grade and yield" basis with nominal premiums which may be easily justified; or (iii) forward contract for all cattle using a formula price based upon a recognized commodity market. In any case, it is likely prices for cattle will be reduced for all producers upon implementation of the Proposed Rules. *See also* Informa Study, note 8, at 31-32 (outlining packer reaction to the proposed rules).

⁵³ In Section 11006 of the Farm Bill, GIPSA was directed to "establish criteria that the Secretary *will consider*" in determining: (a) whether an undue or unreasonable preference or advantage has occurred in violation of [the] Act . . ." Congress was very clear: GIPSA was instructed to provide guidance to the livestock industry in order that packers and swine contractors be provided a meaningful opportunity to conform to the Proposed Rules. GIPSA has failed to comply with the Congressional directive. Rather, it has chosen to merely suggest what factors may be relevant to assessing whether an undue or unreasonable preference has occurred. It is incumbent upon GIPSA to

- volume;
- transportation costs;
- quality;
- age and or source verification;
- verification of use or nonuse of animal drugs;
- animal welfare processes;
- prior course of dealing among the parties;
- supply of livestock in the market;
- consumer demand;
- meat sales of the packer;
- packer existing supplies and sales; or
- national and/or international economic factors that may influence beef demand?

What is a “standard price”? What economic or regional factors will be used to determine a standard price? What is the time frame for a standard price? Who determines what the “standard price” is? How will the “standard price” be reported? On the day that this regulation becomes effective, what will be the “standard price”? When and under what conditions will the “standard” price change? Could a packer purchasing beef in the cash market use “compliance with this regulation” as justification for paying a price different from the cash market? Could a packer purchasing beef through a marketing agreement offer a price different from the contract price but equal to the “standard price” and use this regulation as a justification? What economic or legal analysis can the agency offer producers to assure that packers will not use this regulation as a basis to depress prices to a “standard” unknown price? Has the agency considered the immediate market impact the implementation of this regulation will have on the marketplace? If so, NCBA requests a copy of such analysis.

Given the virtually nonexistent cash market for poultry growers,⁵⁴ it seems reasonable to conclude that the regulation will affect pork and beef markets more than poultry. What action will the agency take to assure this regulation will not have an immediate effect on cash market transactions and benefit one protein source over another? Please advise NCBA on how quickly the agency will act to preclude adverse impacts of this regulation to the beef and swine markets.

address each of these factors with specificity in order to provide any semblance of notice to the industry and to comply with the directions from Congress.

⁵⁴ A fact recognized by GIPSA in its 2008 and 2009 Annual Reports. See GIPSA, 2009 Annual Report, Packers & Stockyards Program, at 43 (March 2010); and GIPSA, 2008 Annual Report, Packers & Stockyards Program, at 42 (March 2009) available at <http://www.gipsa.usda.gov/GIPSA/webapp?area=newsroom&subject=landing&topic=cc-ar>.

If the price paid to a producer is different from the contract price, is this a contract violation? If so, under what authority does GIPSA assert jurisdiction over contract violations between beef producers and beef packers?

How quickly after completion of a sale of beef must the packer provide the agency with its price justification? What steps will the agency use to assure that the information provided regarding justification of pricing will not be used by a competitor to undercut a particular market? Who will have access to the justification documents filed by packers? What economic factors will be used to determine whether a particular transaction was justified? If the parties are willing buyers and willing sellers and the parties agree to a price that deviates from a standard price, will the transaction be automatically justified?

This section illustrates fundamental misconceptions behind the Proposed Rules: that there is perfect competition in livestock markets with “standard terms and conditions” and standard livestock. There are no “standard” cattle. Rather, cattle are unique. As a result, concepts of “standard price or contract terms” have no legal or economic underpinnings in the beef industry. This simply invites second-guessing by GIPSA and the courts.

These provisions pose practical problems for live auction markets where recording such data is not possible in the flow of the sale. The regulation ignores transaction costs which are reduced in high volume transactions. The regulations require written documentation for *de minimis* price differentials or “any deviation” from standard price or contract terms, which seems overly burdensome. It is impossible to know what reasons will, in GIPSA’s mind, “justify” a price variation. The regulation will create substantial record-keeping burdens for the industry and is projected to create one-time direct costs of \$68.7 million and ongoing direct costs of \$73.8 million.⁵⁵ Finally, a very real practical problem is that the justification requirement will force packers to return to “grade and yield” pricing for beef and refrain from entering into AMAs or offering premiums to avoid the risks of litigation. By stifling marketing agreements and burdening the markets with “justification” requirements, this provision destroys marketing opportunities for producers and guts the progress the beef industry has made in growing beef demand.⁵⁶

In addition to recordkeeping expenses, the Proposed Rules relating to justifying price differences will lead to increased litigation risks for packers. Such litigation may, under the PSA, be brought by any person who claims to be damaged on account of any conduct by a packer. This litigation risk is only magnified by the absolute terms of the Proposed Rules. No threshold amounts are set forth in the rule. No exception for cash market purchases is set forth in the Proposed Rule. In fact, no exceptions of any type are set forth in the Proposed Rule.

The magnitude of this litigation risk can best be illustrated by *Pickett v. Tyson Fresh Meats, Inc.*, 315 F.Supp.2d 1172 (M.D. Ala. 2004), rev’d, 420 F.3d 1272 (11th Cir. 2005). There, the plaintiffs challenged the livestock procurement practices of the defendant packer through the use of alternative marketing arrangements. At trial, the plaintiffs’ expert testified that the damages

⁵⁵ Informa study, *supra* note 8, at 26-27, 53.

⁵⁶ Informa study, *supra* note 8, at 32-36.

sustained by the cattle producers were in excess of \$2.1 billion.⁵⁷ The jury disagreed with the plaintiffs' expert, but nonetheless returned a verdict of \$1,281,690,000. While the district court ultimately refused to enter a judgment against the defendant in the amount of the jury verdict, the case nonetheless establishes a benchmark for potential liability under Proposed § 201.94(b).

In considering the effect of the Proposed Rules on the cattle industry, it is instructive to consider the experience in Missouri.⁵⁸ In 1999, the Missouri legislature passed Mo. Stat. § 277.201, which prohibited packers from discriminating among livestock sellers based upon price, unless such price differentials were based upon quality, carcass merit premiums or discounts, transportation costs or agreements for specific delivery times. The law also provided for treble damages, costs and attorneys' fees. The implementation of the statute resulted in an immediate and negative impact on the purchase of livestock in Missouri. In fact, the negative impact was so dramatic that the legislature was forced to make significant revisions to the statute in a special session.

