November 22, 2010

Tess Butler
GIPSA, USDA
1400 Independence Ave., NW
Room 1643-S
Washington, DC 20250-3604

**Re: Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act; Proposed Rule; RIN 0580-AB07; 75 *Fed. Reg.* 35338 (June 22, 2010).**

Dear Ms. Butler:

The American Meat Institute (AMI) submits this letter in response to an invitation for comments in the above-referenced notice of proposed rulemaking (proposal) published by the Grain Inspection, Packers and Stockyards Administration (GIPSA or the agency). AMI is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products, and AMI member companies account for more than 95 percent of United States output of these products. Many AMI members procure livestock and poultry on the spot market and through a variety of marketing agreements and contracts and as such would be subject to these proposed rules.

Title XI of the Food, Conservation and Energy Act of 2008 (Pub. L. 110-246) (Farm Bill) directed the Secretary of Agriculture to "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

> (1) whether an undue or unreasonable preference or advantage has occurred in violation of such Act;

> (2) whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement;
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> (3) when a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of such Act; and
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> (4) if a live poultry dealer or swine contractor has provided a reasonable period of time for a poultry grower or a swine production contract grower to remedy a breach of contract that could lead to termination of the poultry growing arrangement or swine production contract." Section 11006, Farm Bill.

In addition to exceeding the Farm Bill's mandate, the proposal is fatally flawed and should be withdrawn for several other reasons.

- The proposed rule conflicts with long-standing judicial precedent.
- Many provisions would cause severe economic harm to producers, consumers, packers, and live poultry dealers.
- Many elements of the proposal are unconstitutionally vague and patently unworkable.
- The proposal would adversely affect the meat and poultry industry's ability to compete regarding international trade.
- The agency failed to meet the requirements of Executive Order 12866.

For these reasons, articulated in more detail below, AMI urges the agency to withdraw the proposal, reconsider many of the proposed sections, and reissue a proposed rule that is consistent with the Farm Bill mandate and that will not adversely affect livestock and poultry producers and the meat packing industry.

## I. MANY PROVISIONS IN THE PROPOSED RULE ARE LEGALLY INFIRM.

GIPSA, through the proposal, seeks to do what it has failed to do through the judiciary on multiple occasions and what the Congress has not authorized the agency to do through legislation. Specially, the proposal would, in effect, waive a necessary element in a Packers and Stockyards Act (PSA or the Act) case, *i.e.*, a showing of competitive injury, thereby setting in motion a cascading effect that will dramatically increase the threat of litigation brought under the PSA and that ultimately will undermine the significant progress made by the meat and poultry industry in meeting consumer demands during the past quarter century. The elements of the proposal that would cause this problem, however, are flawed legally. A more detailed discussion of the legal infirmities follows.

### Proposed Section 201.3(c) Conflicts with the Plain Meaning of the Act and Numerous Appellate Court Decisions, including Recent Cases in which the Agency has Participated.

#### Extensive Case Law before Enactment of the Farm Bill Conflicts with the Proposed Rule.

The agency asserts in the proposed rule that a plaintiff seeking to establish a claim under subsections 202(a) or 202(b) of the PSA need not demonstrate competitive injury or likelihood of competitive injury. This assertion conflicts with the great weight of judicial authority that has on numerous occasions examined that very question and thoroughly reviewed the intent of congress in enacting section 202 of the PSA. In fact, the agency's position conflicts with decisions of every federal circuit court to address the issue over the course of decades.

One of the first circuits to address this issue was the Seventh Circuit, which interpreted subsection 202(a) to require "either [predatory] intent or adverse competitive effect."[1] In that seminal decision, *Armour & Co. v.*

[1] *Armour & Co. v. United States*, 402 F.2d 712, 718. See also at 717-718 (discussing *Swift & Co. v. Wallace*, 105 F.2d 848 (7th Cir. 1939); *Wilson & Co. v. Benson*, 286 F.2d 891 (7th Cir. 1961); and *Swift & Co. v. United States*, 308 F.2d 849 (7th Cir. 1962)); see also *Pacific Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-370 (7th Cir. 1976) (holding that plaintiffs had failed to state a Section 202(a) claim because "the purpose of [the PSA] is to halt unfair business practices which adversely affect competition, not shown here").

