NATIONAL CATTLEMEN'S BEEF ASSOCIATION
CENTER FOR PUBLIC POLICY

January 17, 2023

S. Brett Offutt
Chief Legal Officer
Packers and Stockyards Division
U.S. Department of Agriculture
1400 Independence Ave SW
Room 2097-S, Mail Stop 3601
Washington, DC 20250-3601

RE: NCBA Comments on Inclusive Competition and Market Integrity Under the Packers and Stockyards Act (87 Fed. Reg. 60010; Docket No. AMS-FTPP-21-0045)

Submitted via online portal: https://www.regulations.gov/commenton/AMS_FRDOC_0001-2345

Dear Mr. Offutt:

The National Cattlemen's Beef Association (NCBA) appreciates the opportunity to submit comments regarding the Agricultural Marketing Service's ("AMS" or "the Service") proposed rule titled, "Inclusive Competition and Market Integrity Under the Packers and Stockyards Act" (87 Fed. Reg. 60010; "the proposed rule"). NCBA is the oldest and largest national trade association representing the interests of the U.S. cattle industry, with over 178,000 members represented through direct membership and our 44 state affiliate organizations.

First and foremost, NCBA appreciates that the Service intends this proposed rule to help ensure equality of access to livestock marketing channels. Deception, discrimination, or retaliation on the basis of race, ethnicity, sexual orientation, gender identity, ability, religion/spirituality, nationality and/or socioeconomic status is reprehensible and should be remediated using the appropriate legal avenues, including legislative changes where necessary. Virtue notwithstanding, throughout our comments we will draw the Service's attention to our organization's many policy and legal concerns with the proposed rule. To be clear, these concerns are rooted in our interpretation of the rule's eventual effects on market functionality. They are not a criticism of the Service's overarching objective to safeguard the inherent rights of individual market participants, nor should they be interpreted as opposition to principles of equal protection.

The proposed rule will harm the very producers that it purports to help, and suffers from a series of substantive and procedural flaws, including but not limited to the following:

- The proposed rule is far too reliant on unexplained and unreliable anecdotal evidence. AMS compounds the problem by encouraging commenters to submit anonymous comments.

- AMS has failed to make available its proposal for an additional and closely related rule concerning Section 202 of the PSA, which should be considered alongside this proposal.

- AMS's attempt to undermine the harm-to-competition requirement is beyond AMS's statutory authority and contrary to settled precedent in the federal courts of appeals.

- The new proposed antidiscrimination rule is similarly beyond AMS's statutory authority, lacks a sufficient evidentiary basis, and is hopelessly vague.

- AMS's proposed deception rule is beyond AMS's statutory authority.

- AMS has failed to give sufficient consideration to the harm that increased litigation and litigation risk will impose on the livestock industry.

BACKGROUND

Since its enactment, the *Packers and Stockyards Act of 1921* ("PSA" or "the Act") has governed the trade of livestock and poultry between growers and processors. The *Food, Conservation, and Energy Act of 2008* (Pub.L. 110-246; the "2008 Farm Bill") directed the U.S. Department of Agriculture ("USDA" or "the Department) to "establish criteria that the Secretary will consider in determining…whether an undue or unreasonable preference or advantage has occurred in violation of (the Act)." Since that time, AMS and its predecessor, the Grain Inspection, Packers and Stockyards Division (GIPSA), have promulgated a series of proposed regulations to implement this directive.[1] Largely due to widespread opposition from NCBA and the overwhelming majority of national agriculture trade groups, those efforts were either defunded by Congress or the Agency opted not to pursue finalization. In December 2020, the Service finalized a rule titled "Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act" (85 Fed. Reg. 79779), which currently maintains the full force and effect of law. The 2020 final rule satisfied the Service's congressional mandate under Title XI of the 2008 Farm Bill, and no further regulations under Sections 202(a) or 202(b) of the Act are necessary for compliance with the 2008 Farm Bill.

BEEF CATTLE INDUSTRY OVERVIEW

The proposed rule is likely to impact cattle producers of all sizes and business models. The U.S. cattle industry is multifaceted, diverse, and complex. Each segment within the beef supply chain faces unique challenges and will be impacted to different degrees should the proposed rule be finalized. With few exceptions, the business dealings that are related to cattle and subject to the Service's jurisdiction pursuant to the Act are those that occur between feeders and meatpackers: namely, the sale of fed cattle (also called "finished cattle" or "live cattle"). Nevertheless, producers further up the supply chain (see Figure 1) and consumers alike are also affected by the transactions that occur between, and the regulations that govern, these two segments.

No two pens of cattle are alike, no matter how homogenous they may appear on the surface. While this may be most easily observed between different breeds, such as Angus or Herefords, cattle which may seem identical often exhibit different characteristics. Using USDA quality grade as an example, in a pen of 100 seemingly homogenous Angus steers, 10 may grade Prime, 75 Choice, and 15 Select.

[1] See *Implementation of Regulations Under Title XI of the Food, Conservation and Energy Act of 2008* (75 Fed. Reg. 35338), *Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act* (81 Fed. Reg. 92703), and *Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act* (85 Fed. Reg. 1771).

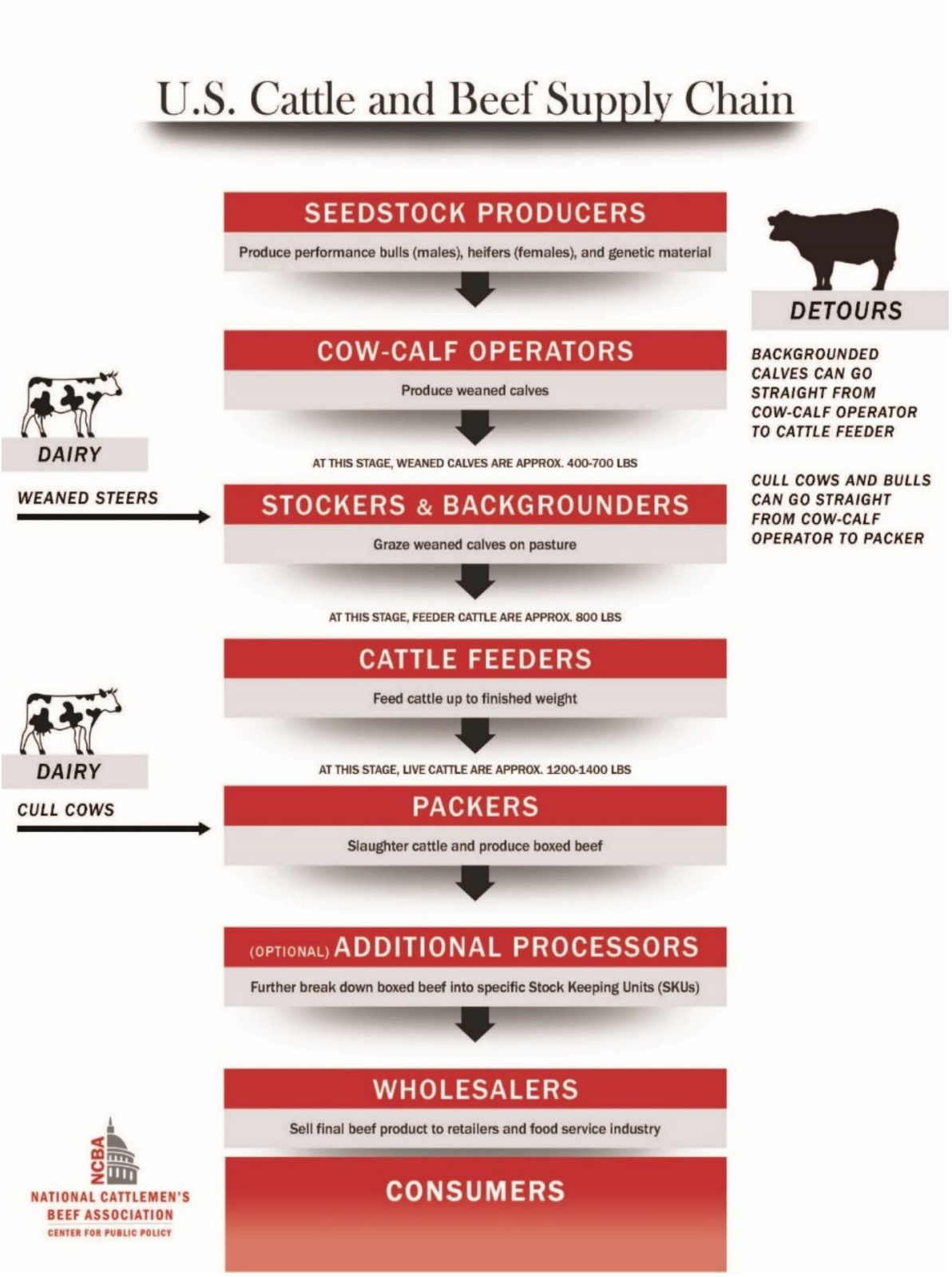
U.S. Cattle and Beef Supply Chain
SEEDSTOCK PRODUCERS
Produce performance bulls (males), heifers (females), and genetic material
COW-CALF OPERATORS
Produce weaned calves
AT THIS STAGE, WEANED CALVES ARE APPROX. 400-700 LBS
STOCKERS & BACKGROUNDERS
Graze weaned calves on pasture
AT THIS STAGE, FEEDER CATTLE ARE APPROX. 800 LBS
CATTLE FEEDERS
Feed cattle up to finished weight
AT THIS STAGE, LIVE CATTLE ARE APPROX. 1200-1400 LBS
PACKERS
Slaughter cattle and produce boxed beef
(OPTIONAL) ADDITIONAL PROCESSORS
Further break down boxed beef into specific Stock Keeping Units (SKUs)
WHOLESALERS
Sell final beef product to retailers and food service industry
CONSUMERS
DAIRY
WEANED STEERS
DAIRY
CULL COWS
DETOURS
BACKGROUNDED CALVES CAN GO STRAIGHT FROM COW-CALF OPERATOR TO CATTLE FEEDER
CULL COWS AND BULLS CAN GO STRAIGHT FROM COW-CALF OPERATOR TO PACKER
NCBA
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Figure 1