The Proposed Rules are likely to reduce the options of producers to market their livestock in a manner which will provide economic incentives for increased efficiency, innovation, responsiveness, course of dealing, or other non-economic considerations. It can be anticipated that packers will do their best to avoid possible claims such as those asserted in *Pickett*. The result will be lower premiums, lower prices and decreased revenues for all cattle producers.

2. Numerous Provisions of the Proposed Rules are Unreasonable Because of Their Likely Adverse Effect on Market Operations.

In addition to striking at contractual relationships between producers and packers, the Proposed Rules would disrupt the functioning of existing markets in ways that undermine, instead of advance, the purposes of the Act.

Section 201.212(c) of the Proposed Rules provides as follows:

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.

The justification for the Proposed Rules is difficult to discern, particularly since it will apply to the beef industry without any apparent reason. By way of explanation, GIPSA offers the following:

Proposed new Sec. 201.212(c) would prohibit packers from purchasing, acquiring, or receiving swine or livestock from another packer or packer-affiliated companies. Packer-to-packer acquisitions have historically been restricted to purchases from other packers of "off" animals that did not fit with the other

⁵⁷ 315 F. Supp. 2d 1172, 1178.

⁵⁸ Ron Plain and Bruce Bullock, *The Missouri Livestock Marketing Law*, Missouri Farm Financial Outlook 2002, Agricultural Economics Department, University of Missouri, November 2001.

packers' specifications but were procured in a larger lot of animals. The practice was primarily restricted to hog packers. Since 2006, GIPSA has observed that the practice has been expanded considerably and GIPSA believes it to be contributing to significant price distortions. *In one instance*, the price distortion was almost 3 percent of the reported base price for hogs. These price distortions in the swine negotiated cash market have larger price effects than just the cash market as many contracts including formula pricing often refer to the reported base price. . . .⁵⁹

As a result of the vagueness of this provision, it is difficult to assess its precise impact upon the beef market. However, since the agency did not define “packer’s affiliated companies,” it is quite possible this section can be read, by either GIPSA or any private individual who believes it has been damaged as a result of a breach of such provision, to attack any sales by a member, shareholder, or employee of a packer to any other packer. In addition, because the provision contains no threshold, any sale of any livestock to another packer would be proscribed. Finally, it appears as though the agency intended “packer’s affiliated companies” to include entities other than another packer’s parent company, wholly owned subsidiaries of the packer, or its parent company. Less clear is which other entities are intended to be covered. As a result, adoption of this provision into the final rules without clarification or further definition could result in serious disruptions to the cattle market.

Another section of the Proposed Rules that will have a chilling effect on existing market operations is Section 201.213. This section requires packers and swine contractors “purchasing livestock under a marketing arrangement” to submit a “sample copy of each unique type of contract or agreement to GIPSA.”⁶⁰ It should be noted, initially, that GIPSA lacks the authority to require the filing of contracts between packers and cattle producers. The NPRM to the Proposed Rules notes that Section 222 of the PSA “requires that certain contracts . . . be available to the Secretary and the public (confidential information).” 75 Fed. Reg. at 35340. However, Section 222 provides authority for the Secretary to establish and maintain a library or catalog of contracts offered by packers to swine producers. The Secretary does not have the authority to collect marketing agreements between packers and cattle producers. Likewise, GIPSA has not been authorized to assemble and publish cattle production contracts for niche markets such as organic and natural beef programs. Congress clearly intended to exclude these cattle contracts from the requirements of § 222, since it used the terms “cattle” and “livestock” extensively throughout the PSA when desiring to include cattle in a section. Therefore, packers cannot be required to file such marketing agreements or production contracts with GIPSA.⁶¹

Even assuming that GIPSA has the authority to require the filing of cattle marketing agreements or production contracts, this section remains defective. The scope of Section 201.213(a) is not clear. The agency appears to confuse production contracts with marketing agreements by including “production contracts” within the “definition” of “marketing arrangements.” This section is also based upon a notion that a packer uses a “standard” contract for each purchase of

⁵⁹ 75 Fed. Reg. at 35346. (emphasis added). This anecdote is a good illustration of the “record” upon which these Proposed Rules appear to be based.

⁶⁰ Proposed § 201.213(a); 75 Fed. Reg. at 35340.

⁶¹ See *Leatherman v. Tarrant County Narcotic Intelligence and Coordination*, 507 U.S. 163, 168(1993); *Alaka v. Attorney General of the United States*, 456 F.3d 88, 97-98 (3d. Cir. 1988).

livestock. As noted above, there are no “standard” animals in the cattle industry. Likewise, there are no “standard” contracts.

Again, assuming that GIPSA has the authority to require the filing of such contracts, Section 201.213(d) contemplates that GIPSA will post on its website a copy of “each unique contract it receives.” The Proposed Rules provide that contract terms containing “trade secrets, confidential business information and personally identifiable information” will not be made public.⁶² Packers must identify “confidential business information” when submitting contracts to GIPSA. However, the Proposed Rules are silent as to whether packers may designate trade secrets or personally identifiable information when submitting contracts to GIPSA. In addition, the rule makes no provision for determining who will decide whether information designated by a packer is, in fact, a trade secret, confidential business information, or personally identifiable information. The rule makes no provision for livestock producers into an assertion of trade secret, confidential business information or personally identifiable information by the packer or GIPSA. As a result, cattle producers may have information they have historically and reasonably assumed was private published on GIPSA’s website. The Proposed Rules completely ignore competition among producers for a particular market and the desire of innovative producers to keep private producer trade secrets and confidential business information. What is the rationale for requiring the reporting of contractual arrangements and making such contracts available to the public? What is the economic benefit for the industry for requiring such publicity? What actions will the agency take to assure the reporting of private business transactions will not become a well for fishing expeditions of litigants and attorneys? NCBA submits that, because beef producers and feedyards are not regulated entities under the PSA, any references to their information should be deleted by packers prior to submission of contracts to the agency.

Proposed § 201.213 will require packers to speculate as to what information will be made public under the Proposed Rules. Accordingly, Proposed § 201.213 contains multiple provisions which in the aggregate will likely create a chilling influence on the use of marketing agreements and production contracts in the beef industry, or in the alternative an incentive toward standard contracts. Such a result will penalize innovative and progressive beef producers and prohibit them from reaping added value for their cattle.

