NORTH AMERICAN MEAT INSTITUTE

March 24, 2017

M. Irene Omade
GIPSA, USDA
1400 Independence Ave., NW
Room 2542A-S
Washington, DC 20250-3613

Re: 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).

Dear Ms. Omade:

The North American Meat Institute (NAMI or the Meat Institute) submits this letter in response to an invitation for comments regarding the above-referenced interim final rule (IFR or the rule) published by the Grain Inspection, Packers and Stockyards Administration (GIPSA or the agency).[1] NAMI is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products, and NAMI member companies account for more than 95 percent of United States output of these products. Many Meat Institute members procure livestock and poultry on the spot market and through many marketing agreements and contracts and will be affected by the IFR.

The 2008 Farm Bill Directed GIPSA to Engage in Specific and Limited Rulemaking Activities.

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;

[1] 81 *Fed. Reg.* 92566-92594, 92703-92740 (Dec. 20, 2016). The comment period was extended by the agency and closes March 24. 82 *Fed. Reg.* 9489, 9533-34 (Feb. 7, 2017).

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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."[2]

Those four provisions covered everything the agency was directed to do through rulemaking. Conspicuous in its absence is any hint in the Farm Bill that Congress intended GIPSA adopt a rule that changes how the Packers and Stockyards Act (PSA or the Act) is administered and the impact on industry that administration will have. Yet, in June 2010 the agency published in the *Federal Register* a collection of complicated and controversial proposed rules, including what has become the IFR.

GIPSA, through the IFR, is conducting an administrative end run to accomplish what it has failed to do ever before the courts and before the Congress. Should the IFR take effect, it would erase without Congressional approval a necessary element in the law, *i.e.*, showing harm or likely harm to competition to prevail in a PSA case. As the agency concedes, that action will set in motion a cascade of litigation brought under the PSA. The impact of that litigation, or the threat of it, will be to undermine and likely roll back the significant progress made by the livestock and meat and poultry industry in meeting consumer demands during the past quarter century.

Because the IFR is flawed legally, because it rewrites the statute without Congressional approval, and because it is poor public policy, the IFR should be withdrawn.

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[2] Food, Conservation and Energy Act of 2008 (Pub. L. 110-246), Section 11006.

I. THE INTERIM FINAL RULE IS LEGALLY INFIRM.

The IFR Conflicts with the Plain Meaning of the Act and Numerous Appellate Court Decisions, including Recent Cases in which the Agency participated.

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

Congress enacted the PSA to secure "the free and unburdened flow of livestock" and prevent "the monopoly of the packers, [which enables] 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] To achieve this purpose, the federal appellate courts have consistently interpreted § 202(a), which prohibits an "unfair, unjustly discriminatory or deceptive practice or device," and § 202(b), which prohibits giving "any undue or unreasonable preference or advantage," to prohibit only acts that harm, or are likely to harm, competition.

The IFR, however, provides that a plaintiff seeking to establish a claim under § 202(a) or § 202(b) need not demonstrate competitive injury or likelihood of competitive injury. The language in the rule conflicts with the great weight of judicial authority that, on numerous occasions, has examined that very question, while reviewing Congressional intent in enacting § 202. The IFR conflicts with decisions of every federal circuit court to address the issue over decades.

One of the first circuits to address this issue was the Seventh Circuit in *Swift & Co. v. Wallace,*[4] in which the court set aside an order in which the Secretary of Agriculture found that a meat packer gave an "unreasonable preference" by extending credit to institutional purchasers on terms that were more favorable than those extended to 95 percent of its customers. The "evidence establishe[d]," however, that the packer extended the preferred credit terms to compete for the institutional purchasers' business.[5] Concluding that § 202 does not "authorize the Secretary of Agriculture to put an end to fair and honest competition," the court held the Secretary's order contrary to the statute.[6]

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[3] *Stafford v. Wallace*, 258 U.S. 495, 514 (1922).
[4] 105 F.2d 848 (7th Cir. 1939),
[5] *Id.* at 854.
[6] *Id.* at 856, 863.