*United States*, the Seventh Circuit recognized the PSA's "ancestry in antitrust law."[2] The antitrust laws, the court observed, "express a basic public policy distinguishing between fair and vigorous competition on the one hand and predatory or controlled competition on the other."[3] "The fact that a given provision [in the PSA] does not expressly specify the degree of injury or the type of intent required," the *Armour* court reasoned, "does not imply that these basic indicators of the line between free competition and predation are to be ignored."[4] Thus, the court concluded, "[s]urely words such as 'unfair' and 'unjustly' in Section 202(a) * * * require some examination of [a dealer's] intent and the likely effects of its acts or practices under scrutiny, even though [the] test under Section 202(a) * * * [may] be less stringent than under some of the anti-trust laws."[5]

The *Armour* court also found that the PSA's legislative history "fully supports [the] conclusion that Section 202(a) was not directed at [a practice] unless there was some intent to eliminate competition or unless the effect of the [practice] might lessen competition."[6] The court noted that the Senate Committee Report "makes it clear that this part of the legislation was promoted primarily by fear of monopoly and predation."[7] Likewise, the House Committee Report makes clear that the PSA "was aimed at halting 'a general course of action for the purpose of destroying competition.' "[8]

Many circuits have followed *Armour's* lead. For example, the Eighth Circuit stated that section 202(a) "authorize[s] the Secretary of Agriculture to regulate anticompetitive trade practices in the livestock and meat industry" and that "[a] practice is 'unfair' [under the PSA] if it injures or is likely to injure competition."[9] Likewise, the Ninth Circuit has held that, at the very least, section 202(a) requires "a reasonable likelihood that * * * the result [of

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[2] *Been v. O.K. Indus., Inc.*, 495 F.3d1217, 1228 (10th Cir. 2007)
[3] *Armour*, 402 F.2d at 717.
[4] *Id.*
[5] *Id.* (Emphasis added).
[6] *Id.* at 720.
[7] *Id.* (citing S. Rep. No. 66-429, at 1, 3) (Emphasis added).
[8] *Id.* (quoting H.R. Rep. No. 66-1297, at 11 (1921)).
[9] *Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 214 (8th Cir. 1985) (Emphasis added). See also *IBP Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999) (agreement providing for right of first refusal did not violate Section 202(a) where it did not "potentially suppress or reduce competition sufficient to be proscribed by the Act"); *United States v. Stanko,* 491 F.3d 408, 417-418 (8th Cir. 2007) (construing Section 202(a) to require "proof of economic effects on competition or consumers").

a practice] will be an undue restraint of competition."[10] As the *DeJong* court stated, "[w]hile § 202 of the [PSA] 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."[11]

Similarly the Fourth Circuit concluded that a plaintiff must prove that a practice or action at issue "was likely to affect competition adversely in order to prevail on [a] claim under [Section 202(a) of the PSA]."[12] And the Tenth and Eleventh Circuits have followed suit and held that "only those unfair, discriminatory or deceptive practices adversely affecting competition are prohibited by the PSA."[13] Thus, every circuit that examined this issue before enactment of the Farm Bill — reaching back over the course of decades — has held that showing an anticompetitive effect is required to establish a claim under subsections 202(a) or 202(b) of the PSA.[14]

In the face of this judicial precedent GIPSA attempts to support its erroneous interpretation of the PSA by citing legislative history and Congressional amendments to the PSA. Specifically, GIPSA claims that "Congress confirmed the agency's position by amending the P&S Act to specify specific instances of conduct prohibited as unfair that do not involve any inherent likelihood of competitive injury."[15] The amended sections of the PSA to which the agency refers for support for its argument, however, are sections 409 and 410 of the Act – not section 202.[16] If Congress wished to

