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November 22, 2010

SUBMITTED ELECTRONICALLY

Tess Butler
U.S. Department of Agriculture, GIPSA
Room 1643-S
1400 Independence Avenue, SW
Washington, DC 20250-3604

Re: Farm Bill Comments, Federal Register, June 22, 2010, Volume 75 No. 119 page 35338, Docket RIN 0580-AB07

Dear Ms. Butler:

The National Chicken Council (NCC) and the U.S. Poultry & Egg Association Inc. (USPOULTRY) appreciate the opportunity to comment on the proposed "Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act" published in the Federal Register on June 22, 2010 by the U.S. Department of Agriculture (USDA) Grain Inspection, Packers and Stockyards Administration (GIPSA or "the agency"). NCC represents vertically integrated companies that produce and process more than 95 percent of the chicken marketed in the United States, and our members would be directly affected by the new regulations. The U.S. Poultry & Egg Association is the world's largest poultry organization, whose membership includes producers of broilers, turkeys, ducks, eggs and breeding stock, as well as allied companies. The Association focuses on research, education, technical services and communications to keep members of the poultry industry current on important issues.

The proposed rule would fundamentally alter the structure of poultry production and marketing, changing the way the chicken industry has operated for decades, adversely affecting live poultry dealers (i.e., poultry processors), growers, and our corollaries in the livestock industry, as well as consumers. 1/ In so doing, not only would the proposal have significant and adverse economic consequences, but it would undermine the very relationships between processors and growers the proposal purportedly seeks to protect. For the numerous reasons discussed in these comments,

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1/ Although our comments focus specifically on the proposed rule as it affects chicken processors, the proposed rule also would have a detrimental impact on the turkey, hog, and cattle industries as well as their customers and consumers.

we urge the agency to withdraw the proposed rule and reissue a revised proposal that is in line with the mandates of the 2008 Farm Bill, the Packers & Stockyards Act (P&S Act), and traditional economic and antitrust principles.

EXECUTIVE SUMMARY

These comments explain the numerous reasons why the proposed rule is ill-advised, exceeds GIPSA's statutory authority, and, for some provisions, is unconstitutionally vague. GIPSA fails to provide an adequate justification for imposing such sweeping and detrimental changes to the poultry industry and does not explain corresponding benefits to counterbalance the hundreds of millions of dollars of detrimental effects this proposal will have on the U.S. economy. The agency also fails even to consider the negative consequences for consumers, innovation, competition, and food safety that would result from the proposal.

Section I of these comments focuses on the adverse effects to the poultry industry and consumers that would result from the proposal. Our practical concerns focus on the provisions of the proposal that would increase costs and harm competition and innovation in the poultry industry. One of the most troubling provisions is the need to maintain written justification for differential pricing paid to growers. In addition to increasing administrative burdens, this provision would subject poultry dealers to potential litigation every time they pay a grower a premium. Poultry dealers also might not have all the information necessary to maintain written documentation of justifications for differential pricing. Taken altogether, the considerations for undue preferences or advantages in the proposal could have a practical consequence of causing poultry dealers not to engage in differential treatment of growers despite compelling justification for doing so.

Several sections of the proposal would result in decreased innovation and efficiency. The provisions regarding tournament systems would reward the most inefficient growers by paying them the same base pay as the best growers. This would result in decreased incentives for growers to make capital improvements or increase efficiency, because base pay would be standardized for producers of all birds of the same type and kind. Additionally, the provisions regarding capital investments would detrimentally affect growth of the poultry industry, innovation, competitiveness, and food safety by virtue of imposing unduly restrictive requirements on acceptable capital improvement mandates by poultry dealers.

We also are concerned about provisions that would, essentially, mandate dealers to continue their contractual relationships with growers who are in breach of their contract, regardless of whether the breach could detrimentally affect animal welfare or food safety. The proposal regarding suspension of delivery of birds is unnecessarily restrictive because it does not consider the practical impacts of market changes in demand. The same is true for the proposal regarding a reasonable period of time for growers to remedy a breach of contract. We also think that there is no justification for requiring disclosure of sample contracts. Additionally, nearly every section of the proposal is rife with vague and undefined terms that would result in superfluous and costly litigation, unnecessarily increasing the costs of doing business.

Section II explains why the proposed rule exceeds the mandate from Congress in the 2008 Farm Bill and the scope of existing law. We also discuss GIPSA's lack of legal authority to regulate all stages of poultry production, which is an important component of the proposal but that the agency fails even to discuss in the preamble. As a whole, the proposed regulations are based on unsubstantiated allegations, which is arbitrary and capricious. Along with the agency and administrator's exhibition of bias against the industry, this is a violation of the Administrative Procedure Act. It also is important to note that GIPSA has failed to fulfill its economic analysis obligations under Executive Order 12866. The agency's economic analysis is cursory at best and reaches the untenable conclusion that this proposal would have less than a $100 million impact on the U.S. economy annually.

Section III discusses why the agency lacks statutory authority to promulgate any regulation that permits a finding of a violation of sections 202(a) and (b) of the P&S Act without a showing of injury to competition. The language of the Act is unambiguous in this regard and effectuates Congress's mandate for this section of the Act to eliminate anticompetitive practices. Additionally, every appellate court that has considered this issue has held that this section of the Act requires a showing of competitive injury. GIPSA lacks the legal authority to eliminate the competitive injury requirement in sections 202(a) and (b) of the Act because that requirement is mandated by statute. An agency may not abolish an element of a claim required by statute, and nothing in the 2008 Farm Bill authorizes the agency to do so. Accordingly, the agency's construction of section 202 is not entitled to deference.

Finally, Section IV of these comments discusses why the proposed rule is unconstitutionally vague under the due process clause of the Fifth Amendment.

Attached to these comments, and referenced throughout, is an economic analysis of the proposed rule conducted by Dr. Thomas E. Elam, President of FarmEcon LLC. This analysis was commissioned by NCC because of the lack of a comprehensive economic analysis in GIPSA's proposal. As discussed further below, Dr. Elam concludes that the proposal would significantly increase costs for the poultry industry and consumers by reducing the rate of efficiency improvements, increasing administrative overhead, and increasing the costs and frequency of litigation.