The Seventh Circuit later interpreted § 202(a) to require "either [predatory] intent or adverse competitive effect."[7] In *Armour & Co. v. United States*, the court recognized the PSA's "ancestry in antitrust law."[8] 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."[9] "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."[10] 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."[11]

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."[12] The court stated the Senate Committee Report "makes it clear that this part of the legislation was promoted primarily by fear of monopoly and predation."[13] Likewise, the House Committee Report clarifies that the PSA "was aimed at halting 'a general course of action for the purpose of destroying competition'."[14]

Many circuits have followed *Armour's* lead. The Eighth Circuit stated that § 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."[15] Likewise, the Ninth Circuit held that, at the very least, section 202(a) requires "a reasonable likelihood

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[7] *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").

[8] *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1228 (10th Cir. 2007)

[9] *Armour*, 402 F.2d at 717.

[10] *Id.*

[11] *Id.* (Emphasis added).

[12] *Id.* at 720.

[13] *Id.* (citing S. Rep. No. 66-429, at 1, 3) (Emphasis added).

[14] *Id.* (quoting H.R. Rep. No. 66-1297, at 11 (1921)).

[15] *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").

that * * * the result [of a practice] will be an undue restraint of competition."[16] 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."[17]

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]."[18] And the Tenth and Eleventh Circuits followed, holding that "only those unfair, discriminatory or deceptive practices adversely affecting competition are prohibited by the PSA."[19] Every circuit that examined this issue before enactment of the Farm Bill — reaching back decades — has held that showing an anticompetitive effect must establish a claim under §§ 202(a) or 202(b) of the PSA.[20]

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

The discussion above focused on the numerous cases decided before the 2008 Farm Bill that held showing harm or likely harm to competition is necessary. The 2008 Farm Bill offered an opportunity for Congress to reject the longstanding judicial precedent when it directed GIPSA to engage in the limited rulemaking discussed above. Congress did not so act; it was silent on the issue.

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[16] *DeJong Packing Co. v. United States Dep't of Agric.*, 618 F.2d 1329, 1337 (9th Cir. 1980).
[17] *Id.* at 1335 n.7 (Emphasis added).
[18] *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").
[19] *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").
[20] 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.

Since the 2008 Farm Bill two more circuits have examined this issue and the agency's position reflected in the IFR, which directly conflicts with the uniform interpretation of the PSA from the now eight (8) different federal appellate courts.

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

Judicial rejection of the interpretation advanced by GIPSA in the 2010 preamble and the IFR's preamble and captured in section 201.3(a) is captured in the *en banc* decision from the United States Court of Appeals for the Fifth Circuit, *Wheeler v. Pilgrim's Pride Corp.*[21] 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 this observation, which more than suggests that the necessity of showing competitive injury in a PSA case is a matter of settled law.

> 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.[22]

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, and decisions in the Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits.[23]

Wheeler also examined the legislative history of the Act, concluding that 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."[24] The *Wheeler* court also recognized that Congress has amended the Act several times since its enactment, including the Farm Bill amendments.[25] The language in *Wheeler,* however, §§ 202(a) and 202(b), is unchanged from original enactment even after many courts found that proving competitive injury necessary. The *Wheeler* court concluded, "[I]t is reasonable to conclude that Congress accepts the meaning of §

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[21] 591 F.3d 355 (5th Cir. 2009) (*en banc*).
[22] *Wheeler* at 357.
[23] The *Wheeler* court also discussed an unpublished opinion from the 4th Circuit with a consistent finding.
[24] *Wheeler* at 361.
[25] 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.

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'."[26]

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."[27]

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

After Wheeler and just six weeks before the proposed rule published in 2010, 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.[28] In *Terry* the Sixth Circuit said:

> 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*

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[26] *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).

[27] *Id.*

[28] *Terry v. Tyson Farms, Inc.* 604 F 3rd 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 then 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.