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[10] *DeJong Packing Co. v. United States Dep't of Agric.*, 618 F.2d 1329, 1337 (9th Cir. 1980).
[11] *Id.* at 1335 n.7 (Emphasis added).
[12] *Goldsboro Milling Co.*, 1998 WL 709324, at *4. See also *Griffin v. Smithfield Foods, Inc.*, 183 F. Supp. 2d 824, 827 (E.D. Va. 2002) ("only those unfair, discriminatory or deceptive practices adversely affecting competition are prohibited by the Act") (quotation omitted); *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197, 201 (E.D.N.C. 1996) (Section 202(a) "is a general mandate against unfair acts by live poultry dealers which adversely affect competition").
[13] *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005). See *Been*, 495 F.3d at 1230 ("a plaintiff who challenges a practice under § 202(a) [must] show that the practice injures or is likely to injure competition").
[14] For like discussions that subsection 202(b) requires the same showing see *Adkins v. Cagle Foods JV, LLC*, 411 F.3d 1320, 1321, 1324 & n.6 (11th Cir. 2005); *IBP*, 187 F.3d at 976-977; *Armour*, 402 F.2d at 717.
[15] 75 *Fed. Reg.* at 35340.
[16] *Id.* See footnote 23 referencing sections 409 and 410.

amend section 202, as it has amended sections 409 and 410, it has had ample opportunity to do so. Congress, however, has declined that option.[17]

The agency also asserts that judicial decisions involving sections 307 and 312 support the concept articulated in proposed subsection 201.3(c). That effort, too, fails because the cases cited are both in circuits that have examined specifically the question of competitive injury as it pertains to section 202 of the PSA and both of those circuits have concluded that a showing of competitive harm is necessary. Specifically, GIPSA cites a 10th Circuit case, *Capitol Packing Company v. the United States*, 350 F.2d 67 (10th Cir. 1965), and a 9th Circuit case, *Spencer Livestock Comm'n Co. v. USDA*, 841 F.2d 1451 (9th Cir. 1988), which deal with parts of the PSA other than section 202, to support its position. The preamble, however, ignores the fact that a showing of competitive injury has been found necessary with respect to section 202 in both circuits.[18]

The agency also argues that the courts should defer to the agency's interpretation of the PSA. Deference, however, is inappropriate in this instance because, "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[19] Among the several circuits that have faced the deference argument the Eleventh Circuit's discussion in rejecting the agency's claim for deference best captures the issue: "Congress plainly intended to prohibit only those unfair, discriminatory or deceptive practices adversely affecting competition."[20] Thus, "a contrary interpretation of Section 202(a) deserves no deference."[21]

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[17] Section 202 has been amended more than once over the last few decades and Congress has never amended the statute to indicate that an anticompetitive effect is not required to establish a PSA claim. See, e.g., Farm Security and Rural Investment Act of 2002, Pub. L. No. 101-171, 116 Stat. 134, 509-510 (2002); Poultry Producers Financial Protection Act of 1987, Pub. L. No. 100-173, 101 Stat. 917, 917-918 (1987). In the Farm Bill Congress failed to enact proposed legislation that would have done just that. See Competitive and Fair Agricultural Markets Act of 2007, S. 622, 110th Cong., at 29 (2007).

[18] See *London* (10th Cir.) and *DeJong* (9th Cir.).

[19] *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

[20] *London*, 410 F.3d at 1304 (quotation omitted).

[21] *Id.* See also *Been*, 495 F.3d at 1227 ("we are not persuaded by the USDA's interpretation of the statute"); *Armour*, 402 F.2d at 722 ("in Section 202(a) Congress gave the Secretary no mandate to ignore the general outline of long-time antitrust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged").