I. THE PROPOSED RULE WOULD ADVERSELY AFFECT THE POULTRY INDUSTRY AND CONSUMERS AND IS UNJUSTIFIED.

NCC, USPOULTRY, and their members have numerous practical and legal concerns with the substance of the proposed rule. Many of the specific provisions proposed would increase costs and harm competition and innovation in the poultry industry. These individual provisions are arbitrary and capricious because they would impose substantial and unnecessary costs to the detriment of the industry and consumers without any reasonable basis. The preamble uniformly fails to justify the rule, making the proposal arbitrary and capricious under the Administrative Procedure Act. Additionally, GIPSA fails to adhere to constraints imposed by the P&S Act.

Throughout its proposal, GIPSA consistently substitutes government fiat for private, market-based decision making. The proposed rule manifests little or no understanding of the practical implications of these mandates and often no inkling of their (i) cost to industry participants and the consuming public or (ii) effect on the competitiveness of the U.S. poultry industry both domestically and globally. As a result of GIPSA's command-and-control approach, instead of improving industry performance, the proposed rule is likely to usher in a number of detrimental outcomes. For example: poultry quality might decrease by virtue of decreased grower compensation; the incentives for growers to compete on the basis of efficiency, quality of birds, and quality of facilities and services are likely to be reduced; and better growers are likely to be deprived of appropriate rewards for their labors and, ultimately, penalized by legal mandates that compel them to be paid the same as, or to subsidize, less efficient growers. Considered in its entirety, the proposed rule seems aimed more at punishing business efficiency and innovation than redressing any identifiable economic distortions that might not ordinarily be corrected by market forces. Congress has not authorized the agency to engage in central planning or empowered it to redistribute income based on its own conception of "fairness" at the expense of rational, legitimate, and efficient business practices that benefit both industry participants and the consumers that they serve.

Compounding this overarching defect, the proposed rule is rife with ambiguities and undefined terms that would result in considerable uncertainty for the poultry industry. Throughout our comments below, we highlight vague or undefined terms in the proposed rule that would result in unnecessary confusion and potential litigation. For example, among other terms, the rule fails to define "reasonable person," "base pay," "like house types," "similarly situated," "reasonably be expected," "reasonable time period," "good working order," "reasonable discovery," "market value," "reasonable expected full economic value," and "adequate compensation incentives." Vague definitions and undefined terms would likely result in numerous lawsuits with the litigation costs effectively operating as a tax on market participants that would continue to be extracted until there is a sufficient body of case law clarifying the proposed rule. These costs are wholly unnecessary and provide no benefit to the industry or the public.

Additionally, the combined effect of the proposed rule's mandates, such as transaction-by-transaction recordkeeping requirements, contract disclosure, and cost justification requirements, are likely to increase administrative costs. Numerous other unintended consequences might result from GIPSA's proposed rule. The proposed rule could result in lenders lending less money (or demanding higher interest rates on loans) for upgrading older houses, increased start-up costs when farms that have lain fallow are sold and recommence operations, lower farm values due to higher start-up costs, and the development of larger farms to the detriment of smaller farms. These and other practical consequences of the proposed rule are explained further in the following sections of these comments.

effect on the economy of $100 million or more, be reviewed by the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) and subjected to a comprehensive cost/benefit assessment. As the numerous economic assessments submitted to the docket show, the economic impact of this rule will far exceed $100 million. In fact, the economic analysis commissioned by NCC, discussed further below, found that *for the broiler industry alone* the proposed rule will have an effect on the economy of $83 million in the first year after promulgation and a $1.025 billion impact over the first five years after promulgation. Therefore, an OIRA review should have been conducted before issuance of the proposal. The agency's disregard of its obligation to conduct an adequate economic analysis and its unsubstantiated conclusion that this is not a "significant regulatory action" are arbitrary and capricious.

The economic analysis included in the proposal provides insufficient information for substantive public comment on the economic impacts of the proposed rule. GIPSA's purported economic analysis is superficial at best and grossly underestimates the likely economic impact of the regulation. The analysis also fails to demonstrate the need for the rule, assess the impact of its implementation on the marketplace, or establish how the implementation of the rule would address a demonstrated need. As an example of its inadequacies, the economic analysis never references potential costs to consumers, although the rule is likely to have a significant adverse impact on consumers as a result of increased costs to industry and decreased innovation. Additionally, the proposed rule does not contemplate the increased costs of doing business that would likely result from (i) a marked increase in lawsuits against industry or (ii) the recordkeeping burdens imposed on poultry dealers, some of whom engage in tens of thousands transactions with growers annually. The proposed rule is sweeping in scope and would have major consequences throughout the economy. Such a broad rule that extends so far beyond Congress's direction in the Farm Bill and that would precipitate major changes in the poultry industry requires a vigorous economic analysis.

USDA's Office of the Chief Economist should conduct a comprehensive economic analysis of GIPSA's proposal. We expect that an appropriate economic analysis will illustrate that the proposed rule will have a significant impact on the U.S. economy, through an annual impact of $100 million or more on the economy or a material adverse affect on the economy, productivity, competition or jobs. 45/ Thereafter, we urge OIRA to conduct a thorough cost/benefit analysis of the rule under Executive Order 12866. Furthermore, after such analyses are complete, GIPSA should disclose those analyses and, if the proposed rule is not withdrawn, reopen the record for public comment before issuing any final rule pursuant to this proposal.

Because of the lack of a comprehensive economic analysis in GIPSA's proposal, NCC commissioned FarmEcon LLC to conduct an analysis of the potential economic impact of the proposed rule. This analysis is attached to these comments. In his report, Dr. Thomas E. Elam, President of FarmEcon LLC, found the most likely economic effects would be a reduction of performance-based competition among growers, a reduced rate of capital investment, a reduced rate of efficiency gains, higher chicken prices, and reduced volume of chicken exports. The

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45/ Exec. Order 12866.

analysis also found that it is likely that the proposed rule would increase production costs by reducing incentives for efficient chicken production, adversely affecting competition, live poultry dealers, efficient and effective chicken growers, and consumers. Dr. Elam further noted that the proposed rule contains a number of provisions that would create legal uncertainty, decrease innovation, and negatively affect how the poultry industry conducts business.

Dr. Elam identified three primary categories of significant added costs for the chicken industry:

- *Reduced Rate of Efficiency Improvements*: The proposed rule would likely reduce the level of future productivity gains, and cause costs to increase above what they otherwise would have been in the absence of the rule. This would likely result in increased retail chicken prices.
- *Increased Administrative Overhead*: Poultry dealers' overhead costs would likely increase because of the burdensome new documentation requirements for contract terms, grower payment rates, negotiated capital improvements to grower facilities, tournament compensation systems, grower termination, and contract submission to GIPSA.
- *Increased Costs of Litigation*: The numerous requirements and terms that are vague, poorly defined, or defined differently from long standing practice invite litigation. This legal uncertainty creates a disincentive for investment and innovation and imposes an unknown and unpredictable added cost burden to the industry.