Some traits exhibited by cattle are more desirable than others. For example, the USDA Prime grade indicates the highest quality of beef available on the market. Choice is the most common of the quality grades, also desirable, and beef achieving this grade can often be found in supermarkets and grocery stores. In addition to quality grade, yield grade is also important. Yield grade measures the amount of boneless meat a carcass will yield compared to fat and can often have an inverse relationship to quality grade.

Other cattle and beef characteristics may be more valuable in certain retail and/or food service channels, such as Certified Angus Beef (CAB) or nonhormone treated cattle (NHTC). In recent years, market participants have begun to develop low-carbon beef products. There are countless source-verification, quality assurance, regional origin, and breed-affiliated opportunities for producers to take advantage of to increase the value of their cattle.

The Service's Livestock, Poultry, and Grain Market News Division ("Market News") categorizes fed cattle transactions in one of four ways:

- Negotiated Cash: Cash trade is the oldest and most traditional of the transaction types. Sometimes referred to as the "spot" or "open" market, this method involves the seller (cattle feeder) and buyer (meatpacker) negotiating the price for a specific pen of cattle at a specific point in time. Prices are reflected in dollars per hundredweight ($/cwt). For example, $120.00/cwt paid for 10 steers weighing an average of 1,434 lbs. would come to a total sale price of $17,208.00. Buyers in a negotiated transaction inspect the cattle available for sale, organized into lots of several animals called pens. They then make a bid for the cattle. The seller can agree to the bid or make a counteroffer. Once both buyer and seller agree on a price, the deal is struck and the cattle are typically delivered within 7-14 days.

- Contract: There are many different types of contract transactions, but the most common is a forward contract. Utilizing this method reduces the price risk associated with selling in the open market and is a common risk management strategy for many cattle producers. In a forward contract, the seller agrees to deliver cattle to the buyer at a fixed point in the future. The price for the cattle will be determined by some external market information, the most common of which are futures quotes from the CME Group's Live Cattle contract. In this case, the price can be set using the contract month nearest the agreed upon delivery date with an adjustment for local basis.

- Negotiated Grid: As previously noted, the value of cattle is determined by various traits that may or may not be consistent throughout a given pen of animals. By using a schedule of premiums and discounts, or a "grid," cattle producers can be rewarded for producing more valuable beef. In a negotiated grid transaction, the buyer and seller negotiate a base price for cattle, similar to the direct interaction of a negotiated cash trade. This will be the starting point for premiums and discounts associated with different traits. From there, the individual animals in the pen are evaluated post-harvest. Premiums are added to the base price for cattle with desired traits (e.g., Prime, Choice, Certified Angus Beef, NHTC, etc.) and discounts are subtracted for less desired traits (e.g., Select, lower yield, blemishes, etc.).

- Formula: The formula category is unique in that it does not have an established definition like the other three transaction types. The formula category includes those transactions that do not meet

> the definition of negotiated cash, negotiated grid, or contract transactions. The key similarity among all formula transactions is that prices are not negotiated each week, but rather established by alternative means. While negotiation does occur in determining the formula, it is different than traditional negotiation. The most common formula transaction functions similar to a negotiated grid transaction. Cattle begin at a base price to which premiums are added and discounts subtracted. However, the base price is not negotiated. There are many ways to establish a base price, but the most common for formula transactions is to utilize the prices discovered through negotiated trades in a given region and reported by USDA under Livestock Mandatory Reporting.

Because the negotiated cash method is the oldest and most traditional means of transacting live cattle, the other classifications are collectively referred to as alternative marketing arrangements (AMAs). In response to poor and declining beef demand in the late 1900s, AMAs were developed by cattle producers as a means of rewarding production practices and genetic improvements that results in higher quality, more valuable, better tasting beef products.

While Market News uses these four classifications, it is important to note the details of individual agreements within these buckets vary widely based on a host of factors, including but not limited to geographic region, cattle characteristics, production methods, and consumer demand trends. Each individual producer's marketing arrangements are negotiated to optimize efficiency and return for their specific situation and business model. As the Service explores regulatory solutions to improve the environment in which these terms are negotiated, NCBA urges AMS to reject attempts to standardize agreements between packers and producers—either directly or indirectly. Because of the innumerable means available to producers to differentiate their products in the marketplace, standardization will undoubtedly result in reduced access to opportunities for many market participants to their detriment and to the detriment of consumers.

As one example, consumers have demonstrated high demand for Angus beef, incentivizing many restaurateurs and retailers to pay premium prices for these products. As a result, packers are also willing to pay premium prices for cattle enrolled in the program. Orders for CAB products are made weeks or even months in advance. For producers, AMAs simultaneously allow them to capture prearranged premiums for higher-quality cattle and reduces the market uncertainty inherent to the spot market. Meatpackers similarly benefit by being guaranteed a supply of cattle to fill their orders.

Another example relates to exports. Trade is an essential component to producer profitability. In fact, it is estimated that beef exports are responsible for $459.50 per head of total fed cattle value.[2] Currently, certain high-value export markets require beef to be sourced from cattle that are nonhormone treated. As with many value-added programs, cattle producers incur higher operating costs to enroll livestock in an NHTC program. Those costs are offset by the premiums packers pay for these specific cattle to meet customs requirements. It is impractical for producers to market cattle with value-added attributes and for packers to purchase these cattle as a negotiated cash transaction. Due to the nature of production practices that must be followed, coordination and scheduling of cattle supplies to correspond with consumer demand for the product must be managed by meatpackers weeks and months in advance.

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[2] U.S. Meat Export Federation. *October Pork Exports Largest in 16 Months; Beef Exports Already Top $10 Billion*. 7 December 2022.

Additionally, and similar to the previous example, AMAs reduce price uncertainty for producers and supply uncertainty for packers.

In short, AMAs allow market signals to be more effectively communicated between producer and consumer and reduce volatility in pricing arrangements. They are a critical component of the modern cattle trade, and any policies which result in standardization or decreased use of AMAs would be detrimental to profitability in the cattle production sector.

