The Proposal to Attempt to Establish that Proving Harm, or Likelihood of Harm, to Competition in a Packers and Stockyards Act Section 202(a) or (b) Case Conflicts with Judicial Precedent and Congressional Intent, Will Adversely Affect the Supply, and Should be Withdrawn.

On behalf of the National Cattlemen's Beef Association, the National Pork Producers Council and itself, the Meat Institute submits this white paper explaining that the proposed rule, Unfair Practices, Undue Preferences, and Harm to Competition Under the Packers and Stockyards Act (AMS-FTPP-21-0046), conflicts with longstanding judicial precedent and Congressional intent and should be withdrawn by the Agricultural Marketing Service (AMS or the agency).

The agency steadfastly refuses to accept the well-established precedent set by the eight federal appellate circuits that have addressed the issue: to prevail in a Packers and Stockyards Act (PSA or the Act) case brought under section 202 of the Act a plaintiff must show the action or behavior is harmful, or likely harmful, to competition. The proposal also is inconsistent with Congressional intent and fails a *West Virginia v. EPA* analysis.

The proposal fails any measure of good public policy because it will serve to incite litigation rather than discourage lawsuits and it create uncertainty throughout the supply chain, which adversely affect consumers, livestock producers, and packer processors.

The Agency Refuses to Accept the Well-Established Judicial Precedent that Sections 202(a) and (b) Require an Adverse, or likely Adverse, Effect on Competition – Precedent Congress Has Declined to Overturn Through Legislation.

A. The Agency Seeks to Accomplish a Regulatory End Run Around Well-Established Legal Precedent.

Simply put, the agency seems to operate under the premise that if it says something enough times, what it says is so.[1] Regardless of how many times the agency asserts "an individual should not have to show market-wide harm to secure relief under the Act" does not change the fact eight federal appellate courts have found otherwise.[2]

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[1] See Proposed Rule; *Inclusive Competition and Market Integrity Under the Packers and Stockyards Act*; 87 *Fed. Reg*. 60010 (Oct. 3, 2022); And see *Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act*, 75 *Fed. Reg*. 35338, 35340 (June 22, 2010); and *Scope of Sections 202(a) and (b) of the Packers and Stockyards Act*; Interim Final Rule; RIN 0580-AB25; 81 *Fed. Reg*. 92566 (Dec. 20, 2016).

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[2] 87 *Fed. Reg*. at 60014. See also pages 60010, 60013, 60018, and 60026.

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As the Supreme Court explained, the PSA was focused on preventing harm to competition: "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."[3] Congress enacted the statute "to combat restraints on trade" and to "promote healthy competition" in the livestock industry.[4]

The PSA built on existing antitrust statutes by providing a special statute for the meatpacking industry.[5] In enacting this special statute, Congress "incorporate[d] the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation."[6] That "general outline of long-time antitrust policy" incorporated in the PSA "distinguish[es] between fair and vigorous competition on the one hand and predatory or controlled competition on the other."[7] And that understanding follows the settled principle that an antitrust plaintiff must show antitrust injury – a harm that the antitrust laws were designed to prevent.[8] To prove an antitrust injury, it is not enough for the plaintiff to show it was harmed by the defendant's conduct; rather, the plaintiff must prove that competition was harmed from the defendant's conduct.[9] Interpreting Section 202(a) and (b) to require proof of actual or likely harm to competition furthers the statute's key purpose, which is to protect competition in the meat packing industry.

The PSA's judicial history confirms Congress knew, and intended to incorporate, the meanings of key terms and the eight federal courts of appeals that have considered this issue have unanimously concluded that a plaintiff must show actual or likely harm to competition to make a claim under Section 202(a) or (b) of the PSA.[10] That rejection of USDA's interpretation included in previously proposed rules is best captured in the *en banc* decision from the United States Court of Appeals for the Fifth Circuit, *Wheeler v. Pilgrim's Pride Corp*. which began as follows.