The analysis concludes that that the total cost of the rule for the poultry industry alone for the first five years after promulgation would be about $1.025 billion. Per year, the costs are forecast to steadily increase reaching a predicted cost of over $336 million in 2015. In addition, there are significant additional costs that cannot be estimated, such as litigation expenses, higher prices from reduced market competition in related product markets, and reduced competitiveness in export markets. These costs far exceed the amount necessary to require a robust cost/benefit analysis by OMB under Executive Order 12866.

III. THE AGENCY LACKS STATUTORY AUTHORITY TO PROMULGATE ANY REGULATION THAT PERMITS A FINDING OF A VIOLATION OF SECTION 202(a)-(b) OF THE PACKERS AND STOCKYARDS ACT WITHOUT A SHOWING OF INJURY TO COMPETITION.

The proposed rule purports to abolish the requirement that either the agency or private plaintiffs prove a likelihood of competitive injury to establish a violation of section 202(a)-(b) of the P&S Act. 46/ The agency claims that "a violation of section 202(a) or (b) can be proven without proof of predatory intent, competitive injury, or likelihood of injury." 47/ That position is contrary to the plain language of the statute and the unanimous construction given it by every

46/ 7 U.S.C. § 192(a)-(b).
47/ 75 Fed. Reg. 35338, 35340 (June 22, 2010).

federal appellate court to have addressed the issue. Indeed, the agency effectively concedes as much in the proposal's preamble and invites judicial reconsideration of settled law. 48/

When Congress passed the P&S Act, it specifically intended to prohibit practices that harmed the competitive process. The language that it used in the statute was understood at the time of enactment to address those practices that were collusive or monopolistic (or monopsonistic) and had a substantial likelihood of reducing output and ultimately raising prices to consumers. Congress incorporated terminology from other regulatory statutes – most notably, the Interstate Commerce Act and the Federal Trade Commission Act – that were plainly designed to protect the competitive process for the benefit of the consuming public. The competitive injury requirement, therefore, is not some judicial gloss on section 202(a)-(b), but an integral part of the statutory scheme. By importing language from other enactments with well-established legal meaning, Congress necessarily "adopt[ed] the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use convey[ed]." 49/ Accordingly, it is the statutory language itself that imposes the requirement of competitive injury. Indeed, there is no other reasonable reading of the statute. The agency has no authority to promulgate any regulation that is broader than, or conflicts with, the underlying statutory provision on which it is based. 50/ Because sections 202(a) and (b) of the P&S Act mandate a showing of competitive injury, GIPSA has no power to abrogate that statutory element through its rulemaking authority.

A. The Unambiguous Language of Section 202 of the Packers & Stockyards Act Requires a Showing of Competitive Injury.

1. Congress Intended Section 202 of the Act to Eliminate Anticompetitive Practices.

There is no dispute that the purpose of section 202 of the P&S Act is the elimination of monopolistic or other anticompetitive practices. Only a year after the Act's passage, the Supreme Court in *Stafford v. Wallace* recognized that the "chief evil" that section 202 sought to address was "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*." 51/ "Another evil," according to the Court, was "exorbitant charges, duplication of

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48/ *Id.* at 35340-41 (stating that "USDA has consistently taken the position that, in some cases, a violation of section 202(a) or (b) can be proven without proof of predatory intent, competitive injury, or likelihood of injury" and that proposed rule "constitute[s] a material change in circumstances that warrants judicial reexamination of the issue").

49/ *Morissette v. United States,* 342 U.S. 246, 263 (1952).

50/ *Morrison v. National Australia Bank, Ltd.*, 130 S. Ct. 2869, 2881 (2010) (regulation promulgated under a statute "'does not extend beyond conduct encompassed by [the statute's] prohibition'") (quoting *United States v. O'Hagan*, 521 U.S. 642, 651 (1997)); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1975) ("scope [of a rule] cannot exceed the power granted the [agency] by Congress under [the relevant statute]").

51/ *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922) (emphasis added).

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.*" 52/

GIPSA apparently treats the existence of these multiple remedial purposes as evidence that the Congress did not intend to prohibit only those practices resulting in competitive injury. 53/ That contention cannot be squared with *Stafford*. The common thread linking the statutory purposes identified by the Supreme Court is the elimination of anticompetitive practices. First, as the *Stafford* Court noted, Congress sought to prohibit the abuse ("unduly and arbitrarily") of monopsony power by packers that leads to a monopolistic restriction of output with the effect of ("arbitrarily") increasing the price of products purchased by consumers. Second, Congress intended to prevent "exorbitant charges" and other anticompetitive practices resulting from collusion among market participants. As the Court noted, because of that collusion, "[e]xpenses 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.*" 54/ In other words, every aim of section 202 identified in *Stafford* manifests an intent to protect the competitive process for the benefit of consumers.

GIPSA never offers any explanation of Congressional intent. Certainly nothing in *Stafford* or in the language of the statute suggests that Congress intended the Act to protect producers (e.g., growers) distinct and apart from its protection of overall competition in the market and consumer interests. Rather, in identifying the aims of section 202, *Stafford* explicitly connects any protection of producers to the protection of consumers. The Court's additional statements that the Congress sought to remove "undue burden[s] on . . . commerce" 55/ and "unjust obstruction[s] to . . . commerce" 56/ flowing from any "unjust or deceptive practice or combination" only confirm that Congress enacted the P&S Act to maximize market output for the benefit of consumers.

This is hardly surprising. It has long been recognized that the P&S Act has its roots in antitrust law. 57/ Antitrust law exists to protect the competitive process so that consumers may obtain the

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52/ *Id.* (emphasis added).
53/ *See* 75 Fed. Reg. at 35840-41 (claiming that judicial decisions requiring competitive injury to establish a violation of section 202 "incorrectly assume that harm to competition was the only evil Congress sought to prevent by enacting the P&S Act" and noting that *Stafford* cites "multiple 'evils' that the P&S Act sought to remedy").
54/ *Stafford*, 258 U.S. at 515.
55/ *Id.*
56/ *Id.*
57/ *De Jong Packing Co. v. United States Dep't of Agric.*, 618 F.2d 1329, 1335 n.7 (9th Cir.), *cert. denied*, 449 U.S. 1061 (1980) (P&S Act "incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation"); *Armour & Co. v. United States*, 402 F.2d 712, 722 (7th Cir. 1968) ("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.").

highest quality goods and services at the lowest possible cost. 58/ In the absence of some likely consumer harm, "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws." 59/ In short, the Sherman Act and other antitrust statutes have not been construed to protect producers from the rigors of competition or to strike against aggressively competitive practices. Instead, they aim to enhance consumer welfare by ensuring that there are no collusive or monopolistic practices that restrict output and deprive consumers of the benefit of free and open markets. *Stafford* makes clear that the goals of the P&S Act are identical. 60/

2. Every Appellate Court to Have Considered the Issue Has Held That Section 202 of the Packers and Stockyards Act Requires a Showing of Competitive Injury.

