National Cattlemen's
Beef Association

November 18, 2010

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

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

Dear Ms. Butler:

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

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

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

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[1] Notice of Proposed Rulemaking, Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act ("NPRM").
[2] *See* USDA Economic Research http://www.ers.usda.gov.
[3] The National Agricultural Law Center, www.nationalaglawcenter.org/gipsaworkshops (9/10/2010).

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

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

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

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

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

> The object to be secured by [the PSA] is the free and unburdened flow of live stock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still as livestock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market.
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> The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil which it sought to provide against by the act, was exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of the live stock through the stockyards, all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers on the other. Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. Any unjust or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce.

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

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

[I]t shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

(a) engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or

(b) make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; . . .

7 U.S.C. § 192(a) and (b).

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

(a) If any person subject to this act violates any of the provisions of this act, or of any order of the Secretary under this Act, relating to the purchase, sale, or handling of livestock, the purchase or sale of poultry, or relating to any poultry growing arrangement or swine production contract, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as provided in Section 309, or (2) by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

7 U.S.C. § 209.

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

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

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

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

By the Proposed Rules, GIPSA now attempts to repeal the PSA's established competition standard and ignore the rulings of eight Courts of Appeals.[19] The Proposed Rules expressly provide that proof of injury to competition is no longer an essential element of a claim under Sections 202(a) and (b). *See* proposed § 201.3(c), which provides in part: "A finding that the challenged act or practice adversely affects or is likely to adversely affect competition is not necessary in all cases. Conduct can be found to violate section 202(a) and/or (b) of the Act without a finding of harm or likely harm to competition."[20] The Proposed Rules then go on to carry out GIPSA's new policy by declaring that several specified practices constitute violations of Section 202(a), without requiring proof that they have harmed, or are likely to harm, competition.[21]

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

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[18] See *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (en banc); *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1230 (10th Cir.2007); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir.2005), *cert. denied*, 547 U.S. 1040, 126 S.Ct. 1619, 164 L.Ed.2d 333 (2006); *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir.2005), *cert. denied*, 546 U.S. 1034, 126 S.Ct. 752, 163 L.Ed.2d 574 (2005); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir.1999); *Philson v. Goldsboro Milling Co.*, Nos. 96-2542, 96-2631, 164 F.3d 625, 1998 WL 709324, at *4-5 (4th Cir. Oct.5, 1998) (unpublished table decision); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir.1985); *De Jong Packing Co. v. United States Dep't of Agric.*, 618 F.2d 1329, 1336-37 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061, 101 S.Ct. 783, 66 L.Ed.2d 603 (1980); and *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir.1976).

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

[20] 75 Fed. Reg. at 35351.

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

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

1. The PSA incorporates long-standing antitrust policy.

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

It is widely accepted that "long-time antitrust policies . . . formed the backbone of the PSA's creation." *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1304 (11th Cir. 2005). Congress felt a "need for specialized regulation [by the Department of Agriculture] of the many-tiered packing industry," but "the legislative history does not show that the Secretary was to have carte blanche in prohibiting whatever practices he pleased." *Armour*, 402 F.2d at 721. "[I]n Section 202(a) Congress gave the Secretary no mandate to ignore the general outline of long-time antitrust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged." Id. at 722. Moreover, "the purpose behind the act 'was not to so upset the traditional principles of freedom of contract,' as to require an entirely level playing field for all." *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999) (citation omitted.)

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

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

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

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

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

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

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

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

> When viewed together, the antitrust laws, although not completely harmonious and frequently overlapping, express a basic public policy distinguishing between fair and vigorous competition on the one hand and predatory or controlled competition on the other. Normally the twin solvents for determining when the boundaries of fair competition have been exceeded are the existence of predatory intent and the likelihood of injury to competition . . . . The fact that a given provision [of a statute] does not expressly specify the degree of injury or the type of intent required, does not imply that these basic indicators of the line between free competition and predation are to be ignored. Surely words such as 'unfair' and 'unjustly' in Section 202(a) and 'undue' and 'unreasonable' in Section 202(b) require some examination of the seller's intent and the likely effects of its acts or practices under scrutiny, even though these tests under Section 202(a) and (b) be less stringent than under some of the antitrust laws. These adjectival

> qualifications expressed in the statutory language enjoin the Department and courts to apply a rule of reason in determining the lawfulness of a particular practice under Section 202(a) and (b).

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

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

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

> After 1921 [when the PSA was enacted] and up to 2002, Congress has amended [Section 202] seven times without making any changes that would affect the many court interpretations cited above. It is reasonable to conclude that Congress accepts the meaning of [§ 202(a)] to require an effect on competition to be actionable because congressional silence in response to circuit unanimity "after years of judicial interpretation supports adherence to the traditional view."

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

> [i]t shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:
>
> > (a) engage in or use any unfair, unjustly discriminatory, or deceptive practice or device regardless of whether the practice or device causes a competitive injury.

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

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

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

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

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

> these provisions concern only those business dealings that have an actual or potential effect on competition.
> * * *
> "Unfair" was not an inkblot in 1921. Congress could not have expected, then, that its use of the term would occasion a free-ranging inquiry into the equities of business practices; rather, Congress intended, and made plain by its choice of language, that injury to competition would be an element of the inquiry.
> * * *
> In sum, the evidence of Congress' intent, while not itself dispositive, confirms, and does not repudiate, the view that the broad words of § 202 were to be considered in light of their established meanings, as terms of art limited to competitive wrongs.

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

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

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

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

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

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

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

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

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

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

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

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

[25] *See* § 201.2(u), listing seven practices included within GIPSA's term "likelihood of competitive injury"; § 201.210, enumerating eight practices said to violate Section 202(a).
[26] The extent of GIPSA's departure from antitrust principles is discussed further in Section I.E below.

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

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

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

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

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

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

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

> The entirety of [Section 202(a)], as well as the specific terms 'unfair' and 'deceptive are a slight variation of § 5 of the FTCA: 'That unfair methods of competition in commerce are hereby declared unlawful.'
>
> Not only is the language of the PSA nearly identical to that of its predecessors, but this choice of terms was deliberate. Their meaning had been firmly established in numerous court decisions that placed definite limits on the authority of, respectively, the Interstate Commerce Commission and Federal Trade Commission. . .
>
> The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. ***It is for the courts, not the commission, ultimately to determine as a matter of law what they include***. . . .
>
> Because of their provenance, the words of § 202(a) and (b) of the Packers and Stockyards Act are susceptible to a plain meaning: To provide that a practice is 'unfair,' 'unjustly discriminatory,' or an 'undue or unreasonable preference,' a plaintiff must demonstrate an actual or potential adverse impact on competition.

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

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

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

   a. The Proposed Rules' "competitive injury" scheme.

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

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

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

The rule then specifies that the term "likelihood of competitive injury" "includes but is not limited to" seven particular situations,[28] those in which a packer, swine contractor or live poultry dealer—

- "raises rivals' costs";
- "improperly forecloses competition in a large share of the market through exclusive dealing";
- "restrains competition";
- engages in conduct that "represents a misuse of market power to distort competition";
- "wrongfully depresses prices paid to a producer or grower below market value";
- "impairs a producer's or grower's ability to compete with other producers or growers"; or
- impairs "a producer's or grower's ability to receive the reasonable expected full economic value from a transaction in the market channel or marketplace."

b. The Proposed Rules' "competition" policy.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

d. The Proposed Rules' treatment of commercial discrimination.

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

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

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

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

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

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

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

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

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

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

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

II. THE PROPOSED RULES ARE ARBITRARY AND CAPRICIOUS.

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

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

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