THE ROLE OF ALTERNATIVE MARKETING ARRANGEMENTS IN THE FED CATTLE TRADE

At multiple points throughout the proposed rule's preamble, the Service implies a causal relationship between consolidation in the meatpacking sector and declining use of negotiated cash trades.[3] It is further implied that this decrease in the use of cash trade in favor of AMAs[4] has adversely impacted rural economies and communities.[5]

The reality is far different than the Service alleges. A 2021 study published by Texas A&M University, in collaboration with 19 livestock economists representing 11 land-grant universities, stated:

> *While not the central focus of the study, one can't discuss fed cattle pricing and capacity without acknowledging concerns over packer concentration. However, with respect to fed cattle pricing, research shows that alternative marketing arrangements (AMAs) do not create market power, because they do not change underlying supply and demand fundamentals.*[6]

The Service's implications are even more curious when compared to the findings in its January 2007 GIPSA Livestock and Meat Marketing Study.[7] This study, commissioned by USDA and prepared by RTI International, looked at the impact of AMAs across all livestock and meat markets. It modeled what impact reducing or eliminating AMAs would have across all sectors of the supply chain from cow/calf producer to consumer. USDA's own study found:

> **Hypothetical reductions in AMAs, as represented by formula arrangements (marketing agreements and forward contracts) and packer ownership, are found to have a negative effect on producer and consumer surplus measures.** Beef and cattle supplies and quality decreased and retail and wholesale beef prices increased because of reductions in AMAs. However, feeder and fed cattle prices decreased because of higher slaughter and processing costs resulting from the AMA restrictions. The short-run, long-run, and cumulative present value surplus for producers and consumers associated with reduced AMA volumes are all negative.

Alternative marketing arrangements were developed by cattle producers, not packers, as a means of capturing additional value for livestock, minimizing price risk, and increasing operational efficiencies. While NCBA has led, and continues to advocate, an industry-wide effort to improve price discovery for producers,

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[3] 87 Fed. Reg. at 60011; *Id*. at 60032 et seq.
[4] Transaction types other than negotiated cash, such as formulas, contracts, and negotiated grids.
[5] 87 Fed. Reg. at 60012
[6] Fischer, Bart, et al. *The U.S. Beef Supply Chain: Issues and Challenges*. Texas A&M University. 3 Jun. 2021.
[7] GIPSA Livestock and Meat Marketing Study, Vol. 1, ES-8 (January 2007).

our members unequivocally "oppose any mandate on cash trade volumes for cattle or any other legislative or regulatory policies that would limit the methods producers utilize to market cattle."[8]

An example to underscore the importance of AMAs in the marketplace can be found in USDA's desire to adopt more sustainable and climate-related improvements to the domestic food supply chain. In cattle production, many such practices require additional investments of time and capital to achieve. Producers who employ such methods are often unable to maintain profitability without access to AMAs because there is not a direct mechanism to compensate them for the specific traits demanded. The cash market reflects the value of cattle at a fixed point in time based upon the most current dynamics of supply and demand. The inherent volatility associated with this transaction method is precisely why producers opt for the greater certainty provided by AMAs—especially in situations where producers utilize claims-based product labels such as "sustainable beef," CAB, or NHTC. Any efforts by the Service to reduce or restrict AMA access would disincentivize many production practices, several of which have been prioritized by both USDA and consumer demand. Eliminating these incentives would reverse a 50-year trend of continuous improvement that has resulted in significant improvements in production efficiency. Reversing this trend would result in negative consequences, such as reduced beef production, increased natural resource utilization, increased carbon emissions, and reduced economic viability for farmers and ranchers–ultimately causing families to exit the business which would be socially devastating to rural economies and communities.

NCBA believes that AMS's commentary and criticism of AMAs are not germane to the proposed rule itself. We respectfully request additional information as to why AMS opted to include this divisive language in the preamble, whether AMS intends the proposed rule to limit the ability of cattle producers to use AMAs to sell their products, and whether the Service intends to promulgate any other rules that would limit producers ability to use these critical tools.

RELIANCE UPON ANECDOTAL EVIDENCE

AMS's overreliance on unexplained anecdotal evidence is arbitrary and capricious as well as inconsistent with the procedural requirements of the Administrative Procedure Act.

The proposed rule is impermissibly reliant on unexplained, anonymous anecdotes.

The proposed rule represents a significant shift in the rights and obligations of packers and producers under the PSA. But AMS has failed to put forward an adequate and reliable evidentiary basis to justify such a major shift. Under the arbitrary-and-capricious standard, an agency "bears the burden of producing a reasonable basis on the record for its regulations."[9]

Here, AMS primarily relies on unexplained and unverifiable anecdotes. For example, AMS says that "cattle producers have complained to AMS that they are provided with false pretexts as to why a packer would not accept cattle from a producer or would pay less for it."[10] But USDA omits any meaningful detail and fails to present any evidentiary findings resulting from a comprehensive investigation initiated as a result of the

[8] See NCBA policy M 1.10 – Fed Cattle Price Discovery (Addendum).
[9] *Chemical Manufacturers Association v. EPA*, 885 F.2d 253, 265 (5th Cir. 1989); *see also, e.g.*, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency.").
[10] 87 Fed. Reg. at 60013.

alleged complaints. For example, how many complaints did AMS receive? How long ago, and in what markets? How did AMS substantiate the complaints? How many were even investigated? Were the allegations in these complaints supported by any underlying factual evidence or detail? Does AMS have any independent reason to believe cattle producers actually *were* given "false pretexts" for packers' decisions?

This is not the only instance of AMS's reliance on vague and unexplained anecdotes. Unfortunately, such reliance permeates the proposed rule. For example, AMS claims that "a number of producers reported to USDA that they suffered retaliation, and that racial and other exclusionary prejudices were problems."[11] But AMS fails to provide any concrete examples to explain the nature or scope of the purported problem, let alone explain how (or if) AMS corroborated or otherwise independently verified the complaints. AMS also depends heavily on complaints it received during the course of a workshop with producers in 2010, as well as other "private complaints" submitted to AMS, in which participants expressed concern about retaliatory behavior from large packers.[12] So too, for deceptive practices, where AMS gestures generally at "complain[ts] over the years" and "highlighted concerns."[13] Yet AMS expressly acknowledges that many producers benefit from changes in the livestock market that create more stable long-term contractual relationships that could be threatened by the proposed rule. For example, AMS itself recognizes that AMAs help producers "manage price and production risks, elicit the production of products with specific quality attributes by tying prices to those attributes, and facilitate the smooth flow of commodities to processing plants."[14] Many producers are happy with their contractual relationships with packers, and it is arbitrary for AMS to focus solely on anecdotes from producers who are unhappy, which are insufficient as a matter of record evidence, in attempting to support new rules that could harm producers as a whole.

AMS's overreliance on anonymous or unsubstantiated anecdotes is particularly concerning given the inherent unreliability of that kind of evidence.[15] Anonymous evidence that cannot be independently corroborated is "inherently unreliable" because such evidence carries a "risk of fabrication."[16] AMS should not rely on such thin evidence in a rulemaking proposing a major transformation of the PSA that will have severe consequences for the beef industry.

AMS's failure to sufficiently describe the evidence underlying the proposed rule violates 5 U.S.C. § 553.

Section 553 of the APA requires agencies to disclose the factual basis for a proposed rule with enough specificity to allow commenters to meaningfully respond.[17] The APA's notice requirement ensures that

[11] 87 Fed. Reg. at 60013.
[12] *Id.* at 60026.
[13] *Id.* at 60032.
[14] *Id.* at 60039.
[15] *Cf. Alabama v. White*, 496 U.S. 325, 329 (1990) (explaining that "the veracity of persons supplying anonymous tips is by hypothesis largely unknown and unknowable").
[16] *United States v. Monteiro*, 447 F.3d 39, 46 (1st Cir. 2006).
[17] *See, e.g.*, *Chamber of Commerce v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006) ("[T]he 'most critical factual information' used by the agency [must] be subjected to informed comment.").

parties have "an opportunity to present comment and evidence to support their positions," and "enhance[s] the quality of judicial review."[18]

Here, "the most critical factual information" on which AMS relies is a series of anonymous anecdotes alleging discrimination, retaliation, deception, and other forms of market abuse by packers. Not only are these anecdotes inherently unreliable, but AMS fails to describe them with sufficient specificity to permit examination of and comment on that evidence. For example, as noted above, AMS asserts that "cattle producers have complained to USDA that they are provided with false pretexts as to why a packer would not accept cattle from a producer or would pay less for it."[19] These anecdotes, uniformly presented anonymously, do not include any details as to the timeframe, region, or any other factual detail that would allow commenters to respond.