In light of *Stafford*, every appellate court to have construed section 202 of the P&S Act has held that no violation of subsections (a) or (b) occurs without a showing of competitive injury. Eight different circuits have addressed the issue, and they have uniformly and resoundingly rejected

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58/ *See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S 209, 225 (1993) (the antitrust laws protect "*competition*, not *competitors*") (emphasis in original) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription'") (quoting R. Bork, *The Antitrust Paradox* 66 (1978)); *Sanderson v. Culligan Int'l Co.*, 415 F.3d 620, 623 (7th Cir. 2005) ("The antitrust laws protect consumers, not producers. They favor competition of all kinds, whether or not some other producer thinks the competition 'fair.'"); *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1154 (9th Cir. 2003) ("Inefficiency is precisely what the market aims to weed out. The Sherman Act, to put it bluntly, contemplates some roadkill on the turnpike to Efficiencyville."); *Chicago Prof'l Sports Ltd. P'ship v. National Basketball Ass'n*, 95 F.3d 593, 597 (7th Cir. 1996) ("The core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem.").

59/ *Brooke Group*, 509 U.S. at 225.

60/ The P&S Act may be broader than some antitrust provisions in that it prohibits acts that are *likely* to have a detrimental effect on competition rather than only those having an *actual* anticompetitive effect. *See, e.g., De Jong*, 618 F.2d at 1335 n.7 ("the courts that have considered § 202 have consistently looked to decisions under the Sherman Act for guidance, although recognizing that § 202 in some cases proscribes practices which the Sherman Act would permit"); *Armour & Co.*, 412 F.2d at 722 ("While Section 202(a) of the Packers and Stockyards Act may be broader than antecedent antitrust legislation found in the Sherman, Clayton, Federal Trade Commission and Interstate Commerce Commission Acts, there is no showing that there was any intent to give the Secretary of Agriculture complete and unbridled discretion to regulate the operations of packers."). The point remains, however, that section 202 does not permit either the agency or a private plaintiff to dispense with some showing of competitive injury – actual or likely – to prove a violation.

the position advanced by GIPSA in the proposed rule. 61/ In several of these cases, the agency has argued its position directly to the court in question; 62/ in others, it has filed *amicus* briefs urging the court to adopt its preferred construction. 63/ Rather than acquiesce in the these decisions, however, GIPSA now seeks to misuse the rulemaking process to achieve what it has not won in court. 64/

The agency offers no analysis undermining any of these decisions. Aside from GIPSA's *ipse dixit* that these judicial opinions are incorrect, nothing in the proposed rule itself or in the Federal Register notice explains any flaws in the reasoning of any of these cases. To the extent GIPSA discusses this plethora of judicial pronouncements at all, it either ignores certain decisions or denies that they mean what they say. 65/ In fact, the agency attempts to minimize the uniformity with which the appellate courts have rejected its position by conceding only that "[r]ecently, three courts of appeals have disagreed with the USDA's interpretation of the P&S Act and have concluded (in cases to which the United States was not a party) that plaintiffs could not prove their claims under section 202(a) and/or (b) without proving harm to competition or likely harm to competition." 66/ Besides ignoring the unbroken string of cases going back more than 40

61/ *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 276-79 (6th Cir. 2010); *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 (2006); *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir.), *cert. denied*, 546 U.S. 1034 (2005); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *Philson v. Goldsboro Milling Co.*, 1998 WL 709324 at *4-5 (4th Cir., Oct. 5, 1998); *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*, 618 F.2d at 1336-37; *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir. 1976); *see also Armour & Co.*, 402 F.2d 712.

62/ *IBP*, 187 F.3d 974; *Farrow*, 760 F.2d 211; *De Jong*, 618 F.2d 1329; *Armour & Co.*, 402 F.2d 712.

63/ *Terry*, 604 F.3d 272; *Wheeler*, 591 F.3d 355.

64/ The agency's Federal Register notice is quite explicit about this effort. *See* 75 Fed. Reg. at 35341 ("To the extent that these courts failed to defer to the USDA's interpretation of the statute because that interpretation had not previously been enshrined in a regulation, the new regulations constitute a material change in circumstances that warrants judicial reexamination of the issue.") (footnotes omitted). A more complete discussion of the many defects in GIPSA's deference argument is below. *See infra* at Section III.C.

65/ In one instance, the agency seeks to justify its refusal to acquiesce in the uniform judicial decisions rejecting its position by making the preposterous assertion that two of the appellate decisions adverse to its contention "were issued over vigorous dissents." 75 Fed. Reg. 35341. Exactly how that observation undermines the reasoning of the ten cases holding that injury to competition is an element of a section 202 claim is never explained. Apparently the agency believes that the fervor of its opposition to those decisions is a suitable substitute for sober legal analysis and can override unanimous federal precedent rejecting the agency's position.

66/ *Id.*

years explicitly construing section 202 to require a showing of competitive injury, 67/ the agency's discussion of the cases is blatantly misleading in at least three respects.

First, GIPSA simply ignores the most recent case rejecting its position, the Sixth Circuit's decision in *Terry v. Tyson Farm, Inc.* 68/ In a footnote, the agency states that the case "is pending." In fact, the Sixth Circuit decided *Terry* on May 10, 2010, some six weeks before the publication of the Federal Register notice.

Second, the agency asserts that the United States "was not a party" to any of the "recent" cases. Yet GIPSA omits that it participated in both *Terry* and *Wheeler v. Pilgrim's Pride Corp.*, 69/ as an *amicus* and made the same arguments in both cases that it makes in the Federal Register notice.

Third, GIPSA fails to note that its interpretation of the statute has been rejected in four cases in which the United States has been a party. 70/

In short, the agency has participated in some capacity, either as a party or an *amicus*, in six of the ten appellate cases holding that competitive injury is an element of a section 202 violation. In light of this record of litigation futility, GIPSA is not free to ignore the prevailing judicial authority or seek to undo it through the rulemaking process. Given the uniformity of decisions, it lacks authority to abrogate the competitive injury requirement and should abandon its effort to do so.