Finally, the agency contends that publication of the new regulations constitutes a "material change in circumstances that warrants judicial reexamination of the issue."[22] That argument is inapplicable here, where 1) GIPSA has participated repeatedly in cases in which this issue was presented and in doing so has provided to the courts its interpretation of subsection 202(a) and (b), and 2) has had that interpretation rejected at least four times in the last five years by every circuit that has examined the issue.[23]

**Cases Decided since the 2008 Farm Bill also Conflict with the Proposed Rule.**

***Wheeler v. Pilgrim's Pride Corp.* – December 2009**

The discussion above focused on the conflict between the several cases decided before the 2008 Farm Bill. Since passage of the Farm Bill two more circuits have examined the issue and the agency's position, as reflected in subsection 201.3(c), which directly conflicts with the uniform interpretation of the PSA from the eight (8) different federal appellate courts that have considered the issue. The preamble discussion and the language in section 201.3(c) simply confirms that agency officials intend to apply the law as they see fit -- regardless of statutory language, Congressional intent, and existing judicial precedent.

Judicial rejection of the interpretation advanced by GIPSA in the preamble and articulated in section 201.3(c) is captured in the recent *en banc* decision from the United States Court of Appeals for the Fifth Circuit, *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (*en banc*). The *Wheeler* case includes an extensive review and analysis of the Act's language, its legislative history, and the extensive case law history. The opinion begins, however, with the following observation, which more than suggests that the necessity of showing competitive injury in a PSA case is a matter of settled law.

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[22] 75 *Fed. Reg.* at 35341.

[23] *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005); *Been v. O.K. Indus., Inc.*, 495 F.3d1217, 1228 (10th Cir. 2007); *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (*en banc*); and *Terry v. Tyson Farms, Inc.* 604 F3rd 272 (6th Cir. 2010).

> Once more a federal court is called to say that the purpose of the Packers and Stockyards Act of 1921 is to protect competition and, therefore, only those practices that will likely affect competition adversely violate the Act. That is this holding.[24]

The *Wheeler* court engaged in a thorough analysis of the history of the PSA and the extensive case law that preceded *Wheeler*. In that regard, the court examined holdings of the Supreme Court, as well as decisions in the 7th, 8th, 9th, 10th, and 11th Circuits.[25]

*Wheeler* also examined the legislative history of the Act and concluded that the history "supports the conclusion that it was designed to combat restraints on trade, with everyone from the Secretary of Agriculture to members of Congress testifying to the need of this statute to promote healthy competition."[26] The *Wheeler* court also recognized that Congress has amended the Act several times since its enactment, including the Farm Bill amendments.[27] The language at issue in *Wheeler* and in proposed section 201.3(c) however, sections 202 (a) and (b), has remained unchanged from original enactment even after many courts found that proving competitive injury necessary. Thus, the *Wheeler* court concluded, "[I]t is reasonable to conclude that Congress accepts the meaning of § 192(a) to require an effect on competition to be actionable because congressional silence in response to circuit unanimity 'after years of judicial interpretation supports adherence to the traditional view'."[28]

The *Wheeler* court properly rejected the agency's *Chevron* deference argument, which GIPSA made through its role as *amicus*. In fact, contrary to the agency's position in the proposed rule, *Wheeler* specifically found that such deference "is unwarranted where Congress has delegated no authority

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[24] *Wheeler* at 357.
[25] The *Wheeler* court also discussed an unpublished opinion from the 4th Circuit with a consistent finding.
[26] *Wheeler* at 361.
[27] Congress amended the PSA to provide for guidelines for poultry and hog production contracts that allow producers to terminate a contract within three days of execution, as well as mandating disclosure of required capital investments. The 2008 amendments also established a judicial forum for dispute resolution and provided producers an option regarding refusing arbitration clauses in contracts. See 122 Stat 1651, Pub. L. 110-246.
[28] *Wheeler* at 361-362 citing *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 593-94, 124 S. Ct. 1236, 1244-45 (2004).

to change the meaning the courts have given to the statutory terms, as the Eleventh and Tenth Circuits have held."[29]