3. Numerous Provisions of the Proposed Rules Are Unreasonable Because Their Vagueness Makes Compliance Impossible.

The Proposed Rules contain several provisions which will have a direct negative effect on the negotiation and performance of marketing agreements and production contracts by beef packers. Unfortunately, many such provisions are incredibly vague, inconsistent internally, or inconsistent with the explanations offered by GIPSA to justify such Proposed Rules.⁶³

⁶⁴ Proposed § 201.213(d); 75 Fed. Reg. at 35340.

⁶³ The Due Process Clause requires that government regulation must be sufficiently explicit to provide fair notice to those subject to the regulation of the conduct that is prohibited or required. *See Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1925); *see also* *Ariz. Cattle Grower’s Ass’n v. U.S. Fish & Wildlife*, 273 F.2d 1229, 1250-51 (9th Cir. 2001)(agency action held to be arbitrary and capricious where agency employed “vague” criteria and did not provide a “clear standard” for determining when the criteria were met).

Proposed § 201.2(u)'s "definition" of likelihood of competitive injury expands the concept of competitive injury to include, but is not limited by, examples that are specific to producers, to packers and to packer competitors. These examples are overly broad providing no guidance to the regulated entities and marketplace. For example, the regulation 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:" If a packer improves the efficiency of its own operations, does it impermissibly "raise rivals' costs"? If a packer raises prices paid for livestock, does it "raise rivals' costs"? What economic factors will be examined to make such a determination? Will improvements or gains in efficiencies in the marketplace be considered a benefit to the marketplace and not a violation of the act?

"Improperly forecloses competition in a large share of the market through exclusive dealing." What is the meaning of "large"? What economic factors will be considered in making this determination? Does "foreclose" mean a permanent effect on the marketplace or a temporary effect? What "market" will be examined? Is the "market" that of all buyers and sellers? Is the "market" limited to a period of time? If so, what period? Is the existence of an exclusive arrangement automatically a violation of the act? Under what conditions could an exclusive relationship between a supplier and a packer exist? For example, if a supplier initiates the transaction by offering to sell all of their livestock at a set price and to be delivered on a set day (which is the supplier's choice) and the packer accepts the offer, would such a transaction violate the concept of "exclusive arrangement"?

"Restrains competition among packers, swine contractors, or live poultry dealers." What economic factors will be considered in making this determination? Is **any** "restraint" of competition, regardless of market impact, a violation? What actions would be acceptable?

"Represents a misuse of market power to distort competition among other packers, swine contractors, or live poultry dealers." What is a permissible use of market power? Again, what economic factors will be considered to make this determination? Does "represent" mean the same thing as "causes"? Does "represent" mean that a plaintiff or the government must prove a market effect? May a claim arise regardless of whether it is a positive or negative impact or "distortion" to the marketplace? Again, what economic factors will be used to make this determination?

"Wrongfully depresses prices paid to a producer or grower below market value." What does it mean to "depress" a producer's prices "wrongfully"? Does the word "wrongfully" infer that the packer or regulated party acted with "intent"? Is any depression of prices paid to producers a violation of this provision? If so, what actions would be allowed under the PSA?

"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." What is the

meaning of “full economic value”? What does it mean to “impair” a producer’s “ability to receive the reasonable expected full economic value from a transaction in the market channel or marketplace”? Does this provision require a finding that the actions of the regulated party have impacted the market place or simply one producer? What economic factors will be used to determine “impairment” or the “expected full economic value”? What is the basis for determining whether the producer’s expectations are reasonable?

Proposed § 201.3(b) purports to apply to *all* production and marketing agreements in the livestock industry, including those between two unregulated parties (e.g., feedyards and their customers).⁶⁴ GIPSA cites no legal basis for this expansion of the PSA.⁶⁵ What is the rationale for GIPSA to include these types of beef contracts in this regulation, since neither feedyards nor cattle producers are subject to the PSA? What beef marketplace problem is being addressed by this regulation and what is the expected benefit to the producer? What economic gain can producers expect from implementation of this regulation?

The effective date provision at Proposed § 201.3(d) is very curiously drafted.⁶⁶ It appears to leave open a comparison between a spot market transaction after the effective date of the final regulations with a sales transaction based upon a pre-effective date marketing agreement. Must the packer “justify” a price differential in such a case? If so, all existing marketing agreements are at risk.

Proposed § 201.94(b) requires a packer to maintain written records that “provide justification for differential pricing or any deviation from standard price or contract terms” offered to swine production contract growers or livestock producers. The rule is silent as to the nature and extent of written records required. The rule is also silent as to the nature of any characteristics of livestock, course of dealing, volume of transactions, transaction costs, etc., which may “provide justification” for differential pricing. Proposed § 201.94 does not attempt to establish what is meant by the “standard price.” The rule is silent as to whether the standard price is measured on a daily, weekly, monthly, or alternative frequency. The rule is silent as to what market is to be considered in determining the standard price. The rule is silent as to whether the “standard price” is the standard price of an individual packer, packers with processing facilities located in specific and unique geographic areas, or all packers regardless of size and location in the national market. As a result, Proposed § 201.94(b) contains so many ambiguities it is impossible for any packer to conform its conduct to its requirements. NCBA strongly opposes this provision as unworkable and unreasonable in its application to the beef industry.

NCBA requests that USDA conduct a detailed analysis of beef market implications prior to implementation of these provisions in the beef industry. The beef industry is complex and highly differentiated with optimal efficiency in the slaughter/processing sector which is dependent upon live animal procurement, slaughter/processing and beef product merchandising.⁶⁷ NCBA

⁶⁴ 75 Fed. Reg. at 35351.

⁶⁵ As a result, any provision of the Proposed Rules which would apply to such parties is clearly beyond the authority granted GIPSA by Congress. GIPSA has been granted authority to issue rules to carry out the provisions of the PSA, not enlarge its scope.

⁶⁶ 75 Fed. Reg. at 35351.

⁶⁷ See Informa study, *supra* note 8, at 51.

submits that the Proposed Rules will cause an immediate depression in prices as packers revert to either (i) uniform pricing, (ii) reduced “grade and yield” pricing, or (iii) pricing based upon recognized commodity markets rather than risk litigation. Ironically, under the Proposed Rules, the packers will be the only entities able to “capture” the value added benefits of the livestock.