3. When the Packers and Stockyards Act Was Enacted, the Language of Sections 202(a) and (b) Was Understood to Proscribe Conduct That Harmed Competition.

The agency's attempt to abrogate the competitive injury requirement of section 202 rests on the premise that the words used in the Act are malleable and open to variable interpretation. 71/ Rather than base this argument on any legal authority, GIPSA dredges up contemporaneous dictionary definitions of the terms and then seeks to impress them on the statute's language. 72/ The agency cites no authority for this bizarre form of statutory construction, which borders on the frivolous. In exercising its rulemaking authority, GIPSA must follow the canons of statutory interpretation. It is neither "free to pour a vintage that [it] think[s] better suits present-day

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67/ *See supra* note 62.
68/ 604 F.3d 272 (6th Cir. 2010).
69/ 591 F.3d 355 (5th Cir. 2009) (en banc). The agency also fails to note that it participated in *London v. Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir. 2005), in which the Eleventh Circuit also rejected the arguments it makes on this issue in the preamble.
70/ *IBP*, 187 F.3d 974; *Farrow*, 760 F.2d 211; *De Jong*, 618 F.2d 1329; *Armour & Co.*, 402 F.2d 712.
71/ 75 Fed. Reg. 35340.
72/ *Id.* at 35340 n.32.

tastes" 73/ nor otherwise permitted to construe a statute in a linguistic vacuum. The Administrative Procedure Act does not sanction such "make-it-up-as-the-agency goes-along" exercises of regulatory power.

The agency's attempt to manufacture ambiguity, however, is utterly unavailing. Apparently, GIPSA believes that if the definition of statutory terms is not readily ascertainable without resort to outside sources, then the text is ambiguous and has no "plain meaning." This facile version of the "plain meaning" rule would eviscerate it as a mode of statutory construction. Contrary to GIPSA's premise, the terms actually used by Congress in sections 202(a) and (b) of the P&S Act had precise and well defined legal meanings when the statute was enacted. The relevant provisions of the Act prohibit "unfair," "unjustly discriminatory," and "deceptive" practices and devices, as well as "undue" or "unreasonable" preferences and advantages and "undue" or "unreasonable" prejudices and disadvantages. All of these terms had established statutory and common-law antecedents that were well-known to members of Congress. Read in legal context, these terms concern only business conduct that has an actual or likely adverse effect on competition. 74/ Therefore, the interpretation given by the courts to sections 202(a) and (b) is not merely the best reading but rather is the only permissible reading of the statute.

The language of sections 202(a) and (b) is lifted almost verbatim from provisions of the Interstate Commerce Act and the Federal Trade Commission Act. By the time of the P&S Act's passage in 1921, these statutes had been addressed a number of times by the Supreme Court. There was no question that the aims of those laws were to preserve or restore competition and prevent monopolistic practices either generally, in the case of the Federal Trade Commission Act, or in specific economic sectors, in the case of the Interstate Commerce Act. 75/ The language used in those enactments was understood to effectuate those Congressional goals.

Words used in a statute that "have acquired a specialized meaning in the legal context must be accorded their *legal* meaning." 76/ When Congress transports phrases from one statute to another, there is a strong presumption that adoption of such terminology "carries with it the previous judicial interpretations of the wording." 77/ Moreover, Congress "presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless

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73/ *United States v. Sisson*, 399 U.S. 267, 297 (1970).

74/ *Wheeler*, 591 F.3d at 364 (Jones, J., concurring). The term "unreasonable," for example, had a clear antitrust meaning by the time of the passage of the P&S Act. The Supreme Court had used that terminology to distinguish between those business practices that unlawfully restrained competition from those that were permissible under the Sherman Act. *See, e.g., Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

75/ *See generally Wheeler*, 591 F.3d at 365-70 (Jones, J. concurring) (collecting cases).

76/ *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Resources*, 532 U.S. 598, 615 (2001) (emphasis in original).

77/ *Carolene Prods. Co. v. United States*, 323 U.S. 18, 26 (1944).

otherwise instructed." 78/ "[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it." 79/ Here, nothing in sections 202(a) and (b) of the P&S Act suggests that Congress intended the words used in those provisions to have a meaning different from the meaning given them in other statutes. 80/ Rather, Congress used terms of art to describe the unlawful practices prohibited by sections 202(a) and (b). The "plain language" rule requires that those terms of art be given their commonly understood meaning at the time of the P&S Act's passage. Accordingly, the statutory language itself requires that either the agency or a private plaintiff prove some competitive injury in order to show a violation of sections 202(a) and (b).

4. The Structure of Section 202 of the Act Mandates a Competitive Injury Requirement.

The existence of a competitive injury requirement is also manifest from the structure of the statute. In its Federal Register notice, GIPSA makes much of the fact that subsections (a) and (b) of section 202 do not mention competitive injury while the other subsections of that provision expressly reference it. The agency claims that this difference "is a strong indication that Congress did not intend sections (a) and (b) to be limited to harm to competition." 81/ It is nothing of the sort. For the reasons described above, 82/ the words used in section 202(a) and (b) do expressly enshrine a competitive injury requirement in those subsections. Thus, GIPSA's argument rests on a fundamental error. In addition, the structure of the statute indicates that sections 202(a) and (b) are intended to prohibit only practices that injure competition.

Sections 202(a) and (b) do not ban all forms of economic discrimination, preference or advantage. Rather, they prohibit only those that are "unjust," "undue," "unfair" or "unreasonable." Therefore, there must be some forms of discrimination, preference or advantage that are legitimate and some that are not. Both the courts and the agency must have an objective standard by which to distinguish lawful conduct from unlawful conduct. The explicit requirement of competitive injury in other subsections of sections 202 demonstrate precisely what Congress intended that objective standard to be. When examined in context, the only reasonable conclusion that can be drawn is that sections 202(a) and (b) are intended to be catch-

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78/ *Morissette*, 342 U.S. at 263.
79/ *Moskal v. United States,* 498 U.S. 103, 121 (1990) (quoting F. Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L.R. 527, 537 (1947)).
80/ Although resort to the legislative history of the P&S Act is unnecessary for a proper construction of sections 202(a) and (b), that legislative history also confirms that Congress understood the terms used in the statute to address anticompetitive conduct. *See* H.R. Rep. No. 67-77, at 2-10 (1921) (detailed discussion of Supreme Court cases construing the language of the Interstate Commerce Act and the Federal Trade Commission Act).
81/ 75 Fed. Reg. 35340
82/ *See supra* Section III.A.3.