> *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).[29]

The *Terry* court also referenced directly GIPSA's participation 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 creating a conflict. We decline to do so.[30]

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 on a claim under §§ 192(a) and (b) of the PSA, a plaintiff must show an adverse effect on competition."[31]

The agency asserted that judicial decisions involving §§ 307 and 312 support the concept articulated in the IFR. 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 § 202 and both circuits have concluded that showing competitive harm is necessary. Specifically, GIPSA cited a 10th Circuit case, *Capitol Packing Company v. the United States*, and a 9th Circuit case, *Spencer Livestock Comm'n Co. v. USDA*, which deal with parts of the PSA other than § 202, to support its position.[32] The 2010 preamble, however, ignores the inconvenient fact that showing harm or likely harm to competition has been found necessary regarding § 202 in both circuits.[33]

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[29] *Terry* at 277.
[30] *Terry* at 277-278.
[31] *Terry* at 279.
[32] 350 F.2d 67 (10th Cir. 1965), 841 F.2d 1451 (9th Cir. 1988).
[33] See *London* (10th Cir.) and *DeJong* (9th Cir.).

Not only have the courts repeatedly ruled contrary to the IFR, these rulings have been issued in a wide variety of settings. Some courts have applied the principle in affirming dismissal of a claim under § 202 for want of an allegation or proof of injury to competition.[34] The principle was also applied in an answer to a certified question in an interlocutory appeal under 28 U.S.C. § 1292(b).[35] The injury to competition requirement has been applied in an appellate court's affirmance of the legal standard adopted by a district court[36] and regarding jury instructions.[37] Finally, in *Armour and Co. v. United States*,[38] the court of appeals applied the competitive injury requirement in setting aside an order of a Judicial Officer of the Department of Agriculture.[39]

Faced with this overwhelming judicial precedent GIPSA still published its erroneous interpretation of the PSA, first in the 2010 proposed rule and now in the IFR. The agency's blatant disregard for the holdings in the extensive case law and its misplaced reliance on dissents and inapposite cases is the definition of arbitrary and capricious under the Administrative Procedure Act.

The Agency and IFR should be accorded no Deference.

GIPSA suggests that the IFR should prompt a change in the nationwide judicial interpretation of §§ 202(a) and 202(b). Deference, however, is inappropriate 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."[40] If a "prior court decision holds that its construction follows from the unambiguous terms of the statute," a change in agency interpretation does not warrant judicial reconsideration of the statute's meaning.[41]

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[34] *London*, 410 F.3d 1295; *Terry*, 604 F.3d 272.
[35] *Wheeler*, 591 F.3d 355 (*en banc*).
[36] *Been*, 495 F.3d 1217.
[37] *Philson*, 164 F.3d 625, 1998 WL 709324 (4th Cir. Oct. 5, 1998) (unpublished table decision).
[38] 402 F.2d 712 (7th Cir. 1968).
[39] 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.*, 618 F.2d 1329 (conspiracy against auction stockyards); *IBP, Inc.*, 187 F.3d 974 (packer's use of right of first refusal).
[40] *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).
[41] *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.* 545 U.S. 967, 982 (2005).

Repeatedly, the courts interpreting §§ 202(a) and 202(b) have held the statute unambiguously applies only to anti-competitive practices.[42] 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."[43] Thus, "a contrary interpretation of Section 202(a) deserves no deference."[44] Courts have repeatedly held the statute is unambiguous, several times with GIPSA participating in the proceedings and in every instance having its interpretation of §§ 202(a) and 202(b) rejected.[45]

Deference in inappropriate because GIPSA failed to comply with the Administrative Procedure Act's (APA) notice-and-comment requirements prior to adopting the IFR.[46] As the Supreme Court recently explained, "*Chevron* deference is not warranted where the regulation is 'procedurally defective' – that is, where the agency errs by failing to follow the correct procedures in issuing the regulation."[47] Among other things, the APA requires that "[t]he opportunity to participate . . . occur[] reasonably close to the time in which the [agency] makes a

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[42] *See, e.g.*, *London*, 410 F.3d at 1304; *Armour & Co. v. United States*, 402 F.2d 712, 722 (7th Cir. 1968). That some courts may have read differently *other* sections of the PSA that are not at issue in these rulemakings, *see* 81 *Fed. Reg.* at 92567-92568, does not remotely call into question the "tidal wave" of rulings that directly addressed the provisions of being implemented by GIPSA hear and that squarely foreclose GIPSA's reading of those provisions.