As the trade association representing the cattle industry, NCBA would be well-positioned to comment on well-framed allegations. It could explain whether AMS's anecdotes are plausible evidence of real problems impacting a large number of producers or, instead, whether AMS is cherry-picking the vague complaints of a few producers who have been unable to adapt to procompetitive changes in the livestock market, such as the move towards alternative-marketing agreements. But without more detail about AMS's evidence, NCBA is unable to comment on the import of AMS's anecdotes.

By withholding this information in the proposed rule, AMS has not opened its decision-making process to a reasonable opportunity for evaluation and criticism by the public. Accordingly, AMS should comply with the APA and either withdraw the proposed rule or re-publish it with more information about the anecdotal complaints on which the proposed rule is premised. AMS should then provide for a new comment period to allow the public to respond.

AMS is compounding the problem by encouraging anonymous and unverifiable comments.

AMS's decision to encourage commenters to submit even more anonymous evidence compounds these problems.[20] By soliciting anonymous comments, AMS is ensuring that it is *less* likely to receive reliable information in response to the proposed rule. And AMS is ensuring that the evidentiary foundation of any final rule will be even weaker than in the proposed rule.

Even without inviting anonymous comments, the online comment process is already prone to abuse without sufficient safeguards. The magnitude of the problem became clear during the Federal Communication Commission's 2017 net-neutrality rulemaking, where millions of comments were fake, misattributed, and even fraudulent.[21] Even assuming anonymous comments could reasonably be relied upon, the Administrative Conference of the United States recommends that agencies should have clear, published policies regarding such anonymous comments, which AMS does not have.[22]

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[18] *Id.*
[19] 87 Fed. Reg. at 60013.
[20] *See, e.g.*, 87 Fed. Reg. at 60010, 60029, 60034 ("Parties who wish to comment anonymously may do so by entering 'N/A' in the fields that would identify the commenter").
[21] James V. Grimaldi, *Millions of People Post Comments on Federal Regulations. Many Are Fake*, Wall Street Journal (Dec. 12, 2017).
[22] *Rulemaking Comments*, ACUS, https://www.acus.gov/recommendation/rulemaking-comments (June 16, 2011).

Accordingly, anonymous comments submitted online should be accorded little if any weight. The value of information submitted during the notice-and-comment process hinges largely on the credibility of the individual commenters, which itself turns largely on their identity. For example, an established and respected member of the beef or poultry industry plainly has far more credibility in this rulemaking than, say, a college professor who worked on a farm for a summer in the 1990s, a trial lawyer who would like it to be easier to bring private actions under the PSA, or radical animal rights activist organizations and their members. AMS has set up this rulemaking so that it (and other commenters) will not be able to tell the difference.

By specifically inviting this sort of inherently unreliable evidence here, AMS has irrevocably tainted the notice-and-comment process. Producers or packers who prefer to remain anonymous will, through no fault of their own, submit unverifiable comments that the agency has at least implicitly suggested will receive the same consideration as more reliable evidence. At the same time, interested parties who prefer increased regulation of alternative-marketing agreements and similar contractual arrangements will likely attempt to flood the record with duplicative and potentially fictitious stories, protected from any potential liability for false statements or questioning by AMS. Thus, AMS will be forced to either: (1) credit inherently unreliable evidence and base its final rule on a flawed record; or (2) disregard potentially meritorious comments from parties who chose anonymity only because of AMS's encouragement.

Under the arbitrary-and-capricious standard, AMS has only one real option—it cannot rationally base its final rule on evidence that the agency knows is unreliable. Nor can AMS give equal weight to anonymous anecdotes submitted online and signed comments from recognized leaders in the industry.[23] Thus, at minimum, AMS should give no weight or severely diminished weight to any anonymous and unverifiable anecdotes that it receives in this rulemaking. Because AMS has misled commenters as to the validity of unverifiable evidence by specifically inviting them to submit comments anonymously, AMS should re-open the comment period after clarifying that the agency will not give such evidence inordinate weight.

AMS'S FAILURE TO RELEASE INFORMATION ON CLOSELY-RELATED PROPOSED RULEMAKINGS

The proposed rule also violates 5 U.S.C. § 553 and is arbitrary-and-capricious insofar as AMS has announced but thus far declined to release several closely-related proposals. Section 553(c) affords interested parties "an opportunity to participate in the rule making through submission of written data, views, or arguments."[24] This opportunity must be both "reasonable,"[25] and "meaningful."[26] When an agency refuses to disclose how a proposed change will fit into an interlocking set of closely-related rules that the agency has not even fully released, the agency deprives commenters of the ability to respond to the agency's rulemaking actions as a whole, rather than merely as discrete pieces of a series of interrelated rulemakings.

That is exactly what AMS has done here. AMS has framed the current proposed rule as the second in a series of at least three aimed at overhauling antitrust enforcement in the livestock industry. The third proposed rule, AMS has announced, "will focus on certain unfair practices and undue preferences, as well

[23] *See Texas Oil*, 161 F.3d at 935–36 (agency violated APA when it credited the results of an "unrepresentative" study while "ignor[ing] the results of a superior study").
[24] 5 U.S.C. § 553(c).
[25] *Forester v. CPSC*, 559 F.2d 774, 787 (D.C. Cir. 1977)
[26] *Regulatory Planning and Review*, Executive Order 12,866, 58 F.R. 51735 (Sept. 30, 1993).

as explain whether and when a showing of harm to competition is—and is not—required under sections 202(a) and (b)."[27] This preview of the third rule is as sweeping as it is non-specific, and has the potential to transform fundamentally the context in which the current proposed rule would be enforced. Without understanding how this closely-related rulemaking is likely to interact with, for example, AMS's proposed new cause of action for "market disadvantaged groups," NCBA cannot fully evaluate how the proposed rule will work in the real world as modified by all of AMS's new regulatory changes.

Nor can AMS or NCBA understand the cumulative effect that the proposed rule will have when it is combined with closely related rulemakings unless AMS's proposals are considered together, rather than in isolation. AMS's omission of information essential to evaluating this cumulative effect is especially significant given that the centrality of cumulative effect to modern cost-benefit analysis is the subject of a multi-decade, bipartisan consensus.[28] The Administrative Conference has similarly emphasized the significance of cumulative effect in cost-benefit analysis, stating that "the cumulative burden of decades of regulations issued by numerous federal agencies can both complicate agencies' enforcement efforts and impose a substantial burden on regulated entities."[29] This alignment on the importance of a regulation's cumulative effect is grounded in the real harms that a myopic focus on individual proposals can inflict on an industry. Each new regulation not only imposes direct and indirect compliance costs, which can interact with each other for multiplicative effect, but each new regulation also reduces the adaptability of regulated parties in the face of changing market conditions and can cause companies to shift their primary focus away from the provision of goods or services and toward regulatory compliance.[30]

The cumulative effect is particularly significant in light of the potential overlap between the proposed rule and a future rulemaking in which AMS has indicated it might attempt to overturn settled judicial precedent confirming that the statute requires plaintiffs to prove harm to competition to establish a Section 202 claim or otherwise seek to increase PSA litigation by watering down the elements of a plaintiff's claim. Those changes would represent a fundamental shift in the scope of the PSA and could entirely upend the anticipated implementation and litigation costs of the proposed rule in ways that AMS appears not to have contemplated.

AMS cannot invite interested parties to comment with its right hand while covering up what they are supposed to be commenting on with its left. In order for all stakeholders to consider the impact of all of the proposed rules adequately, AMS should withdraw the proposed rule, and coordinate its rulemaking schedule going forward to ensure that the industry can comment on AMS's interrelated proposed changes as a whole rather than merely in individual pieces. Either way, NCBA believes that its comments pertaining to the proposed rule are necessarily incomplete due to NCBA's lack of access to the additional rules forthcoming in this regulatory series. NCBA reserves the right to make further comments on the impacts of this proposed rule pending additional regulatory action under the Act.