These provisions will have a disproportionate impact on beef markets. For example, beef trade is composed of 35-40% cash or spot market transactions. The poultry industry has been vertically integrated for several decades. As a result, the use of spot markets for poultry is virtually nonexistent. As stated earlier, Proposed Rules provide the packers with a tool and justification for “bidding” down livestock to assure “equality” of pricing in the beef industry. Meanwhile the near totally integrated poultry industry is able to continue contract pricing with no immediate impact to their market.⁶⁸ The recent report of Informa quantifies the disproportionate impact of the Proposed Rules. The report estimates the losses to the beef industry at \$837 million; pork at \$335 million; and poultry at \$341 million.⁶⁹

The NCBA is unable to discern GIPSA’s motivation to push the U.S. beef industry toward standardized pricing. GIPSA has no authority to determine price terms between two parties to negotiated contracts. Such a policy will only promote a race toward mediocrity where beef producers are no longer able to get compensated for added value. This will stifle innovation and quickly erode the U.S. beef industry’s competitive advantage in the global market. As an economic matter, this does a disservice to the U.S. beef industry. As a policy matter, it is bad public policy.

Proposed § 201.210(a) contains numerous ambiguous provisions which render compliance virtually impossible. Proposed § 201.210(a)(1) provides that an “unjustified material breach of a contractual duty, express or implied” may constitute an unfair, unjustly discriminatory or deceptive practice or device under Section 202(a) of the PSA. “Unjustified material breach of a contractual duty” is not defined by the Proposed Rules nor is it defined by the Uniform Commercial Code, applicable to all marketing agreements in every state. Further, that term is not defined in the common law, including the Restatement of Contracts. It is a concept not mentioned in any leading contract law treatise. In short, the concept appears to have been created by the agency to expand the scope of the PSA to apply to all contractual disputes in the livestock industry without providing any guidance to packers, livestock producers or federal courts as to its intent, scope or meaning.⁷⁰

Does Proposed § 201.210(a)(2) apply to both production and marketing contracts? What actions would constitute a “disadvantage” to producers? What factors will be used to determine whether an action is coercive, or intimidating? Is this determination based solely upon the perspective of the plaintiff? What “balancing” of interests is allowed in this section?

⁶⁸ Indeed, the only “market” at work in the poultry industry, in light of the elimination of cash markets, is the “market” for poultry grower contracts and facilities.

⁶⁹ See Informa study, *supra* note 8, at 31.

⁷⁰ Since GIPSA is focused on “unjustified” material breaches of contracts, it is implicit that “justified” material breaches of contracts will not give rise to a claim under Section 202(a) of the PSA. However, “justified material breaches of contracts” are also not defined by the agency, the Uniform Commercial Code or the common law. Thus, any challenge to a packer’s conduct based upon this novel theory of contract law must be addressed by a federal court without any guidance from GIPSA.

Proposed § 201.210(a)(4) creates a new contract grower bill of rights which are typically applicable only to production contracts. Is this section intended to also apply to marketing agreements? Violations of these provisions would now constitute an unfair practice under the PSA and within the jurisdiction of the federal courts. Has GIPSA considered the costs of federal litigation to producers and packers in the evaluation of this proposal? Has GIPSA considered the length of time it would take to resolve a simple contract dispute at the federal court level?

Proposed § 201.210(a)(5) provides a packer may not pay a premium or apply a discount on compensation or purchase price for livestock without documenting the reasons associated with such premium or discount and substantiating the revenue and cost justification for such premiums or discounts. As noted above, the Proposed Rules are silent as to the agency's view of the appropriateness, nature and extent of any justifications for such premiums or discounts. Thus, packers are left in the untenable position of attempting to speculate as to whether their prior course of business will meet the requirements of this Proposed Rules. In addition, courts will be faced with the very likely prospect of litigation challenging any such premiums or discounts with no guidance from the agency.

Poultry is excluded from Proposed § 201.210(a)(5) without any explanation in background information. Under this provision, a lack of paperwork is an unfair practice and thus a violation of the PSA. What is documenting? What authority does GIPSA have to require "substantiating the revenue and cost justification associated with the premium or discount"? Will confidential business information be protected to assure producer and packer competitors will not use this information to undercut market positions? How does this provision differ from the written records requirements of Proposed § 201.94? It is not clear whether comparative sales must be substantially contemporaneous or must be among competing sellers (e.g., sales to a packer for delivery of livestock in different states).

Proposed § 201.211 states that the Secretary "*may* consider the following criteria, *among others*, in determining if an undue or unreasonable preference or advantage or disadvantage, has occurred. . ."⁷¹ As noted above, Congress instructed GIPSA to "establish criteria the Secretary "will consider" in determining if an unfair or unreasonable preference or advantage has occurred. The vagueness of this proposed section is inconsistent with the Congressional directive.⁷² What other criteria would be considered? When will the regulated community know what is or is not a prohibited act? Must the regulated community wait until litigation arises before clarity to the law is provided?

The basis for the rule, as applied to the cattle industry is undisclosed. What is the rational basis for application of these provisions? In the NPRM, GIPSA cites to "telephone calls received from producers and poultry growers, complaints received by its field agents, and comments made at meetings, conferences and conventions" as a basis for the regulation. The NPRM also cites to a case where a "Midwestern packer was offering a higher price to an individual producer who could deliver full truck loads of cattle. A group of producers approached the same packer and offered collectively to provide a full truck load of like cattle, but the packer refused to offer the

⁷¹ 75 Fed. Reg. at 35352 (emphasis added).

⁷² This is totally inconsistent with the per se rule crafted by GIPSA in Proposed § 201.210(a).

same price terms to the group of producers.”⁷³ GIPSA also cites anecdotes in which packers have allegedly paid one producer a premium for early delivery of cattle while others who allegedly offered similar livestock at similar times were not given a premium. There is no indication as to whether these allegations were investigated and/or found to be truthful.