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[3] *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922).
[4] *Wheeler v. Pilgrim's Pride Corp*. 591 F.3d 355, 361 (5th Cir. 2009) (*en banc*); *see* H.R. Rep. No. 85-1048, at 1 (1957) (Act's purpose was to "assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry").
[5] *Armour & Co. v. United States*, 402 F.2d 712, 721 (7th Cir. 1968).
[6] *De Jong Packing Co. v. United States Dep't of Agric*., 618 F.2d 1329, 1335 n.7. (9th Cir. 1980), cert. denied, 449 U.S. 1061 (1980).
[7] *Armour & Co.*, 402 F.2d at 717, 722.
[8] *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).
[9] *See, e.g.*, *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 83 (3d Cir. 2010); *see also Brunswick*, 429 U.S. at 488 ("[A]ntitrust laws …were enacted for 'the protection of competition not competitors.").
[10] *Wheeler,* 591 F.3d at 369-70 (explaining that the House Report, H.R. Rep. No. 67-77, at 2-10 (1921), included a "detailed exposition of Supreme Court decisions on the meaning and constitutionality of those earlier acts").

> 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.[11]

Writing for the majority, Judge Reavley said:

> We conclude that an anti-competitive effect is necessary for an actionable claim under the PSA considering 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.[12]

And the Sixth Circuit said it best.

> 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 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*

[11] *Wheeler* 591 F3d at 357.
[12] *Id.*

> *Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir. 1976).[13] (Emphasis added.)

And the agency knows this. In a 2017 notification AMS's predecessor agency, the Grain Inspection, Packers and Stockyards Administration (GIPSA), acknowledged the great weight of judicial precedent against its position when it said:

> First, the interpretation of 7 U.S.C. 192(a)–(b) embodied in the IFR [Interim Final Rule] is inconsistent with court decisions in several U.S. Courts of Appeals, and those circuits are unlikely to give GIPSA's proposed interpretation deference.[14]

And in its 2020 rulemaking the agency addresses the legal standard issue by saying the following.

> In past cases, courts have considered whether a specific preference or advantage would be a violation of the Act if the preference or advantage did not harm competition. However, AMS does not intend to create criteria that conflict with case precedent, so PSD expects that court precedents relating to competitive harm are likely to remain unchanged.[15]

Those courts relied on the statute's use of antitrust terms of art, on the situation in the meat packing industry that prompted the statute's enactment, and on Congress's statements of its purpose in the legislative record. Indeed, although no courts were asked to defer to a final USDA rule interpreting the statute, two courts affirmatively volunteered they would *not* defer to an agency rule that eliminated the element of harm to competition because Congress's contrary intent is so clear.[16] In short, although the agency, or its predecessor, has at times waffled on this issue, the courts have not, routinely rejecting the idea that a plaintiff need not show harm or likely harm to competition.

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[13] *Terry v. Tyson Farms, Inc.,* 604 F.3d 272, 277 (6th Cir. 2010)
[14] 82 *Fed. Reg*. at 48596 (Oct. 18, 2017).
[15] 85 *Fed. Reg*. at 1774 (Jan. 13, 2020).
[16] See *Wheeler,* 591 F3d. at 362; *London*, 410 F3d. at 1304.

B. The Major Questions Doctrine Confirms Proving Harm or Likelihood of Harm to Competition is Necessary.

Changing the harm to competition standard requires Congressional action and that fact is highlighted by the Supreme Court's recent decision in *West Virginia v. EPA*.[17] In that decision the Supreme Court invoked explicitly the "major questions doctrine," which requires Congress to speak clearly when authorizing agency action in certain cases.