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[27] *Agricultural Competition: A Plan in Support of Fair and Competitive Markets*, Agricultural Marketing Service (May 2022), at 19, https://www.ams.usda.gov/sites/default/files/media/USDAPlan_EO_COMPETITION.pdf.
[28] *See* Exec. Order 12,866 § 1(b)(11) (Clinton Administration); Exec. Order 13,563 § 1(b) (Obama Administration); Executive Order 13,771 (Trump Administration); Executive Order 13,992 § 2 (Biden Administration).
[29] Administrative Conference Recommendation 2014-5, 79 Fed. Reg. 75114, at 75114 (Dec. 17, 2014).
[30] *See* Michael Mandel & Diana G. Carew, *Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform*, Progressive Policy Institute, at 3–10 (May 5, 2013), https://tinyurl.com/y72atzn2; Richard Williams & Mark Adams, *Regulatory Overload*, Mercatus Center, at 2 (Feb. 8, 2012), https://tinyurl.com/y9mtn8xw.

HARM TO COMPETITION

The Service implies throughout the preamble that the Department intends to depart from its longstanding position that complainants must demonstrate harm to competition to establish a violation of the Act under Sections 202(a) and 202(b).[31] Such a departure would be inconsistent with federal case law and the Service's own prior position on the standard.[32]

The harm to competition standard appropriately obligates the complainant to demonstrate that a specific arrangement is injurious to overall competition in the marketplace and ensures that individual perceptions of unfairness are vetted according to uniform criteria. Because of the previously described complexities inherent to marketing cattle in the U.S., the requirement that a plaintiff demonstrate harm to competition is vital to our evolving industry. Cattle values are differentiated using a host of factors in addition to standard genotypical and phenotypical traits. As such, seemingly similar lots of cattle may be valued drastically differently based upon such factors as production method, animal handling requirements, regionality, program enrollment, export verification program requirements, etc. Without the harm to competition requirement, individual adjudications under Section 202 of the Act would vary substantially, confuse market participants, quell differentiation among products, and penalize innovation. Thus, it necessarily follows that the uncertainty stemming from this Wild-West approach to regulation will disincentivize procompetitive marketing arrangements to the ultimate detriment of producers and consumers.

Similarly perplexing, the Service asserts that the proposed rule is likely to *reduce* litigation.[33] NCBA vehemently disagrees with this position, especially given the Service's stated position on competitive injury. The harm to competition standard functions in accordance with the original intent of the Act and establishes clear guidelines for both market participants and mediators, both within the Service and the federal judiciary. If eliminated, courts would employ various, inconsistent means to establish a violation of the Act. The resulting application of unclear standards and increased confusion would almost certainly require the courts to weigh in on a multitude of individual cases—thus encouraging litigation and increasing the cost burden on producers. Such inconsistent findings would further confound the regulated entities and would create a regulatory environment hostile to innovation and improvement.

The proposed rule exceeds AMS's statutory authority and is inconsistent with decades of precedent holding that the PSA is an antitrust statute requiring harm to competition.

Congress enacted the PSA to protect consumers from anticompetitive conduct in the meatpacking industry. "[T]he chief evil feared [was] the monopoly of the packers" and the "exorbitant charges, duplication of commissions," and all other manner of "deceptive practices . . . made possible by collusion" between stockyard managers and packers.[34] The PSA incorporates the principles of antitrust law, which "formed the backbone of the PSA's creation."[35] "The PSA "is essentially an antitrust statute."[36]

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[31] See page 17 of the proposed rule and USDA Press Release No. 0130.21.
[32] 85 Fed. Reg. 1771, 1774 (Jan. 13, 2020) (stating, "AMS does not intend to create criteria that conflict with case precedent, so PSD expects that court precedents relating to competitive harm are likely to remain unchanged."). *See also Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 277-79 (6th Cir. 2010) (stating, "All told, seven circuits—the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits—have now weighed in on this issue, with unanimous results.")
[33] 87 Fed. Reg. 60044
[34] *Stafford v. Wallace*, 258 U.S. 495, 514 (1922).
[35] *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1304 (11th Cir. 2005).
[36] *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 277 (6th Cir. 2010).

"Although intended to be broader than antecedent antitrust legislation, § 202 'nonetheless incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation.'"[37]

"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."[38]

In the proposed rule, AMS repeatedly suggests that a plaintiff need not show harm to competition to bring an action under Section 202.[39] For support, AMS cites an executive order and "academics" who argue that plaintiffs "should not have to show market-wide harm to secure relief under the Act."[40]

Even setting aside the precarious basis of that support, that interpretation has "been consistently rejected by numerous courts of appeals for over 75 years, without congressional intervention."[41] A packer's conduct is actionable under Section 202 only if it is "injurious to competition []or intended to be so."[42] Federal courts of appeals are unanimous in holding that Section 202 requires a plaintiff to prove harm to competition.[43]

Several courts of appeals have held that the harm-to-competition requirement proceeds from the statutory text as a matter of settled law, foreclosing any argument that *Chevron* might support an inconsistent interpretation.[44] "Given the clear antitrust context in which the PSA was passed, the placement of [Section 202](a) and (b) among other subsections that clearly require anticompetitive intent or effect, and the nearly ninety years of circuit precedent," AMS's attempt to remove that requirement "goes against the meaning of the statute."[45]

"Whether the PSA should be amended to reflect USDA's view of what [Section 202] *ought* to provide is the task of Congress."[46]

AMS observes that the PSA has a "broader application" than the Clayton Act.[47] To the extent AMS suggests that this breadth means that Section 202 lacks a requirement that a plaintiff show harm to competition, that argument has been considered and rejected by federal courts.[48] AMS's sense of fairness, untethered from well-established antitrust principles, cannot justify the agency's attempt to expand the

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[37] *Been v. O.K. Industries, Inc.*, 495 F.3d 1217, 1228 (10th Cir. 2007) (quoting *De Jong Packing Co. v. USDA*, 618 F.2d 1329, 1335 n.7 (9th Cir. 1980)).
[38] *Armour & Co. v. United States*, 402 F.2d 712, 722 (7th Cir. 1968); *see also London*, 410 F.3d at 1304; *Terry*, 604 F.3d at 277–79; *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 363 (5th Cir. 2009) (en banc); *Been v. O.K. Industries, Inc.*, 495 F.3d 1217, 1228–30 (10th Cir. 2007).
[39] *See, e.g.*, 87 Fed. Reg. at 60014, 60017–19, 60025.
[40] 87 Fed. Reg. at 60014 & n.39.
[41] *Organization for Competitive Markets v. Department of Agriculture*, 912 F.3d 455, 458 (8th Cir. 2018).
[42] *Armour*, 402, F.2d at 722.
[43] *See, e.g.*, *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 277–79 (6th Cir. 2010) (citing decisions in the Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits).
[44] *See, e.g.*, *London*, 410 F.3d at 1304; *Wheeler*, 591 F.3d 355.
[45] *Wheeler*, 591 F.3d at 363.
[46] *Organization for Competitive Markets*, 912 F.3d at 458.
[47] 87 Fed. Reg. at 60015.
[48] *See, e.g.*, *De Jong Packing Co. v. USDA*, 618 F.2d 1329, 1335–37 (9th Cir. 1980) ("[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.").

scope of Section 202.[49] Such a move would be a significant departure from congressional intent. The PSA was written to prevent injury to the overall functioning of markets, not place USDA in a position to decide whether individual circumstances were disadvantageous to a particular market participant. In other words, removing the harm to competition requirement is an attempt to ensure equal outcomes instead of equal opportunities. This goes against the very tenants of a free marketplace and is not the purpose of anti-trust law.