Proposed § 201.211(a) requires an analysis of “whether contract terms based on number, volumes or other condition or contracts with price determined in whole or in part by the volume of livestock sold are made available to all ...livestock producers who individually or collectively meet the conditions set by the contract.” What is meant by “contract terms”? Does the term refer to sales contracts that have been completed? If so, the packers’ needs have been met and thus removed from the market. If it is intended to be proscriptive to future sales transactions, how would this work in the marketplace? How does a packer assure that its offer is made to *all* livestock producers who meet the conditions set by the contract? The NPRM states that the agency does not intend to incorporate concepts of public utilities into the trade, but this is exactly what it has done. As a practical matter how would packers comply with this regulation? Would they be required to post as “offers to buy” their purchase needs on the internet or some other public venue? How can anyone, packer or regulator, assure that *all* producers received the information? If a producer does not (for whatever reason) receive the offer, does it have a “per se” cause of action? What precludes this process from being used to manipulate the market as all buyers and sellers will now know what each competitor does and does not need? This regulation needs to be clarified to incorporate the principles of “willing buyer willing seller”; open markets (but not public utility markets); and the privacy of contract. By eliminating the ability of packers to make premium offers, the agency has eliminated the incentive for producers to innovate and provide the various qualities of meat and meat products that consumers demand.

Proposed § 201.211(b) presents similar practical problems. What is meant by “in a manner that does not discriminate against a producer or group of producers that can meet the same standards”? Please describe for producers how the packer can meet this requirement and purchase livestock in the cash or spot market.

Proposed § 201.211(c) presents the same practical problems regarding distribution of information to all producers as described above. Does this provision apply to production contracts and marketing contracts? Is this provision meant to attach at the time of sale or at some point earlier? GIPSA should fully describe the actions the agency will require the packer to take to meet the requirements of this section.

In seeking to tilt the rules to benefit one segment in the long chain of production, the NCBA believes GIPSA will perversely limit the ability of producers to negotiate contracts that permit them to manage risk, secure long-term commitments for the sale/purchase of their livestock and obtain favorable financing, and, perhaps, limit the producers’ ability to recover capital investment made for purposes of financing expansion and improvements to their herds.⁷⁴ GIPSA has undertaken to proscribe certain contract terms (those set forth in § 201.210(a)); interfered in the scope of contract provisions (those set forth in § 201.216-.218); rendered any alleged contract breach a potential “unfair practice” (by virtue of § 201.210(a)(1)); and limited the marketing

⁷³ 75 Fed. Reg. at 35343.

⁷⁴ Buhr, *supra* note 11, at 18.

opportunities of certain producers (by virtue of § 201.212(c)). By incorporating these types of provisions into the PSA, GIPSA is creating a regulatory framework that will stifle both cash and contract trading of beef.

4. The Proposed Rules Would Convert Every Breach of Contract Claim in the Livestock Industry into a PSA Claim.

As noted above, Proposed § 201.210(a)(1) would result in the federalization of any breach of contract claims asserted against a packer arising out of the marketing agreement or production contract.⁷⁵ However, Congress has not delegated authority to GIPSA to expand the scope of the PSA. The PSA was never intended to be a federal counterpart to the Uniform Commercial Code for livestock. Indeed, Section 308(b) of the PSA expressly provides that the remedies provided by the PSA “shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.”⁷⁶

It is clear that the purpose behind Section 202 of the PSA “was not to so upset the traditional principles of freedom of contract” so as to require an entirely level playing field for all. *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (9th Cir. 1999). Likewise, the PSA was not intended to subject packers to liability under the PSA for a simple breach of contract. *London v. Fieldale Farms Corporation*, 410 F.3d 1295, 1304 (11th Cir. 2005); *Been v. O.K. Industries, Inc.*, 495 F.3d 1217, 1228-29 (10th Cir. 2007).

For example, in *London v. Fieldale Farms Corporation*, 410 F. 3d 1295 (11th Cir. 2005), certain plaintiff poultry growers brought an action against a live poultry dealer alleging the poultry dealer had improperly terminated the growers’ contract after a flock raised by the plaintiffs was below average. The district court granted the poultry dealer’s motion for judgment as a matter of law on the plaintiffs’ PSA termination claim and the plaintiffs appealed. The US Department of Agriculture supported the plaintiffs in an amicus brief and asserted that in order to prove that any practice is “unfair” under Section 202(a) of the PSA, it is not necessary to prove predatory intent, competitive injury or likelihood of competitive injury. The Court of Appeals disagreed, noting “elimination of a competitive impact requirement would subvert the policy justifications for the PSA’s adoption....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.” 410 F.3d 1295, 1304. Under the Proposed Rules, not only would the *London* case be reversed, but, under Section 201.210(a)(1), a plaintiff need only allege a packer has engaged in conduct which constitutes an “unjustifiable material breach” of the grower contract. Such an expansion of Section 202(a) of the PSA is well beyond the authority granted the agency by Congress:

Congress selected the Secretary as overseer [of the livestock industry] but established some restrictions with regard to the Secretary’s authority. Congress gave the Secretary no mandate to ignore the general outline of long-time antitrust

⁷⁵ While a cattle producer could assert a claim against a packer under proposed § 201.210(a)(1) for an alleged violation of a marketing agreement between the parties, a packer could not assert a similar claim against a cattle producer for breach of the same contract.

⁷⁶ 7 U.S.C. § 209(b).

policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged.

Id. (citations omitted).

Similarly, in *Terry v. Tyson Farms, Inc.*, 604 F.3d 272 (6th Cir. 2010), a Tennessee poultry farmer brought suit under the PSA alleging that the live poultry dealer engaged in unfair discriminatory or deceptive practices and subjected him to undue or unreasonable prejudice or disadvantage. The District Court held the proof of injury to competition is a necessary element of a claim under Section 202(a) and (b) of the PSA. Because the plaintiff failed to plead that the processor's actions had an adverse effect on competition, the court dismissed the plaintiff's action for failure to state a claim. The plaintiff, joined by the United States Department of Agriculture as Amicus Curiae sought reversal by the Sixth Circuit Court of Appeals unsuccessfully. Under the Proposed Rules, however, it is likely a different result would be obtained. GIPSA has not cited any authority for the expansion of the PSA to control such disputes.

B. The Proposed Rules Are Not Supported by Adequate Record Evidence or Economic Support.

The Proposed Rules represent a drastic change regarding the interpretation of the PSA. Even GIPSA has acknowledged the Proposed Rules are “significant” for purposes of Executive Order 12866.⁷⁷ Such a sweeping regulatory proposal requires an in-depth, comprehensive economic analysis and justification based on all available research and factual information.⁷⁸ GIPSA's economic cost-benefit analysis is presented at pages 35345 through 35349 accompanying the notice of the Proposed Rules in the *Federal Register*. However, the so-called economic analysis is woefully inadequate. Estimated costs associated with the Proposed Rules are grossly underestimated, if estimated at all.⁷⁹

More significantly, however, GIPSA briefly discusses benefits without any quantifiable estimates of the economic benefits conferred upon the beef, pork, and poultry industries. Rather, GIPSA's attempts to comply with Executive Order 12866 are replete with statements such as the following:

“GIPSA *believes* that potential benefits are expected to exceed costs.”⁸⁰

“GIPSA *believes* the benefits to increased transparency are expected to exceed its costs.”⁸¹

⁷⁷ 75 Fed. Reg. at 35345.