all provisions that sweep up anticompetitive practices not otherwise prohibited by the more narrowly drawn subsections of the statute. 83/

GIPSA's alternative construction is patently unreasonable. Without the competitive injury requirement, there is no objective standard by which courts or the agency can separate prohibited practices from lawful ones. Cut loose from their moorings in competition law, the terms "discrimination," "preference" and "advantage" have broad meanings that extend well beyond the economic realm. Yet even GIPSA has not suggested that the P&S Act applies to noncommercial practices. The agency's own understanding of the statute, therefore, confirms that Congress intended the P&S Act to be economic legislation governing commercial relationships. Once that fact is recognized, it follows that the terms "unfair," "unjust," "undue" and "unreasonable" must also have economic content. The only way to give those terms such content is to apply a clear set of objective economic principles that allow a court or agency to ferret out those practices that are harmful – that is, "unfair," "unjust," "undue," or "unreasonable" – from those that are efficient and beneficial based on the legal definitions of these terms when the P&S Act was adopted. The competitive injury requirement, in turn, is the only way to do so consistent with the structure and purposes of section 202.

GIPSA's preferred interpretation would make it virtually impossible for any business subject to the P&S Act to order its affairs rationally to comply with section 202(a) or (b). What is "unfair," "unjust," "undue," or "unreasonable" would depend solely on what an agency adjudicator or, in civil litigation, a judge or jury decided that it meant in any particularly case. To exercise that function, the agency or court would have to make value judgments, choosing one set of priorities over another without any guidance from the statutory text or any other source about which value or set of values is to be preferred in any particular case. Such an approach raises significant constitutional issues, 84/ but in any event, there is no need to address those matters because nothing in the statutory text suggests that Congress intended to empower the agency or the courts to make such standardless value judgments. 85/

In sum, the plain language of section 202 of the P&S Act, its aims, and its structure reveal that Congress intended that the practices banned by subsections (a) and (b) be those that harm competition in some fashion. That conclusion has been unanimously confirmed by every appellate court to address the issue. Therefore, the competitive injury requirement is not merely some gloss on an allegedly ambiguous provision but an integral and permanent statutory command.

83/ *Wheeler*, 591 F.3d at 371 (Jones, J., concurring).
84/ *See infra* Section IV.
85/ *Wheeler*, 591 F.3d at 365 (Jones, J., concurring) (P&S Act "certainly did not delegate any such free value-choosing role to the courts") (quoting R. Bork, *The Antitrust Paradox* 53 (1993 ed.)).

B. GIPSA May Not Eliminate the Competitive Injury Requirement in Sections 202(a) and (b) of the Packers and Stockyards Act Because That Requirement Is Mandated by Statute.

1. An Agency May Not by Regulation Abolish or Abrogate an Element of a Claim That Is Required by the Statute Upon Which the Rule Is Based.

Because competitive injury is an element of a violation under the statutory language of sections 202(a) and (b) of the P&S Act, GIPSA is not free to abolish or abrogate it by regulation. "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law." 86/ Rather, it is "'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" 87/ Accordingly, the scope of a regulation may not (i) exceed the power granted to the agency under the statute pursuant to which the regulation is promulgated or (ii) ban conduct that the statute does not prohibit. 88/

GIPSA's proposed rule violates this provision in two ways. First, by purporting to eliminate the requirement that the agency or a private plaintiff prove competitive injury in cases under sections 202(a) and (b), the proposed rule plainly extends beyond the scope of what the statute allows. 89/ For that reason alone, the proposed rule is unlawful and should be withdrawn. Second, even when the proposed rule pays lip service to the concept of competitive injury, it stretches the idea beyond the breaking point. The most notable examples lie in that portion of the rule that attempt to define a "likelihood of competitive injury." 90/

Section 201.2(u) of the proposed rule apparently seeks to enumerate certain "situations" that would be deemed to violate section 202(a) or (b) because they are likely to injure competition. Most of the seven different concepts set forth in section 201.2(u) are hopelessly vague and provide no administrable standard for determining when the statute has been violated. Some are full of buzzwords or phrases that are used in antitrust law – "raises rivals' costs," "forecloses competition," "restrains competition" and "market power," for example. But nothing in the proposed rule remotely suggests that the agency intends that these phrases be given their ordinary antitrust meaning. Moreover, the definition of "likelihood of competitive injury" does not turn on any specific practice in which a packer, swine contractor, or live poultry dealer might

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86/ *Hochfelder*, 425 U.S. at 213.
87/ *Id.* at 214 (quoting *Dixon v. United States*, 381 U.S. 68, 74 (1965) (quoting *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936)).
88/ *Morrison*, 130 S. Ct. at 2881 (2010) (regulation promulgated under a statute "'does not extend beyond conduct encompassed by [the statute's] prohibition'") (quoting *United States v. O'Hagan*, 521 U.S. 642, 651 (1997)); *Hochfelder*, 425 U.S. at 214.
89/ *See, e.g.*, 75 Fed. Reg. 35351-52, Proposed Rule §201.210(1)-(7) (prohibiting certain vaguely defined practices without any requirement that there be competitive injury); *Id.* at 35352, Proposed Rule 201.211 (prohibiting additional practices that do not result in competitive injury).
90/ 75 Fed. Reg. 35351, Proposed Rule 201.2(u).

engage but on "situations" that might result from some practice. These flaws alone warrant withdrawal of the rule.

Yet even giving section 201.2(u) the most generous reading possible, it is still clear that it exceeds the agency's authority. Three "situations" that are deemed likely to create competitive injury – those in which a packer, swine contractor or live poultry dealer (i) "wrongfully depresses prices paid to a producer or grower below market value," (ii) "impairs a producer's or grower's ability to compete with other producers or growers" or (iii) "impair [sic] a producer's or grower's ability to receive the reasonable expected full economic value from a transaction in the market channel or marketplace" – do not define competitive injury at all because none of them is tethered to consumer injury. Injury to competition is not some vague concept. Because the P&S Act has its historical roots in antitrust law, it incorporates basic antitrust principles. 91/ Unless a practice actually restricts output and raises prices or reduces the quality of goods and services to consumers (or is reasonably likely to do so), there can be no injury to competition under the antitrust laws. 92/ Even aggressive competitive practices – so long as they do not result in or threaten consumer injury – are not prohibited. As one court noted,

> Inefficiency is precisely what the market aims to weed out. The Sherman Act, to put it bluntly, contemplates some roadkill on the turnpike to Efficiencyville. 93/

Similar principles apply under the P&S Act. Section 202(a) and (b) do not stamp out every practice that some may regard as "unfair," "undue," "unjust" or "unreasonable" in order to protect growers from the vagaries of the market. They decline to do so because the ultimate beneficiaries of the statute are consumers. 94/ Any protection given to growers is the means to that end. The proposed rule, however, makes grower protection an end unto itself. Whatever else that may be called, it is not "likelihood of competitive injury."