Congress has long accepted the judicial consensus and for that reason, too, AMS's interpretation is foreclosed.[50] In fact, Congress has already spurned efforts to divorce Section 202 from harm to competition. In 2008, for example, Senator Harkin proposed an amendment to Section 202(a) that would have provided that a violation can occur "regardless of whether the practice or device causes competitive injury."[51] The amendment was rejected. Similar legislation was put forward in 2021 but has failed to gain traction in the House or the Senate.[52]

NCBA finds no discernable connection between the commentary in the preamble regarding harm to competition and the proposed rule. NCBA again requests the Service provide additional information pertaining to the inclusion of this dialogue in the preamble and any specific plans AMS may have to pursue policy or regulatory changes related to the implementation of this standard.

"MARKET VULNERABLE PRODUCERS" AND "LIVESTOCK PRODUCERS"

The proposed rule contemplates a definition for "market vulnerable individuals" who would receive additional protections under the Act should the rule be finalized. While the legal basis of this definition is questioned below, the policy implications of the proposed definition itself and the practice of selectively affording extraordinary protections to subsets of market participants is alarming to NCBA.

Statutory authority notwithstanding, the proposed definition of "market vulnerable individual" lacks clarity and raises more questions than it provides answers. As proposed, the Service will require regulated entities to make individual determinations, likely based upon perceptions, of whether someone is a "market vulnerable individual," rather than codifying a coherent standard based on consistent immutable traits such as race. At best, this reckless regulatory language will result in inconsistent application of standards and misapplication of the definition as the Service envisions—achieving the opposite of its intended effect. At worst, this is a thinly veiled attempt to subvert public scrutiny and substantially alter the scope of the proposed rule following the closure of this comment period. As elaborated below, NCBA opposes any categorical designation of producers as market vulnerable. However, if the Service insists on pursuing this course of action, NCBA strongly urges the Service to abandon the proposed definition to allow creation of a more reasonable and discernable definition that can then be evaluated by interested stakeholders and commented on accordingly pursuant to the Administrative Procedure Act.

[49] *See Armour*, 402 F.2d at 721.
[50] *See Wheeler*, 491 F.3d at 361–62 ("congressional silence in response to circuit unanimity after years of judicial interpretation supports adherence to the traditional view").
[51] H.R. 2419, Amendment No. 3667, 110th Cong. (2007). H.R. Rep. No. 110-627, at 469-477 (2008) (Conf. Rep.).
[52] H.R. 1393 § 502, 117th Cong. (2021); S. 300 § 502, 117th Cong. (2021).

The PSA is not an antidiscrimination statute.

AMS similarly exceeds its authority by attempting to transform Section 202 into a general antidiscrimination statute. To be clear, NCBA opposes invidious discrimination in all of its forms. But AMS cannot create a new civil rights law—especially one that is more expansive than any of the civil rights statutes actually enacted by Congress—through Section 202 of the PSA.

The proposed rule focuses primarily on race discrimination. But racial discrimination in private contracting is already unlawful under 42 U.S.C. § 1981.[53] Section 1981 is an antidiscrimination statute, not an antitrust statute like the PSA, so Section 1981 does not require a plaintiff alleging racial discrimination in contracting to show that the defendant's conduct harms competition. Thus, to the extent AMS's new antidiscrimination rule seeks to protect producers who cannot show harm to competition from racial discrimination, the proposal is unnecessary. And to the extent AMS is attempting to expand the protections of Section 1981 to include other protected categories, Congress has never taken that step and AMS lacks authority to do so without further legislation. Congress empowered AMS to protect competition, not to indulge in a "free-ranging inquiry into the equities of business practices" in the meatpacking industry.[54]

AMS's novel interpretation of the PSA is also inconsistent with Congress's choice to bar discrimination based on protected classifications through specific statutes and statutory language sprinkled throughout the United States Code. For example, Section 1981 has long barred racial discrimination in private contracting, as explained above. Title VII bars employers from discriminating on the basis of "race, color, religion, sex, or national origin."[55] The Americans with Disabilities Act bars discrimination "on the basis of disability."[56] And even Congress has never sought to punt to courts and litigants the threshold question of *who* an antidiscrimination law should protect, as AMS proposes to do here through its vague and indeterminate ban on discrimination against "market vulnerable" individuals.

In any event, producers alleging invidious discrimination by a packer with market power will often be able to satisfy the competitive-harm requirement. It is difficult to imagine circumstances in which race, sex, or other forms of discrimination against minority producers could be justified as pro-competitive, legitimate business practices that are consistent with Section 202. AMS's attempt to eliminate the competitive-harm requirement by converting Section 202 into an antidiscrimination law is therefore unnecessary in addition to exceeding AMS's statutory authority.

The proposed rule is barred under the major-questions doctrine.

AMS's proposed transformation of the PSA is also barred by the major-questions doctrine. Recent Supreme Court decisions have made clear that even where an agency's interpretation of a statute has a "plausible textual basis," the agency lacks authority to resolve major policy questions absent "clear congressional authorization."[57]

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[53] *See, e.g.*, *Patterson v. McLean Credit Union*, 491 U.S. 164, 171–72 (1989).
[54] *Wheeler*, 591 F.3d at 364, 367, 370 (Jones, C.J., concurring).
[55] 42 U.S.C. § 2000e-2.
[56] 42 U.S.C. § 12182(a); *see also, e.g.*, 29 U.S.C. § 621 et seq. (age discrimination); 20 U.S.C. § 1681 et seq. (sex discrimination in education); 42 U.S.C. § 18116 (race, sex, disability, and age discrimination in health care).
[57] *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (quotation marks omitted); *see also NFIB v. OSHA*, 142 S. Ct. 661 (2022) (per curiam); *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (2021).

The Supreme Court is especially skeptical where, as here, an agency's new assertion of authority "effect[s] a fundamental revision of the statute, changing it from one sort of scheme of regulation into an entirely different kind."[58] The Court is similarly skeptical where the agency seeks to adopt a rule "that Congress has conspicuously and repeatedly declined to enact itself."[59] And where an agency has long administered a statute, the "lack of historical precedent, coupled with the breadth of authority that the [agency] now claims, is a telling indication that the mandate extends beyond the agency's legitimate reach."[60]

Here, even assuming AMS could show a "plausible textual basis" for the proposed rule, it would still lack authority under the major-questions doctrine to adopt such a major transformation of the PSA.[61] Section 202 has long been understood as a statute grounded in principles of antitrust law. AMS cannot use its rulemaking authority to remake the statute into a broad prohibition on whatever AMS views to be unfair. And Congress has considered and rejected attempts to remove the competitive-harm requirement from the statute. Congress has similarly declined to adopt a general prohibition on discrimination in contracting, other than for race discrimination under Section 1981. AMS cannot use this rulemaking to implement a "legislative work-around."[62]

* * *

For each of these reasons, NCBA opposes AMS's new proposed antidiscrimination rule and strongly recommends that AMS withdraw the proposed rule and make clear that the agency will comply with well-settled law holding that a Section 202 violation requires competitive harm.

The proposed rule lacks a sufficient evidentiary basis.

Virtually all of AMS's purported evidence of illicit discrimination relates to alleged race discrimination.[63] As explained above, however, race discrimination in contracting is already illegal under 42 U.S.C. § 1981. Thus, the proposed rule is unnecessary because it would not add anything meaningful to the law already prohibiting packers from making contracting decisions based on race.