The "major questions doctrine" turns on several considerations, including whether: the agency discovered in a "long-extant statute an unheralded power" that significantly expands or even "transform[s]" its regulatory authority; the claimed authority derives from an "ancillary," "gap-filler," or otherwise "rarely used" provision of the statute; or the agency adopted a regulatory program Congress had "conspicuously and repeatedly declined to enact itself." [18] The Court is particularly skeptical where an agency seeks to promulgate a rule "that Congress has conspicuously and repeatedly declined to enact itself."[19]

Section 202 has long been understood as a statute grounded in principles of antitrust law. AMS cannot use its rulemaking authority to remake the statute into a broad prohibition on whatever AMS views to be unfair. And Congress has considered and rejected attempts to remove the competitive-harm requirement from the statute. Congress has similarly declined to adopt a general prohibition on discrimination in contracting, other than for race discrimination under Section 1981. AMS cannot use this rulemaking to implement a "legislative work-around."

Where an agency has long administered a statute, the "lack of historical precedent, coupled with the breadth of authority that the [agency] now claims, is a telling indication that the mandate extends beyond the agency's legitimate reach."[20] Section 202 of the Act can hardly be called an ancillary or rarely used provision of the statute and given Congress has amended section 202 multiple times over the decades, when it considered amending the statute to articulate the standard AMS promotes, Congress declined to do so.

Specifically, in the very Farm Bill that precipitated this rulemaking Congress considered and rejected a proposal to amend section 202(a) to state that a business practice can be found to be "unfair, unjustly discriminatory or deceptive" "regardless of whether the practice or device causes a competitive injury or otherwise adversely affects competition and regardless of any alleged business justification for the

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[17] *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); see also *NFIB v. OSHA,* 142 S. Ct. 661 (2022) (per curiam); *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (2021)
[18] *West Virginia v. EPA*.
[19] *West Virginia v. EPA* at 2610.
[20] *NFIB*, 142 S. Ct. at 666 (quotation marks omitted).

practice or device."[21] Senator Harkin, who sponsored the bill in the Senate, explained that the legislation would overturn court rulings that "producers need to prove an impact on competition in the market in order to prevail" in cases alleging that packers or dealers engaged in "unfair" or "unjustly discriminatory" practices.[22] But the legislation did not pass in either the Senate or the House. The failure of Congress to amend section 202 "after years of judicial interpretation supports adherence to the traditional view" that a finding of harm or likely harm to competition is required.[23] This conclusion is particularly true given Senator Harkin's efforts were part of the Congressional consideration of the bill that ultimately, when enacted, directed the Secretary to promulgate the regulations regarding undue preferences.

And 2007 was not the only instance Congress rejected efforts to change the harm to competition standard. Between 1921 and 2002, Congress amended section 202 of the PSA seven times, but it never disrupted the courts of appeals' statutory interpretation.[24] Congressional inaction in the face of the decisions of the appellate courts suggests that it has accepted that settled understanding.

Indeed, if anything, Congressional action supports the conclusion that the standard set by the appellate courts is the proper one. Proposed section 201.3(c) of the failed 2010 rulemaking would have attempted to overrule the standard established by the courts, *i.e.*, "[c]onduct can be found to violate § 202(a) and/or (b) of the Act without a finding of harm or likely harm to competition."[25] But appropriations bills passed for fiscal years 2012 through 2015 all included language prohibiting the agency from expending any funds to "publish a final or interim final rule in furtherance of, or otherwise implement, proposed sections 201.2(l), 201.2(t), 201.2(u), 201.3(c), 201.210, 201.211, 201.213, or 201.214 of Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act (75 Fed. Reg. 35338 (June 22, 2010))." This behavior suggests Congress thought proposed section 201.3(c), along with others, was not the proper standard. The ultimate question is one of Congress's intent, and here, all signs point toward Congress intending to require proof of actual or likely harm to competition under sections 202(a) and (b).

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[21] See Competitive and Fair Agricultural Markets Act of 2007, S. 622, 110th Cong. § 202 (2007); see also H.R. 2135, 110th Cong. § 202 (same).
[22] 153 Cong. Rec. S2053 (daily ed. Feb. 15, 2007).
[23] *Wheeler*, 591 F.3d at 362 (quoting *Gen. Dynamics v. Cline*, 540 U.S. 581, 593-94 (2004)).
[24] *See Wheeler*, 591 F.3d at 361-62; *see also General Dynamics Land Sys., Inc. v. Cline*, 594, 599 (2004) explaining that "congressional silence" in the face of "years of judicial interpretation" suggests that Congress has accepted the judicial consensus.
[25] 75 *Fed. Reg*. 35338 (June 22, 2010).