Finally, in writing for the majority, Judge Reavley wrote: "We conclude that an anticompetitive effect is necessary for an actionable claim under the PSA in light of the Act's history in Congress and its consistent interpretation by the other circuits. ... Given the clear antitrust context in which the PSA was passed, the placement of § 192(a) and (b) among other subsections that clearly require anticompetitive intent or effect, and the nearly ninety years of circuit precedent, we find too that a failure to include the likelihood of an anticompetitive effect as a factor actually goes against the meaning of the statute."[30]

***Terry v. Tyson Farms, Inc.* -- May 2010**

Subsequent to *Wheeler* and just six weeks before the proposed rule published, the most recent interpretation of the PSA, this time from the United States Court of Appeals for the Sixth Circuit in *Terry v. Tyson Farms, Inc.* raised to eight the number of federal appellate courts that have considered the key issue of whether demonstrating harm or likely harm to competition is a necessary element of a PSA claim.[31] In *Terry* the Sixth Circuit said the following:

> The tide has now become a tidal wave, with the recent issuance of the Fifth Circuit Court of Appeals' *en banc* decision in *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (*en banc*), in which that court joined the ranks of all other federal appellate courts that have addressed this precise issue when it held that "the purpose of the Packers and Stockyards Act of 1921 is to protect competition and, therefore, only those practices that will likely affect competition

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[29] *Wheeler* at 362.

[30] *Id.*

[31] *Terry v. Tyson Farms, Inc.* 604 F3rd 272 (6th Cir. 2010). An interesting and telling indicator of the agency's stubborn refusal to abide by the repeated rulings against the position articulated in proposed subsection 201.3(c) is the fact that in footnote 31 in the preamble to the proposed rule GIPSA references the fact that *Terry* was argued in March 2010, leaving the impression that the case had yet to be decided when the proposed rule published on June 22. The agency does not acknowledge that *Terry* was decided consistently with seven other circuits, and in a manner at odds with the agency's interpretation, on May 10 – six weeks before publication of the proposed rule.

> adversely violate the Act." *Wheeler*, 591 F.3d at 357. All told, seven circuits – the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits – have now weighed in on this issue, with unanimous results. *See Wheeler*, 591 F.3d 355; *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1230 (10th Cir. 2007); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006); *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005), *cert. denied*, 546 U.S. 1034 (2005); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *Philson v. Goldsboro Milling Co.*, Nos. 96-2542, 96-2631, 164 F.3d 625, 1998 WL 709324, at *4-5 (4th Cir. Oct. 5, 1998) (unpublished table decision); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985); *DeJong Packing Co. v. United States Dep't of Agric.*, 618 F.2d 1329, 1336-37 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980); and *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir. 1976).[32]

The *Terry* court also referenced directly the agency's participation in the case as *amicus* stating:

> In this appeal, Terry, joined by *amicus curiae* United States Department of Agriculture ("USDA"), seeks to persuade us to adopt the decidedly minority view embraced by some district courts and vigorously articulated by Judge Garza, along with six of his colleagues, in his dissenting opinion in *Wheeler*. *See Wheeler*, 591 F.3d at 371 (Garza, J., dissenting). ...Ultimately, Terry and the USDA would have this court deviate from the course taken by the seven other circuits that have spoken on this issue, thus creating a conflict. We decline to do so.[33]

The *Terry* court found that "the rationale employed by our sister circuits is well-reasoned and grounded on sound principles of statutory construction. Moreover, under the fundamental principle of *stare decisis*, we deem the construction of this nearly 90-year-old statute to be a matter of settled law. We therefore join these circuits and hold that in order to succeed

[32] *Terry* at 277.
[33] *Terry* at 277-278.

on a claim under §§ 192(a) and (b) of the PSA, a plaintiff must show an adverse effect on competition."[34]

The agency's blatant disregard for the holdings in the extensive case law and its misplaced reliance on report language and dissents in one of those cases is the definition of arbitrary and capricious under the Administrative Procedure Act.