AMS further attempts to defend its new antidiscrimination rule on the ground that there are "[d]isparities in farm size and income across racial and ethnic groups" that "also exist among livestock and poultry farms with production contracts, highlighting additional vulnerability for particular groups in the sector."[64] AMS explains that "[m]arkets dominated by one or a few large packers or live poultry dealers may be less accessible to these smaller farms, which have limited financial or other economic resources with which to

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[58] *West Virginia v. EPA*, 142 S. Ct. at 2612 (alterations adopted and quotation marks omitted).
[59] *Id.* at 2610.
[60] *NFIB*, 142 S. Ct. at 666 (quotation marks omitted).
[61] *West Virginia v. EPA*, 142 S. Ct. at 2609.
[62] *NFIB*, 142 S. Ct. at 668 (Gorsuch, J., concurring) (quotation marks omitted); *see also West Virginia v. EPA*, 142 S. Ct. at 2614 (rejecting agency rule that "conveniently enabled it to enact a program that . . . Congress considered and rejected multiple times") (quotation marks omitted).
[63] *See, e.g.*, 87 Fed. Reg. at 60013 ("Racial and ethnic minorities are arguably more exposed to market abuses, as evidenced by their participation in the agricultural sector having declined sharply over the last many decades."); *id.* at 60019 (describing historical discrimination against Black farmers and "[o]ther racial and ethnic minorities"); *id.* at 60021–22 (statistics for production contracts showing "race and ethnicity" breakdowns).
[64] 87 Fed. Reg. at 60021.

engage."[65] AMS's reasoning is premised on a basic logical fallacy—that is, AMS is conflating correlation with causation. That minority-owned farms are more likely to be small, and that smaller farms have a harder time competing in the marketplace, does not mean that smaller minority-owned farms have a harder time competing *because of race discrimination*. At most, AMS has shown that smaller farms are at a competitive disadvantage vis-à-vis larger farms, which is true in any competitive marketplace due to economies of scale. AMS does not explain why the proposed rule seeks to attack that disparity through a broad and unprecedented antidiscrimination rule targeting discrimination against a novel category of "market vulnerable individuals" defined not by their size but instead by their race, gender, or other unidentified characteristics.

Nor can AMS's purported evidence of *racial* disparities in the meat industry justify the agency's proposal for a nebulous new antidiscrimination cause of action for any alleged discrimination against a "market vulnerable" producer—a new category in which AMS apparently intends to include all protected classifications under existing civil rights law, plus any future categories that AMS or the plaintiffs' bar seeks to add. In fact, AMS appears to lack *any* meaningful evidence of discrimination in contracting in the beef industry on the basis of sex, gender, sexual orientation, disability, or any of the other protected classes AMS recites in the proposed rule. At minimum, AMS has failed to explain its evidentiary or policy basis for going beyond race discrimination in attempting to transform the PSA from an antitrust statute into a new and expansive civil rights law.

The proposed category of "market vulnerable producers" is overbroad and hopelessly vague.

AMS's proposed definition of its novel protected class—"market vulnerable producers"—is also overbroad and hopelessly vague. The proposed rule would bar discrimination against any person who "is a member, or who a regulated entity perceives to be a member, of a group whose members have been subjected to, or are at heightened risk of, adverse treatment because of their identity as a member or perceived member of the of the group without regard to their individual qualities."[66]

AMS appears to be contemplating that courts and litigants will flesh out the details, on a case-by-case basis, to determine who is protected by the agency's new antidiscrimination rule. AMS's bizarre approach will lead to uncertainty and confusion for packers, producers, and courts left to fill in the blanks. And AMS's vague definition of "market vulnerable individual" is not just poor policy. It is unlawful.

The Due Process Clause prohibits laws that fail to give adequate notice of what they prohibit. A "vague law is no law at all."[67] AMS's proposed rule does not satisfy that standard. Packers will "be hard pressed to know when [they are] in danger" of violating the new prohibition, which is "subject to seemingly open-ended interpretation."[68] AMS's inability to "settle upon a single" meaning of who should be protected by the proposed rule renders the rule impermissibly vague.[69]

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[65] *Id.*
[66] 87 Fed. Reg. at 60054.
[67] *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019); *see also, e.g.*, *id.* at 2325 (laws "must give people of common intelligence fair notice of what the law demands of them").
[68] *Timpinaro v. SEC*, 2 F.3d 453, 460 (D.C. Cir. 1993).
[69] *Georgia Pacific v. OSHRC*, 25 F.3d 999, 1005 (11th Cir. 1994).

The vagueness problem is magnified here, where AMS's definition of a "market vulnerable individual" is not based on any objective standard that packers and producers can use to tell in advance whether a packer's business decisions are prohibited. Whether, for example, a producer is a member of a group "whose members . . . are at heightened risk of . . . adverse treatment,"[70] is inherently dependent "on the subjective viewpoints of others."[71] AMS cannot ask courts and litigants to act as legislators and figure out for themselves whom the new rule protects on pain of retroactive liability if a packer guesses wrong.

The proposed definition of "livestock producer" is similarly overbroad and vague.

AMS's proposed definition of "livestock producer" is similarly overbroad and unnecessarily vague. AMS proposes to define a "livestock producer" who is protected by the new antidiscrimination rule as "any person engaged in the raising and caring for livestock by the producer or another person, whether the livestock is owned by the producer or by another person, but not an employee of the owner of the livestock."[72] Read literally, AMS's broad definition could include anyone who cares for cattle on a farm, so long as that person is not employed by the owner of the cattle. That could sweep in, say, a neighbor helping care for a producer's farm while the producer is on vacation, a small producer's nephew who visits for the holidays, a cowboy working on a contract basis caring for cattle, accountants working for custom feedyards, or truck drivers hauling livestock owned by others.

The definition would particularly be overbroad in the case of commercial feed yards. A case noted in the agency's comments, [73] *Solomon Valley Feedlot Inc. v. Butz*,[74] held that commercial feed yards are not regulated entities under the PSA. Nevertheless, AMS's comments cite the *Solomon Valley* case for the proposition that the use of surety bonds is one of the means used under the Act to protect farmers and ranchers from receiving less than fair market value for their livestock and protecting consumers from unfair practices. The reference to the *Solomon Valley* case in this context is particularly troublesome to the industry because it suggests that commercial feed yards are required to post bonds—something only regulated entities are required to do. The suggestion is completely inaccurate and is not supported by the very case law cited by the agency.

Moreover, the overbroad definition of "livestock producer," when considered with the inappropriate reference to *Solomon Valley*, suggests that the agency is attempting to create a means to support regulation of feed yards by rule although that very issue has been rejected by the courts and is inconsistent with the language adopted by Congress.

In addition, AMS generally lacks authority to regulate relationships on the *producer* side of the beef industry. AMS cannot use its new definition of "livestock producer" to bring those relationships within the agency's regulatory authority and should not attempt to use its new proposed definition of "livestock producer" to do so in the future.

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[70] 87 Fed. Reg. at 60054

[71] *Women's Medical Center v. Bell*, 248 F.3d 411 (5th Cir. 2001); *see also Belle Maer Harbor v. Charter Township of Harrison*, 170 F.3d 553 (6th Cir. 1999) (holding a law unconstitutional because there was no clear definition of the prohibition).

[72] 87 Fed. Reg. at 60054.

[73] 87 Fed. Reg. 60033.

[74] *Solomon Valley Feedlot Inc. v. Butz*, 550 F. 2d 717 (10th Cir. 1977)

The proposed rule fails to make clear that the standard for discrimination must be "but for" causation.

If AMS insists on attempting to create a new antidiscrimination rule, it should clarify the causation standard for proving a violation. In particular, AMS should confirm that a violation requires that impermissible discrimination must be the but-for cause of a packer's contracting decision. That clarification will provide producers, packers, and courts with at least some certainty on the basic elements of AMS's new cause of action.

"It is textbook tort law that a plaintiff seeking redress for a defendant's legal wrong must prove but-for causation."[75] "This ancient and simple 'but for' causation test . . . supplies the default or background rule against which Congress is normally presumed to have legislated when creating its own new causes of action."[76]

Here, the text of the PSA confirms that the normal rule applies and that a plaintiff must show that a defendant's unlawful conduct was the but-for cause of the plaintiff's injury. When a defendant violates the statute, Section 308 provides the defendant is "liable to the person or persons injured thereby for the full amount of such damages sustained *in consequence of* such violation."[77] That language clearly requires that a plaintiff's injury be the "consequence" of the statutory violation—i.e., that the injury would not have occurred but-for the violation. Accordingly, if AMS adopts the proposed rule, it should confirm that the statutory standard of but-for causation applies to AMS's new antidiscrimination rule.

AMS's proposed bar on deceptive practices is flawed.