⁷⁸ *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 762 (6th Cir.1995)(holding that rules that restricted cellular communications providers from participating in Personal Communications Service auctions were arbitrary because they were inadequately explained, and were the “product of arbitrary decisionmaking”).

⁷⁹ See Hausman, *supra* note 31, at 5.

⁸⁰ 75 Fed. Reg. at 35346 (emphasis added).

⁸¹ 75 Fed. Reg. at 35347 (emphasis added).

“GIPSA *believes* benefits are expected to be larger than costs, but recognizes that, in general, this may require a period of adjusting to a new contractual relationship between packers, swine contractors and live poultry dealers and poultry growers or swine production contract growers.”⁸²

GIPSA does not even attempt to identify, much less quantify, the purported benefits of many of the Proposed Rules. Rather, it seeks input from the public to attempt to justify the Proposed Rules: With respect to the potential “benefits” of Proposed § 201.94, “GIPSA invites specific comments on additional categories of costs and benefit items as well as their magnitudes.”⁸³ This invitation to provide economic assessments of the benefits of the Proposed Rules is repeatedly offered by GIPSA as a justification for the rules. However, the agency proposing the rules has utterly failed to offer any economic analysis of the hypothetical benefits of the rules.⁸⁴

It is important to consider not only the supposed benefits to producers, but the impact of the Proposed Rules on the entire meat production system. As Professor Brian L. Buhr has noted, the “modern value and production chain for meat products is an interdependent and complex web of interactions of crop and livestock genetics, animal nutrition and health, livestock rearing, crop nutrient management, meat and food ingredient production and human health. ... Therefore any regulatory actions taken at one stage in the chain have economic impacts throughout the chain.”⁸⁵ One such impact, totally ignored by GIPSA, is food safety. Market coordination assists in addressing food safety problems inherent in open markets since the lowest quality and greatest risk producers may “actually benefit from the anonymity of the open market.”⁸⁶ Before revolutionary changes are made to the PSA and its regulatory scheme, the NCBA suggests GIPSA carefully consider the system-wide implications of its Proposed Rules.

Indeed, the entire manner in which the record in this proceeding was formed was highly irregular. In announcing the Proposed Rules, GIPSA has indicated that “[t]he proposed regulations are based on comments, information and recommendations received in ...[2008] meetings along with GIPSA’s expertise, experience and interactions in the livestock and poultry industries.”⁸⁷ However, at the time the Proposed Rules were published, the USDA and the Department of Justice had also conducted two workshops on competition issues in agriculture.

At the USDA\DOJ workshop held in Fort Collins, Colorado, on August 27, 2010, the Secretary of Agriculture announced from the dais that comments on the proposed GIPSA rules made at the workshop *would* be included in the “record” for the Proposed Rules. This announcement is not

⁸² 75 Fed. Reg. at 35347 (emphasis added).

⁸³ 75 Fed. Reg. at 35346.

⁸⁴ In fact, the Proposed Rules and the NPRM acknowledge no limitation to GIPSA’s regulatory authority. 75 Fed. Reg. at 35339-40. The Proposed Rules do not propose an actual interpretation of § § 202(a) and (b) (other than to repeatedly assert the agency is not limited to prohibited acts that harm competition and to provide a non-exhaustive list of some of the practices it would purportedly prohibit). Moreover, the Proposed Rules do not conduct a meaningful analysis of the extent to which the relevant markets are workably competitive. Instead, the NPRM to the Proposed Rules justify the existence of the rules solely with regard to alleged benefits to certain livestock producers and poultry growers who claim to have been harmed by competitive market forces. The Proposed Rules essentially treat the impact of the rules on competition, the other segments of the industry and consumers as irrelevant.

⁸⁵ Buhr, *supra* note 11, at 7. See also Informa Study, *supra* note 8; Knootz, *supra* note 8.

⁸⁶ Buhr, *supra* note 11, at 21.

⁸⁷ 75 Fed. Reg. at 35339.

consistent with the record set forth in the Federal Register announcement of the Proposed Rules or § 553 of the Administrative Procedure Act.⁸⁸ As a result, it is impossible to determine on what factual foundation, if any, the Proposed Rules are actually based.⁸⁹

In response to written questions submitted to GIPSA by the Livestock, Dairy and Poultry Subcommittee of the House Agriculture Committee dated July 20, 2010, GIPSA identified numerous meetings with various participants in the cattle, hog, poultry and meat industries.⁹⁰ However, no information has been provided by GIPSA relating to the subject matter of such meetings, those in attendance at such meetings, or notes or minutes kept or maintained in connection with such meetings.

For all these reasons, it is difficult even to ascertain what the proper record for this rulemaking consists of, much less to identify any actual record support for the propositions upon which GIPSA has relied in issuing the Proposed Rules.

C. The Proposed Rules Ignore GIPSA's Own Industry Studies.

A major omission of GIPSA's so-called economic analysis is its failure to acknowledge a large body of economic research conducted over the past three decades.⁹¹ Included in this gross omission are two recent Congressionally mandated studies administered by GIPSA as well as other studies GIPSA commissioned to analyze its special data collection effort. These studies contain some of the most relevant and most recent research bearing on whether or not there is a need for such a drastic expansion of regulatory authority under the PSA. GIPSA must specify how and why research findings justify the Proposed Rules.⁹²

Congress appropriated \$0.5 million to GIPSA in fiscal year 1992 to conduct a study of concentration in the red meat industry, based on concerns expressed in both Senate and House Committee reports. USDA formed an interagency working group to recommend the priority research areas and six projects were awarded to economists at leading Land Grant Institutions (Iowa State University, Kansas State University, Oklahoma State University, Texas A&M

⁸⁸ 5. U.S.C. § 553.

⁸⁹ Curiously, on the date the Proposed Rules were published in the Federal Register, GIPSA posted "examples of market behavior" which "the Proposed Rule would be designed to address" on its website. Twenty-two (22) of thirty-five (35) of such "examples" relate to complaints of poultry growers purportedly made at the May 21, 2010 USDA\DOJ workshop.