**Proposed Section 201.3(c) does not reflect a Longstanding Agency Interpretation of the Packers and Stockyards Act.**

The proposal is far reaching and several of the provisions are legally suspect. That conclusion is especially true with respect to proposed section 201.3(c), which reads as follows.

> (c) *Scope of Sections 202(a) and (b) of the Act.* The appropriate application of section 202(a) and (b) of the Act depends on the nature and circumstances of the challenged conduct. A finding that the challenged act or practice adversely affects or is likely to adversely affect competition is not necessary in all cases. Conduct can be found to violate section 202(a) and/or (b) of the Act without a finding of harm or likely harm to competition.

This proposed subsection conflicts not only with extensive judicial precedent requiring that private plaintiffs and the agency demonstrate harm or likely harm to competition to prevail in a PSA case brought under section 202(a) or (b), but it is at odds with previous agency positions.

In the preamble the agency contends that it 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."[35] Indeed, the agency goes on to say "[T]he longstanding agency position that, in some cases, a violation of section 202(a) or (b) can be proven without proof of likelihood of competitive injury is consistent with the language and structure of the P&S Act, as well as its legislative history and purposes."[36]

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[34] *Terry* at 279.
[35] 75 *Fed. Reg.* 35338, 35340 (June 22, 2010).
[36] *Id.*

That assertion is at odds, however, with a 1997 agency report responding to a petition submitted by the Western Organization of Resource Councils (WORC).[37] In its response to WORC GIPSA wrote:

> In order to prohibit activities of the packers through regulation or to file a complaint citing a violation of section 202, the Department must develop evidence that the packers have either predatory intent or that there is the likelihood that the complained of activity will result in injury.[38]

That the reference to injury means injury to competition is confirmed in the next sentence in which the report states:

> Case precedent supports this statement of the Secretary's authority to regulate packer activities. As the *Armour* court states: The clearer the danger of the [likelihood of competitive injury], as when competitors conspire to eliminate the uncertainties of price competition, the less important is proof of [predatory intent]. Conversely, the likelihood of injury arising from conduct adopted with predatory purpose is so great as to require little or no showing that such injury has already taken place. *Armour*, 402 F.2d 717. ...Therefore, to satisfy the *Armour* test, WORC would have to establish a violation of the Act based on evidence of the likelihood of injury.[39]

In addition, the Eleventh Circuit also concluded that the government had failed to establish that its interpretation was the Department of Agriculture's (USDA) "consistent view" of section 202(a).[40] That the

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[37] Review of Western Organization of Resource Councils (WORC) Petition for Rulemaking, Grain Inspection and Packers and Stockyards Administration, Packers and Stockyards Programs, August 29, 1997 http://archive.gipsa.usda.gov/psp/issues/worc_petition/worchmpg.pdf. (Attachment A)

[38]). *Id.* at 15-16.citing OGC Memorandum to the Chief Economist, June 20, 1996, p. 5 (Attachment 2).

[39] *Id.* at 16. (Emphasis added).

[40] *London*, 410 F.3d at 1304 n.7. Indeed, in *In re IBP, Inc.*, 57 Agric. Dec. 1353 (1998), the Judicial Officer held that a right of first refusal violated Section 202(a) precisely "because it ha[d] the effect or potential effect of reducing competition." 1998 WL 462705, at *34 (emphasis added), rev'd, *IBP*, 187 F.3d at 977 (holding that right of first refusal did not violate Section 202(a) because it did not "potentially suppress or reduce competition sufficient to be proscribed by the Act") (emphasis added).

government's interpretation is a mere litigating position also means it is not entitled to deference.[41]

In short, as recently as 1997 the agency understood and accepted the position that in order to prevail in a PSA case a plaintiff must demonstrate injury or likelihood of injury to competition, which calls into question the agency's assertion that the proposed rule reflects a "longstanding" GIPSA interpretation of the PSA. Why the agency shifted its position to that posited in the preamble is unknown and not explained by GIPSA.