AMS's proposed expansion of Section 202(a)'s prohibition on "deceptive practice[s]" is similarly unlawful. AMS contends that a claim of deception "does not require proof of a particularized intent."[78] But that interpretation cannot be reconciled with the plain text of the statute as it would have been understood when it was enacted.[79]

The Congress that enacted Section 202 would have understood that conduct is not "deceptive" unless it is committed with the *intent* to deceive a producer. Fraud in contract formation, performance, and termination—referred to, interchangeably, as the tort of *deceit*—has always been central to the common law of contract and torts.[80] In 1921 and before, liability for deceit required a showing of scienter—specifically, a defendant accused of deceitful representation must have "know[n] or believe[d] that" the representation was false.[81] A defendant who lacked intent to deceive could be liable only under a distinct cause of action, negligent misrepresentation.[82] Set against that backdrop, "deceptive practices" under Section 202 plainly requires intent to deceive.

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[75] *Comcast Corp. v. National Association of African American-Owned Media*, 140 S. Ct. 1009, 1014 (2020) (quotation marks omitted).
[76] *Id.* (quotation marks omitted).
[77] 7 U.S.C. § 209(a) (emphasis added).
[78] 87 Fed. Reg. at 60033.
[79] *See Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1737 (2020) (a statute's meaning depends on the "ordinary public meaning of [the statute's] terms *at the time of its enactment*.").
[80] *See* Restatement (Third) of Torts § 9 (2020).
[81] *Id.* § 10.
[82] *Id.*

AMS's arguments to the contrary are confused. After gliding without substantive comment over the common law of fraud, the agency points to developments in the law of deceptive marketing.[83] But the common law tort of deceptive marketing is an inapt comparison to "deceptive practices" under Section 202(a). Unlike common-law fraud, at the time of the PSA's enactment deceptive marketing consisted solely in "palming off" or "passing off" one's own goods for the goods of a competitor.[84] That type of conduct is distinct from the contracting covered by the PSA, since it concerns the misrepresentations of a seller to a buyer as to a product's source. The PSA targets a different scenario, in which the packer—the buyer—deceives the producer—the seller.

AMS then asserts that deceptive marketing eventually expanded to include a broader category of misrepresentations, which AMS says swept away the requirement of intentional misrepresentation and prohibited the omission of "relevant information."[85] But even in the few instances where courts accepted that expansion of deceptive marketing, those decisions came *after* the PSA was enacted.[86] Thus, they do not inform the meaning of the statute. Similarly, the common law understanding of deceptive marketing did not abandon the intent requirement, outside actions for trademark infringement, until well after the PSA was enacted.[87]

LITIGATION

AMS fails to give sufficient consideration to litigation risk and the harm it will impose on the beef industry.

The proposed rule also fails to give adequate consideration to the severe costs that increased litigation and litigation risk will impose on the beef industry. Agency action is arbitrary and capricious if the agency fails "to consider an important aspect of the problem, offer[s] an explanation for its decision that runs counter to the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[88]

Here, AMS is proposing a rule that purports to eliminate the core element of a Section 202 claim—the requirement that a plaintiff show competitive harm—for a new cause of action modeled on federal civil rights law rather than the antitrust principles at the core of the PSA. And AMS is proposing to adopt an interpretation of Section 202's prohibition of "deceptive practices" that would not even require intent to deceive. Worse still, AMS is proposing these rules under vague and unclear standards that will bedevil courts and litigants for years to come. As just one example, AMS has not clarified who is protected by the agency's new civil rights law.

Remarkably, AMS asserts in a cursory analysis of litigation costs that the proposed rule "could result in a *reduction* in litigation costs if companies come into compliance without any enforcement action."[89] But AMS fails to take into account the reality of its new proposed rule, which is *intended* to make it much easier for

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[83] 87 Fed. Reg. at 60031.
[84] Restatement (Second) of Unfair Competition § 2 (1995).
[85] 87 Fed. Reg. at 60031.
[86] *See Ely-Norris Safe Co. v. Mosler Safe Co.*, 7 F.2d 603 (2d Cir. 1925).
[87] Restatement (Second) of Unfair Competition § 2 cmt. f.
[88] *Motor Vehicle Manufacturers of U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).
[89] 87 Fed. Reg. at 60044 (emphasis added).

producers to bring cases against packers challenging alternative-marketing agreements and other pro-competitive practices. AMS similarly fails to account for the massive legal uncertainty that the new rule will create, leading to increased costs for producers, packers, and courts alike as they struggle to complete AMS's work and determine, for example, which plaintiffs are "market vulnerable producers" protected by AMS's new antidiscrimination rule.

Litigation itself increases uncertainty and unduly burdens cattle producers, but even the threat of litigation, based upon the proposed rule's broad impacts and vague regulatory language, will likely result in harm to cattle producers. For example, AMAs are negotiated individually on a business-to-business basis. Many arrangements are similar based upon the cattle being supplied, but there can be small but important differences that are negotiated to meet the needs of each individual business. For example, while a packer may broadly offer premiums for cattle achieving a Prime USDA quality grade, some producers may be offered additional incentives to achieve specific weight ranges for cattle. Weight targets are often based on geographical location due in part to regional availability of certain feedstuffs and unique environmental influences which tend to produce cattle that do not meet or exceed desired live weights. These arrangements could reasonably be perceived by packers to be noncompliant with the proposed rule or, even if compliant, vulnerable to litigation that could survive a motion to dismiss or a motion for summary judgement, and packers may opt to reduce their litigation risk exposure by standardizing contracts. In an effort to reduce contract terms offered to one party but not another, that could mean weight incentives are redacted. In this case, that creates a vulnerability for producers who incur additional costs to achieve weight goals. Ultimately, this achieves the opposite of the proposed rule's stated intent.

AMS's refusal to take litigation costs and risk seriously is a stark departure from the Department of Agriculture's past practice. As AMS acknowledges, GIPSA declined to finalize the agency's 2016 proposed rule because that rule "contained ambiguous terms that were likely to increase and prolong litigation between producers and regulated entities and between regulated entities and AMS."[90] The new proposed rule is even worse, yet AMS fails to explain why it has changed its view on the impact of ambiguous new rules on litigation costs in the meatpacking industry.

CONCLUSION

NCBA appreciates the opportunity to submit comments to this docket. We respectfully request the Service take no further action on this proposed rule. Please direct any questions to NCBA's Center for Public Policy by calling 202-347-0228.

Respectfully Submitted,

Ethan Lane
Vice President, Government Affairs
National Cattlemen's Beef Association

[90] 87 Fed. Reg. at 60014.

ADDENDUM

M 1.10
2022/Amended
Fed Cattle Price Discovery

WHEREAS, a competitive fed cattle market, based on multiple price discovery points, is necessary to achieve robust price discovery that sends proper price signals throughout the supply chain, and

WHEREAS, robust price discovery is vital for all cattle market participants, and

WHEREAS, properly functioning cash and futures markets require transparent distribution of market information and regionally sufficient negotiated trade to achieve robust price discovery, and

WHEREAS, LMR defines negotiated trade as a cash or spot market purchase of cattle by a packer or negotiation of a base price, from which premiums are added and discounts are subtracted, and

WHEREAS, the bid-and-offer cash fed cattle trade remains the primary base factor for fed cattle value determination on a nationwide basis, including those transacted on alternative marketing mechanisms, and

WHEREAS, all fed cattle market participants have a shared responsibility to contribute to regionally sufficient levels of negotiated trade in all cattle feeding regions to achieve robust price discovery, and

WHEREAS, fed cattle market participants sold nearly 100,000 head of negotiated cattle on a weekly basis in 2021, exceeding minimum negotiated trade numbers by a weekly average of 24,000 head and robust levels of negotiated trade by a weekly average of 12,000 head,

THEREFORE BE IT RESOLVED, NCBA supports the cattle industry's voluntary framework that has resulted in frequent and transparent negotiated trade to regionally sufficient levels, to achieve robust price discovery determined by NCBA funded and directed research in all major cattle feeding regions.

BE IT FURTHER RESOLVED, NCBA shall continue to closely monitor and disseminate fed cattle marketing and price discovery information and support research into new and innovative price determination mechanisms.

BE IT FURTHER RESOLVED, NCBA shall continue to pursue legislative or regulatory solutions, consistent with NCBA policy and guided by NCBA funded and directed research, that enhance fed cattle price discovery and market transparency.

BE IT FURTHER RESOLVED, NCBA shall oppose any mandate on cash trade volumes for cattle or any other legislative or regulatory policies that would limit the methods producers utilize to market cattle.