⁹⁰ Supplemental Questions for the Record To: The Honorable Edward M. Avalos, Under Secretary For Marketing and Regulation Programs, U.S. Department of Agriculture, Washington, D.C., Hearings of the Livestock, Dairy, and Poultry Subcommittee, July 20, 2010 (attached as Appendix G).

⁹¹ See Hausman, *supra* note 31, at 9.

⁹² See *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(agency action is arbitrary and capricious if the agency "offered an explanation for its decision that runs counter to the evidence before the agency"). According to the Supreme Court in *State Farm*, a rule is arbitrary if the agency:

relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. (*Id.*)

University, University of Nebraska, and Virginia Polytechnic Institute and State University). A seventh study was conducted by the Economic Research Service of USDA. These projects entailed an extensive data collection effort, including over 200,000 individual procurement transactions.

The study resulted in a series of reports published in 1996 (available online at the GIPSA website: <http://archive.gipsa.usda.gov/pubs/packers/conc-rpt.htm>). Those were:

- Definition of Regional Cattle Procurement Markets – three independent studies
- Price Determination in Slaughter Cattle Procurement
- Role of Captive Supplies in Beef Packing – two independent studies
- Effects of Concentration on Prices Paid for Cattle
- Vertical Coordination in Hog Production
- Hog Procurement in the Eastern Corn Belt
- Assessing Competition in Meatpacking: Economic History, Theory and Evidence

GIPSA failed to acknowledge and include materials from its own studies. The actual studies' findings do not support the need for the Proposed Rules. The last publication listed was the most extensive, in-depth review of relevant literature ever conducted at the time. Yet GIPSA ignored the research and literature review it commissioned. In total, this mandated study was the most comprehensive set of research on topics relevant to competition in the livestock industries at the time. While it was conducted over a decade ago, GIPSA should identify what findings from the research are no longer relevant and what findings justify promulgation of the Proposed Rules.

While the concentration publications were being finalized, GIPSA conducted an investigation of cattle procurement in the Texas Panhandle. GIPSA collected detailed data on cattle procurement by four large beef packing plants. The data set consisted of over 24,000 transactions. Economists at two leading Land Grant Universities (Iowa State University and University of Nebraska) were commissioned to conduct the economic analysis and write a report of their findings for GIPSA (available online at the GIPSA website:

<http://archive.gipsa.usda.gov/psp/issues/txpeer/peerreview.htm>).

GIPSA failed to acknowledge this investigation was conducted or the resulting published research. The findings were not used to support the need for the Proposed Rules. This commissioned study supplemented and complemented the concentration study of 1996. While this study was also conducted over a decade ago, GIPSA should identify what findings from the research are no longer relevant and what findings justify promulgation of the Proposed Rules.

GIPSA failed to consider, without explanation, the most recent Congressionally mandated study administered through GIPSA.⁹³ GIPSA merely cites as “an additional reference” the Interim Report prepared for GIPSA by RTI. Congress appropriated \$4 million to GIPSA in 2003 to conduct a broad study of the effects of alternative marketing arrangements (AMAs) on the livestock and meat industries. An interim report was released in August 2005 on parts A and B and the final reports were published in January 2007 (available online at the GIPSA website: <http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=lmp&topic=ir-mms>).

⁹³ 75 Fed. Reg. at 35346, n. 39.

The final report consists of six volumes:

- Volume 1. Executive summary and overview
- Volume 2. Data collection methods and results
- Volume 3. Fed cattle and beef industries
- Volume 4. Hog and pork industries
- Volume 5. Lamb and lamb meat industries
- Volume 6. Meat Distribution and sales.

A part of the study was the most extensive data collection effort ever on these topics, consisting of over 590,000 transactions, and the most thorough personal interviews and surveys ever undertaken on topics pertaining directly to the Proposed Rules. Given the vast scope of this study and its relevance to the Proposed Rules, it is inconceivable that GIPSA only deems the Interim Report to be an “additional reference.” NCBA respectfully requests an explanation of why the findings of the GIPSA LMMS are not included in the agency’s justification and policy discussion of the Proposed Rules.

Agricultural economists have conducted considerable research over the past three decades on the behavior and performance of livestock and meat markets. Much of this was reviewed in the first Congressionally mandated study for GIPSA (1996). Research conducted more recently was included in comments to the Department of Justice (DOJ) as input into the DOJ/USDA workshops on market structure and concentration (available online: <http://www.justice.gov/atr/public/workshops/ag2010/index.htm#publiccomments>). GIPSA once again failed to show how the body of relevant research conducted by numerous economists over three decades supports the Proposed Rules.⁹⁴

The conclusions of agricultural economists can be generally summarized as follows:

1. The beef industry is affected by many economic factors (supply, demand, input prices, weather conditions, and trade) which should be considered in the development of public policy.
2. Meat packing firms have increased in size through internal growth and from mergers and consolidations.
3. Structural changes are mostly the result of economies of size and an emphasis on reducing costs to remain competitive. Concentration has stabilized.

⁹⁴ “For a complete review of structural changes, causes and impacts for pricing and competition see Clement E Ward, Professor of Economics Oklahoma State University, *Economics of Competition in the U.S. Livestock Industry* (January 2010) (attached and incorporated as Appendix H) and related articles available on the (Insert the Oklahoma State Extension Service website)

4. Behavior changes have occurred within the meatpacking industry and there is no longer a reliance on cash markets. Firms are using AMAs because producers have requested them or to increase efficiency.⁹⁵
5. There is no clear evidence from civil cases to indicate actions that regulatory agencies could or should have taken to reverse the trends in structural or behavioral changes.⁹⁶
6. There is market power exercised in the beefpacking industry. However, most measures of market power in the cattle and beef industry are small, in the range of 1-3%. Examination of the tradeoffs between market power and other benefits of larger firms (economies of scale) finds that the benefits outweigh the costs.⁹⁷
7. Regulatory actions that restrict supply chain organization, innovation, and firm organization are likely to reduce participant welfare within the chain (genetics firms, farmers, feed manufacturers, meat packers, processors, and retailers) as well as consumer welfare.⁹⁸

Rather than building upon the vast history of economic research conducted at taxpayer expense and in response to Congressional directives, GIPSA has chosen to issue these Proposed Rules based upon its “belief” that problems warranting the most radical regulatory expansion in the 89-year history of the PSA exist. Rather than demonstrating any understanding, much less concern, about the impact of such rules on U.S. beef producers of all sizes and structures, GIPSA has chosen to require the affected industries to respond to its completely inadequate and incomprehensible assessment of the livestock industries and markets.