Because the provisions prohibiting a "situation" that "wrongfully depresses prices paid to a producer or grower below market value," or "impairs a producer's or grower's ability to compete with other producers or growers" or "impair [sic] a producer's or grower's ability to receive the

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91/ *De Jong*, 618 F.2d at 1335 n.7; *Armour & Co.*, 402 F.2d at 722.

92/ *Reiter*, 442 U.S. at 343 ("Congress designed the Sherman Act as a 'consumer welfare prescription'") (quoting R. Bork, *The Antitrust Paradox* 66 (1978)); *Sanderson*, 415 F.3d at 623 ("The antitrust laws protect consumers, not producers. They favor competition of all kinds, whether or not some other producer thinks the competition 'fair.'").

93/ *Freeman*, 322 F.3d at 1154.

94/ *See, e.g., Been*, 495 F.3d at 1232 ("the plaintiff must show that the monopsonist's practices have caused or are likely to cause the anticompetitive effect associated with monopsonies, namely the arbitrary manipulation of market prices by unilaterally depressing seller prices on the input market *with the effect (or likely effect) of increasing prices on the output market*) (emphasis added); *Pickett*, 420 F.3d at 1287 ("While talk about the independence of cattle farmers has emotional appeal, the [P&S Act] *was not enacted to protect the independence of producers from market forces.*") (emphasis added).

reasonable expected full economic value from a transaction in the market channel or marketplace" do not address consumer injury, they could not be competitive injury. The proposed rule's attempt to ban such "situations" is beyond the scope of the statute and therefore beyond the rulemaking authority of the agency.

2. Nothing in the 2008 Farm Bill Authorizes the Agency to Eliminate the Competitive Injury Requirement of Section 202 by Regulation

The 2008 Farm Bill 95/ grants no authority to GIPSA to promulgate a rule that abrogates the competitive injury requirement of section 202(a) or (b). Section 11006 of the 2008 Farm Bill states in pertinent part that the "Secretary of Agriculture shall promulgate regulations with respect to the Packers and Stockyards Act, 1921 (7 U.S.C. § 181 et seq) to establish criteria that the Secretary will consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of such Act." 96/ The Farm Bill, therefore, authorizes only a rule setting forth *criteria* that the Agency will use in determining whether a violation of section 202(b) of the P&S Act has occurred. It does not give GIPSA power to alter the fundamental elements of the statute or abrogate them in any way.

Not only does the plain language of the 2008 Farm Bill make that clear, but the legislative record unmistakably demonstrates that Congress authorized no radical alteration of sections 202(a) or (b). The original draft of the 2008 Farm Bill proposed by Senator Harkin contained an express provision eliminating the competitive injury requirement under sections 202(a) and (b). Congress removed that language from the final enactment. Accordingly, the 2008 Farm Bill does not provide statutory authority for the proposed rule's abrogation of the competitive injury element of section 202 violations.

C. The Agency's Construction of Section 202 as Embodied in the Proposed Rule Is Not Entitled to Deference.

Without a sound legal basis under the statute for its attempt to abrogate the competitive injury requirement, GIPSA retreats to its shopworn argument that its determination that sections 202(a) and (b) of the statute do not require a showing of competitive injury is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 97/ Such deference is not warranted for at least three reasons.

95/ Pub. L. 100-246.
96/ *Id.* § 11006(1).
97/ 467 U.S. 837 (1984).

First, the agency or private plaintiffs have made this argument to at least three courts in cases under section 202(a) or (b) and been rebuffed on each occasion. 98/ The argument is no more persuasive in the rulemaking context than it was in any of these judicial proceedings.

Second, for the reasons set forth above, 99/ the plain language of sections 202(a) and (b) requires a showing of competitive injury. *Chevron* deference is a two-step analysis. The first asks whether the statute in question speaks to the question presented. If so, then the inquiry ends. When Congressional intent is clear from the statutory language, as it is here, the agency "must give effect to the unambiguously expressed intent of Congress." 100/ The proposed rule, therefore, is not entitled to *Chevron* deference.

Third, GIPSA's proposed interpretation of the statute, as noted above, is unreasonable. 101/ It would render sections 202(a) and (b) of the P&S Act empty vessels to be filled with whatever standards happen to strike the agency or a court or jury as "fair," "just" or "reasonable" at any particular moment. The proposed rule does not establish any framework for how such a decision is to be made. It offers no hint whether economically efficient and rational business practices will be exempted from this formless inquiry and does not suggest how a poultry dealer or any other entity subject to the statute can bring its conduct into conformity with the statutory mandate. Abandonment of the competitive injury requirement is tantamount to abandonment of the only objective criteria by which the lawfulness of any commercial practice may reasonably be judged. Such an approach is not faithful to Congressional goals in enacting the statute or sensible as public policy. Since the proposed rule is not based on "a permissible construction of the statute," it is entitled to no deference under *Chevron*. 102/

Finally, the Supreme Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services* 103/ provides no refuge for the proposed rule. Nothing in *Brand X* alters the *Chevron* rule that deference is unwarranted when a statute is unambiguous. 104/ Moreover, *Brand X* does not authorize Executive Branch agencies to issue regulations to abrogate judicial decisions with which they disagree. When a court holds that "the statute unambiguously forecloses the agency's interpretation," 105/ then *Chevron* deference is not applicable. At least two courts have specifically noted that the plain language of sections 202(a) and (b) requires a

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98/ *Wheeler*, 591 F.3d at 362 (agency interpretation not entitled to deference because "Congress has delegated no authority to change the meaning the courts have given to the statutory terms"); *Been*, 495 F.3d at 1226-27 (refusing to deter to agency interpretation); *London*, 410 F.3d at 1304 (refusing to deter to agency interpretation).

99/ *See supra* at Section III.A.

100/ *Chevron*, 467 at 841-43.

101/ *See supra* at Section III.A.