The Proposed Rule will Incite Litigation and Create Uncertainty Throughout the Supply Chain by Making Every Contract Dispute a Federal Case.

Having chosen to ignore legal precedent and the will of Congress one can only conclude the intent underlying the proposed rule is to encourage litigation, federalizing breach of contract claims and giving AMS authority to regulate minute details of transactions or business practices that present no likelihood of harm to competition. If Congress had intended to give the agency broad-ranging authority over every contract and practice regardless of effect on competition, it would have said so explicitly, because Congress "does not, one might say, hide elephants in mouse holes."[26] But Congress made no such statement in the PSA and it has had opportunities, including the 2008 Farm Bill and Farm Bills that followed.

Not only were there opportunities, but Congress also rejected proposals to broaden the PSA to cover contractual matters traditionally regulated by state law. In addition to eliminating the competitive injury requirement, Senate Bill 622 and its counterpart, House Resolution 2135, provided that in determining whether a practice is "unfair, a court may consider whether" the practice "may violate standards established by Federal or State law (including common law and regulations)."[27] Congress's refusal to enact these bills lends further support to the conclusion that the PSA does not give the Secretary authority to regulate the equities of every business practice in the industry.

And the courts have followed. In *London*, the court explained that "[e]liminating the competitive impact requirement would ignore the long-time antitrust policies which formed the backbone of the PSA's creation. Failure to require a competitive impact showing would subject dealers to liability under the PSA for simple breach of contract or for justifiably terminating a contract with a grower who has failed to perform as promised."[28] And the Tenth Circuit in *Been* said "Not to require a showing of competitive injury or likelihood thereof would make a federal case out of every breach of contract. Nothing in the PSA suggests that Congress intended this result."[29]

The threat identified in *Been* and *London* highlights the uncertainty the proposed rule will introduce into the supply chain. The use of Alternative Marketing Agreements (AMAs) will dry up, to the detriment of livestock producers,

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[26] *Whitman*, 531 U.S. at 468; see also, *e.g., FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 160 (2000) (declining to find that Congress "intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion").
[27] S. 622, § 202(c)(2); see also H.R. 2135, § 202(c)(2) (same).
[28] *London at* 1304.
[29] *Been*, 495 F.3d. at 1229.

packers and consumers.[30] In the cattle industry, AMAs have been used to enhance beef quality and deliver product attributes demanded by consumers. These incentives have helped producers and packers and will largely be curtailed with the threat of federal litigation hanging over every dispute. To limit their risk, packers likely will reduce their use of AMAs to avoid claims by one supplier that he or she was treated "unfairly."

And in the pork sector, production contracts help pig owners grow operations without needing the capital to build new facilities, and those with facilities enter the industry as independent contract growers. Marketing agreements can also transfer ownership of pigs from producers to packers — helping to ensure access to packing capacity. The risk of litigation would drive industry toward one-size-fits-all contracts and agreements to mitigate that risk. As contracts and agreements are limited, it is the small and mid-sized producers who would be hit hardest, and the consumer would be affected as lost efficiencies drive wholesale and retail prices higher. Moreover, these changes likely would have a greater effect on smaller, independent producers, threatening their viability, perhaps leading to more market consolidation.

Summary

The proposed rule has only one purpose -- to encourage litigation that AMS hopes end up before the Supreme Court in a final effort impose a standard not supported by the law. Those lawsuits will create market uncertainty to the detriment of consumers, livestock producers, and packers. Pursuing a rule that yields such results is bad public policy and bad government.

[30] Fischer, Bart, et al. (2021). *The U.S. Beef Supply Chain: Issues and Challenges*. Agricultural and Food Policy Center at Texas A&M University.