**The Proposed Rule Inappropriately Exceeds the Congressional Mandate in the Farm Bill.**

As stated earlier, the Farm Bill directed the Secretary of Agriculture to promulgate rules that would establish criteria on several explicit topics. Specifically, the Secretary was directed to develop criteria for determining:

> (1) whether an undue or unreasonable preference or advantage has occurred in violation of such Act;
>
> (2) whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement;
>
> (3) when a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of such Act; and
> (4) if a live poultry dealer or swine contractor has provided a reasonable period of time for a poultry grower or a swine production contract grower to remedy a breach of contract that could lead to termination of the poultry growing arrangement or swine production contract.[42]

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[41] See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); see also *Been*, 495 F.3d at 1227 ("USDA's position as stated in its *amicus* brief [is entitled] little to no deference").

[42] Section 11006, Farm Bill.

In short, with respect to beef, RTI found that the net effect of eliminating AMAs would be to reduce prices, quantities, and producer and consumer surplus in almost all sectors of the industry – meaning that "reducing the use of AMAs would result in economic losses for beef consumers and the beef industry."[60]

RTI drew similar conclusions regarding the adverse impact that reducing or eliminating the use of AMAs would have with respect to hogs. In that regard, RTI found that "AMAs are an integral part of hog producers' selling practices and pork packers' procurement practices"[61] and that a "higher proportion of AMA use is associated with higher quality pork products."[62]

As with cattle and beef, RTI examined hypothetical restrictions regarding AMA use in the hog and pork industries and "found that hog producers would lose because of the offsetting effects of hogs diverted from AMAs to the spot market, consumers would lose as wholesale and retail pork prices rise, and packers would gain in the short run but neither gain nor lose in the long run."[63] (Emphasis added.) RTI identified losses to producers and consumers in every simulation scenario because of lost efficiencies associated with reducing the proportion of hogs sold through contracts and/or packer owned channels. RTI concluded that "[I]n all instances, the price spread between farm and wholesale prices would be expected to increase because of the net increase in the costs of processing. Moreover, wholesale, and hence retail, prices would increase, causing pork to become more expensive for consumers."[64]

**The Proposal Will Force Packers to Consider Reducing Markedly Their Use of Marketing Agreements (Alternative Marketing Arrangements) or Eliminating them Altogether**

The RTI conclusions are both relevant and significant because many, if not all, marketing agreements and forward contracts either may no longer be used or they may be notably limited in their use if the proposed rule becomes

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[60] *Id.* at ES-9.
[61] *Id.*
[62] *Id.* at ES-12.
[63] *Id.* at ES-12-13.
[64] *Id.* at ES-13.

final as written. The reasons for that conclusion are straightforward and arise from the disincentives the proposal creates regarding the use of marketing agreements.

First, the threat of liability facing packers from lawsuits that are likely to be brought, either by GIPSA or by private plaintiffs, alleging violations of the Act is markedly greater if proposed section 201.3(c) becomes final. As discussed above in Section I, lessening the burden that a potential plaintiff must meet to prevail in a PSA lawsuit and based on past experience may cause many packers to consider abandoning or significantly limiting the number and types of marketing agreements they utilize simply to limit risk. Past experience, e.g., *Pickett v. Tyson Fresh Meats* may cause packers to consider limiting, if not abandoning wholly, the use of AMAs – however specious the litigation.

Second, the breadth and ambiguity in the definition of "likelihood of competitive injury" also makes the use of such instruments much more risky, again because of the threat of litigation. That definition reads, in pertinent part:

> It also includes situations in which a packer, swine contractor, or live poultry dealer 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...[65]

This proposed definition is a backhanded attempt to satisfy the statutory requirement identified by the eight federal circuits regarding showing competitive injury or a likelihood of competitive injury. Elements of the definition, however, are so vague and so broad that a packer will not be able to make an informed decision regarding what must be done to comply. This uncertainty is particularly applicable regarding the risks of litigation attendant to using marketing agreements.