III. THE PROPOSED RULES VIOLATE THE DATA QUALITY ACT AND GIPSA’S OWN IMPLEMENTING GUIDELINES FOR THAT ACT.

GIPSA has also failed to comply with the restrictions and guidelines imposed by the Data Quality Act (“DQA”), 44 U.S.C. § 3516. Pursuant to the DQA and the USDA’s Information Quality Guidelines (the “Guidelines”), in addition to the comments made herein, the NCBA makes 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 justification for the Proposed Rules. In the NPRM, GIPSA refers to the three public meetings in October 2008, in Arkansas, Iowa, and Georgia. These meetings were apparently used to gather comments,

⁹⁵ See generally Koontz, *supra* note 8.

⁹⁶ See generally Ward, *supra* note 5; Buhr, *supra* note 11.

⁹⁷ See generally Koontz, *supra* note 8; Ward, *supra* note 5; Buhr, *supra* note 11.

⁹⁸ Buhr, *supra* note 11.

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 Rules are 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.”⁹⁹

Despite GIPSA’s reliance on the information described above, the information has not been made available to the public to our knowledge, nor is it included in the Proposed Rules. There is no specific information that would allow the NCBA, and the public, to determine whether the drastic changes in the implementation of the PSA are in fact warranted. Until GIPSA can justify the changes, the Proposed Rules are arbitrary, capricious, and not in accordance with law.

Unfortunately, GIPSA has failed to provide the public with any evidence to support this radical rewrite of the PSA. The federal government simply should not, and cannot change a ninety-year old statute to meet a purported need without corroborated evidence. The DQA and the Guidelines were implemented to prevent these types of misuses of administrative authority. Notably, the information used by GIPSA to justify the Proposed Rules violate 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.” This includes data from surveys, compiled information, and/or expert opinion. Data and information relating to a town hall meeting is inherently unreliable. As noted above, the Agency seems to have purposely ignored its own data, surveys and expert opinions gathered as part of numerous studies in recent years. Moreover, utilizing meetings and the general “expertise” of the agency does not provide transparency to the analysis conducted by GIPSA nor does it clearly identify sources of uncertainty affecting the quality of the data.

Because this rulemaking is *significant* pursuant to Executive Order 12866, the information used to justify the Proposed Rules is considered *influential*. Influential information should, in 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. The information gathered at meetings and the general expertise of GIPSA simply does not conform to these standards.¹⁰⁰

As a result of the failure of the agency to comply with the DQA and Executive Order 12866, the NCBA cannot know or understand GIPSA’s justification or rationale. More importantly, the NCBA and its members will be harmed by the Proposed Rules, particularly if the Proposed Rules were promulgated using biased or faulty information.

⁹⁹ 74 Fed. Reg. at 35339.

¹⁰⁰ Executive Order 12866 considers a “significant regulatory action” as any regulatory action that is likely to have 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. GIPSA has acknowledged that this regulatory action is significant.

CONCLUSION

The Proposed Rules adopt a view of the PSA that has been uniformly rejected by the federal appellate courts. They have been offered by GIPSA despite the recent rejection by Congress of several policies inherent in the Proposed Rules. They have been offered by GIPSA with no meaningful analysis of their impact on the beef industry and without concern for their impact on producers, packers, retailers or consumers.

NCBA respectfully requests that GIPSA withdraw the portions of the Proposed Rules which will have an immediate and detrimental impact upon the beef industry, those which: (1) eliminate the requirement a plaintiff establish injury to competition in order to prove a claim under Section 202 of the PSA, purport to define “competitive injury” and the likelihood thereof, and declare that specific acts or practices are “unfair, unjustly discriminatory or deceptive: under Section 202; (2) suggest the factors which may establish an undue or unreasonable preference under Section 202(b) of the PSA; (3) prohibit sales of livestock by a packer to another packer or its affiliates; and (4) require the production and publication of all cattle marketing and production contracts.

Before GIPSA issues any rules pursuant to the provisions of the Farm Bill, the NCBA requests GIPSA engage in substantive and meaningful discussions with producers, packers, retailers and consumers so as to ensure any such future rules are workable in the beef industry, recognize legitimate business reasons for marketing agreements and production contracts, do not stifle innovation in the industry, and are consistent with existing statutory authority. In addition, the NCBA requests GIPSA provide all participants in the beef industry a thorough and comprehensive practical, legal and economic analysis of the costs and benefits of such Proposed Rules. Following such discussions and analysis, the NCBA requests that GIPSA issue separate, appropriate, clear and legally supportable rules, consistent with Congressional grants of authority, for each of the poultry, swine and cattle industries, recognizing that each segment of the meat industry is unique.

Thank you for this opportunity to comment on these proposed rules.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Foglesong", with a long, sweeping horizontal line extending to the right.

Steve Foglesong
President

APPENDIX A

Stephen R. Koontz, *Economic Factors Impacting the Cattle Industry, the Size of the Beef Cow Herd, and Profitability and Sustainability of Cow-Calf Producers* (November 11, 2010)

APPENDIX B

Brian L. Buhr, *Evaluating the Economic Consequences of Proposed Rules for Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act Considering the Role of Vertical Coordination in Livestock Market Development* (November 5, 2010)

APPENDIX C

Informa Economics, *An Estimate of the Economic Impact of GIPSA's Proposed Rules* (November 8, 2010)

APPENDIX D

Clement E. Ward, *Beef, Pork, and Poultry Industry Coordination* (Oklahoma Cooperative Extension Service piece).

APPENDIX E

Jerry Hausman, *Report of Professor Jerry Hausman* (November 16, 2010)

APPENDIX F

Stephen R. Koontz, *What Does the RTI Study Say About Captive Supplies in the Cattle and Beef Industry?*, Department of Agricultural and Resource Economics – Colorado State University
(July 9, 2010)

APPENDIX G

Supplemental Questions for the Record To: The Honorable Edward M. Avalos, Under Secretary
For Marketing and Regulation Programs, U.S. Department of Agriculture, Washington, D.C.,
Hearings of the Livestock, Dairy, and Poultry Subcommittee, July 20, 2010

APPENDIX H

Clement E Ward, Professor of Economics Oklahoma State University, *Economics of Competition in the U.S. Livestock Industry* (January 2010)