102/ *Chevron*, 467 U.S. at 841-43.

103/ 545 U.S. 967 (2006).

104/ *See id.* at 980 (*Chevron* deference applies only "[i]f a statute is ambiguous, and if the implementing agency's construction is reasonable").

105/ *Id.* at 982-83.

showing of competitive injury. 106/ In light of these holdings, *Brand X* cannot be stretched to cover the proposed rule here.

Furthermore, any attempt to use *Brand X* to circumvent the decisions of the lower federal courts would raise significant constitutional issues. "Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government." 107/ When the courts have placed a definitive judicial interpretation on the statute in question, a precedent holding a statute to be unambiguous forecloses a contrary agency construction." 108/ The doctrine of separation of powers prohibits agency interpretations that effectively undermine or seek to reverse authoritative judicial constructions of a statute. Furthermore, an administrative agency should not adopt any statutory interpretation that unnecessarily raises a constitutional question. 109/ The proposed rule would do precisely that. Accordingly, the agency's construction of the statute is impermissible for this reason as well.

IV. THE PROPOSED RULE IS UNCONSTITUTIONALLY VAGUE.

GIPSA's misbegotten effort to abolish the competitive injury requirement of sections 202(a) and (b) suffers from significant constitutional infirmities as well. A proposed rule having the force of law must give persons and entities subject to it fair notice of what is prohibited so that they may comply with it. Several portions of the proposed rule fail this basic constitutional test. While our analysis focuses on certain provisions in the definition of "likelihood of competitive injury," the same analysis applies to a number of undefined terms used elsewhere in the proposed rule.

106/ *London*, 410 F.3d at 1304 ("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.") (quoting *Philson v. Cold Creek Farms*, 947 F. Supp. 197, 200 (E.D.N.C. 1996)) (emphasis added); *Terry*, 604 F.3d at 279 ("we deem the construction of this nearly 90-year old statute *to be a matter of settled law*") (emphasis added); *Wheeler*, 591 F.3d at 362 (deference "unwarranted where Congress has delegated no authority *to change the meaning the courts have given to the statutory terms*") (emphasis added); *id.* at 366 (Jones, J., concurring) ("It would be a mistake to assume that the plain meaning rule requires interpretation of the PSA in a linguistic vacuum, ignoring how its terms were used by Congress or understood at the time of the Act's passage."); *id.* at 367 (Jones, J., concurring) ("'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.") (emphasis added).

107/ *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948).

108/ *Brand X*, 545 U.S. at 984.

109/ *See INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems") (internal quotations and citations omitted); *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

Under the due process clause of the Fifth Amendment, a rule of law must define a legal violation "with sufficient definiteness that ordinary people can understand what conduct is prohibited and . . . in a manner that does not encourage arbitrary and discriminatory enforcement." 110/ Any legal rule failing to meet that standard is "void for vagueness." While the vagueness doctrine is most often employed in criminal cases, it has also been applied in cases in which a party faced civil sanctions as well. 111/

The Supreme Court has applied the void-for-vagueness doctrine to strike economic regulations that are remarkably similar to the proposed rule. In *Cline v. Frink Dairy Co.*, 112/ the Court held unconstitutional under the Fourteenth Amendment Due Process Clause a Colorado antitrust statute prohibiting certain business combinations except those that were necessary to obtain a "reasonable profit." Similarly, in *United States v. L. Cohen Grocery Co.*, 113/ the Court held unconstitutional section 4 of the Lever Act, which made unlawful any "unjust or unreasonable rate or charge" for "necessities." And in *International Harvester Co. v. Kentucky*, 114/ the Court concluded that a Kentucky antitrust statute proscribing the fixing of prices at levels "greater or less than the real value of the article" was unconstitutionally vague. The fatal flaw in each law was the indeterminate liability standard imposed. None of the statutes proscribed any specific conduct but rather made illegality turn on "elements . . . [that] are uncertain both in nature and degree of effect to the acutest commercial mind." 115/

The proposed rule suffers from the exact same flaws, particularly those provisions purporting to define "likelihood of competitive injury." Several "situations" that fall within that definition do not declare any specific act or conduct unlawful. Rather, an act can be determined to be unlawful under the proposed rule only *after* some event has occurred. A poultry dealer or other entity subject to sections 202(a) and (b) acting in utmost good faith and ordering its affairs in the most rational fashion in an effort to comply with the proposed rule might nonetheless be liable if economic events beyond its control render an agreed-upon price "below market value." The phrases "below market value" and "reasonable expected full economic value" have no definitive measurement. A party subject to the proposed rule, therefore, could not reasonably anticipate, much less determine with any reasonable degree of certainty, what business practices would ultimately be held illegal under these and other provisions. The proposed rule, therefore, cannot withstand constitutional scrutiny. It should be withdrawn. 116/

110/ *Skilling v. United States*, 130 S. Ct. 2896, 2927-28 (2010).
111/ *Gentile v. State Bar*, 501 U.S. 1030, 1048-50 (1991) (invalidating state bar disciplinary rule under the void-for-vagueness doctrine).
112/ 274 U.S. 445, 453-65 (1927).
113/ 255 U.S. 81 (1921).
114/ 234 U.S. 216 (1914).
115/ *Id.* at 223.
116/ The proposed rule cannot be salvaged by a limiting construction. Even the agency will not be able to provide any reasonable guidance about what the vague provisions of the rule mean unless it pre-determines "market values" and "reasonable expected full economic values" and thereafter imposes its guesses on those on entities subject to the proposed rule. The absurdity of

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In conclusion, for the reasons stated herein, GIPSA should not adopt the proposed rule. We request that GIPSA either withdraw the proposed rule altogether or withdraw all aspects of the proposed rule not mandated by the 2008 Farm Bill and reissue a proposed rule that is more narrowly tailored to the Congressional mandates and consistent with well established judicial precedent. We also request that GIPSA conduct an adequate economic analysis of any future proposed rule on these topics to help avoid the clear disincentives to efficiency and innovation under the current proposed rule and that it solicit public comments on that analysis before taking any action on the proposed rule. Thank you for your consideration.

Respectfully submitted,

George Watts
President
National Chicken Council

John E. Starkey
President
U.S. Poultry & Egg Association

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issuing a regulation to construe a regulation aside, the proposed rule, if it is to be made coherent, will necessarily devolve into a regime of price controls. The P&S Act, however, does not authorize the agency to control prices or otherwise displace competition in any market. *Swift & Co. v. Wallace*, 105 F.2d 848, 853 (7th Cir. 1939).