For example, under the proposed definition, it would be virtually impossible for a packer to know whether having marketing agreements with a particular producer or group of producers will be found to have "impaired" the ability of a different producer, *e.g.*, a producer who affirmatively chooses

[65] 75 *Fed. Reg.* at 35351, proposed 201.2(u) (Emphasis added).

not to use such agreements or who does business with another packer, to compete against the producers with whom the packer has such agreements.[66] Similarly, a packer may elect to enter into marketing agreements with a group of producers. At the same time the packer may choose not to enter into the same agreement with other producers for legitimate business reasons, *e.g.*, poor herd management skills, history of poor performance, or the packer simply has met all of its livestock needs. The definition's ambiguity leaves unclear whether the packer has impaired the ability of the producer with whom it has no agreement to compete with those producers who have such an agreement. If by not offering a marketing agreement to a producer the packer is deemed to have impaired that producer's ability to compete, that producer could be in a position to assert he or she has demonstrated a likelihood of competitive injury and prevail in a PSA because, as the agency stated in the preamble, "any act that ...is likely to harm competition necessarily violates the statute."[67]

Finally, the last clause of the "likelihood of competitive injury" definition is unacceptably vague. Specifically, the proposed definition would find a likelihood of competitive injury in a situation in which a packer impairs "a producer's or grower's ability to receive the reasonable expected full economic value from a transaction in the market channel or marketplace." (Emphasis added.) Absent is any explanation in the preamble of what the agency means by the phrase "reasonable expected full economic value."[68] Against this vague and unintelligible standard, the packer in both of the fact examples discussed above will be at an unacceptable risk in a lawsuit. In the first, the producer who sells on the cash market will assuredly assert that his ability to receive the "reasonable expected full economic value" was impaired by the packer's use of marketing agreements with other producers. In the second fact scenario, the producer who was denied a marketing agreement will contend that his ability to receive the "reasonable expected full economic value" was impaired because he was denied such an agreement.

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[66] This scenario is not hypothetical as the fact pattern of *Pickett v. Tyson Fresh Meats* is very similar.

[67] 75 *Fed. Reg.* at 35341. (Emphasis added).

[68] Indeed, the preamble merely recites the language in the proposed rule (or does the rule merely recite the language in the preamble?) in its attempt to explain what "likelihood of competitive injury" is.

In any of the circumstances discussed, and many others not discussed in these comments given time and space constraints, packers will be at risk of being sued successfully given the vagueness and breadth of the definition. Given the history of jury awards in earlier cases, packers will be reluctant to utilize marketing agreements in any meaningful way, to the detriment of most producers and consumers. Companies may consider reacting as they did in South Dakota and Missouri several years ago when those states enacted laws prohibiting any discrimination (including reasonable discrimination).

## III. THE PRACTICAL IMPACT OF MANY PROVISIONS IN THE PROPOSED RULE WILL ADVERSELY AFFECT THE LIVESTOCK, MEAT, AND POULTRY SECTORS.

### The Definition of "Likelihood of Competitive Injury" is Unworkable and Unconstitutionally Vague.

Subsection 201.2(u)'s definition of "likelihood of competitive injury" is so vague that it is unworkable and contrary to law. Specifically, the definition provides that "likelihood of competitive injury"

> includes but is not limited to situations in which a packer, swine contractor, or live poultry dealer raises rivals' costs; improperly forecloses competition in a large share of the market through exclusive dealing; restrains competition among packers, swine contractors, or live poultry dealers; or represents a misuse of market power to distort competition among other packers, swine contractors, or live poultry dealers. It also includes situations in which a packer, swine contractor, or live poultry dealer 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 to impair a producer's or grower's ability to receive the reasonable expected full economic value from a transaction in the market channel or marketplace. (Emphasis added.)