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

[44] *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"). The *Wheeler* court properly rejected the agency's *Chevron* deference argument, which GIPSA made through its role as *amicus*. Contrary to the agency's position in IFR, *Wheeler* specifically found that such deference "is unwarranted where Congress has delegated no authority to change the meaning the courts have given to the statutory terms, as the Eleventh and Tenth Circuits have held." *Wheeler* at 362.

[45] *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005); *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 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 F 3rd 272 (6th Cir. 2010).

[46] *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 577 (2009) (according no deference where "the agency finalized the rule and, without offering States or other interested parties notice or opportunity for comment, articulated a sweeping position on the FDCA's pre-emptive effect in the regulatory preamble"); *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."); *Ketchikan Drywall Servs., Inc. v. Immigration & Customs Enf't*, 725 F.3d 1103, 1112 (9th Cir. 2013) ("Where an agency action was not undertaken pursuant to a 'relatively formal administrative procedure' . . . we are unlikely to find that the agency action carries such force." (citing *Mead*, 533 U.S. at 230)).

[47] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2120 (2016) (quoting *Mead*, 533 U.S. at 227).

decision."[48] Accordingly, when a rulemaking record grows stale due to the passage of time, here six years, the agency must either re-open the comment period to refresh the record or terminate the rulemaking proceeding.[49]

The Act's Legislative History Undermines the IFR.

The PSA was enacted to restrict the monopolistic practices and growing market power of five meat-packing conglomerates in the early part of the 20th century.[50] The Sherman Act authorized the Department of Justice to seek injunctive relief against monopolistic practices, but Congress thought "no injunction can afford a permanent settlement because it affects only a limited number of defendants and does not and cannot lay down a general rule by which all must be guided."[51] Congress enacted the PSA to establish an agency with "sufficient power" to prevent the development of conditions conducive to monopoly, while also taking the "greatest care" to "avoid interference with private initiative and not to place arbitrary powers in the hands of any Government agent."[52]

When developing the Act Congress drew from the Sherman Act and borrowed language from the Interstate Commerce Act of 1887 (outlawing "unjust discrimination" at § 2, or giving "any undue or unreasonable preference or advantage" at § 3), and the FTC Act of 1913 (outlawing "unfair methods of competition" at § 5).[53] When the PSA was enacted, these statutes had been interpreted to prohibit anti-competitive and monopolistic conduct, but not to restrict legitimate competitive activity.[54] When "a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it."[55] Courts have consistently held the PSA's prohibition on using "any unfair, unjustly discriminatory, or deceptive practice" (§ 202(a)), or giving "any undue or

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[48] *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995) (recognizing that "[a]fter a gap of nearly six years, the public may have new or different information to offer for consideration"); *see also Bus. Roundtable*, 647 F.3d at 1148-49 (vacating rule after agency "failed to respond to substantial problems raised by commenters"); *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1482-83 (D.C. Cir. 1994) (describing agency's termination of rulemaking process based on staleness of six-year-old record).

[49] *See, e.g., Verizon Tel. Co. v. FCC*, 453 F.3d 487, 493-94 (D.C. Cir. 2006) (describing re-opening of comment period to refresh the record in a rulemaking proceeding that had grown stale due to the passage of time); *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1482-83 (D.C. Cir. 1994) (describing agency's termination of rulemaking proceeding based on staleness of six-year-old record).

[50] *See, e.g., Stafford,* 258 U.S. at 514-15; *Wheeler*, 591 F.3d at 360-61; H.R. Rep. No. 1297, at 23

[51] S. Rep. No. 429, at 3 (1920).

[52] *Id.*

[53] *See, e.g.,* H.R. Rep. No. 1297, at 16-22 (discussing Supreme Court precedent interpreting and upholding these statutes); *Stafford,* 258 U.S. at 520 ("Congress framed the Packers and Stockyards Act in keeping with the principles announced and applied in the opinion in the Swift Case" that arose under the Sherman Act).

[54] *See, e.g., Wheeler*, 591 F.3d at 367-69 (Jones, J., concurring) (citing cases).

[55] *Moskal v. United States*, 498 U.S. 103, 121 (1990).

unreasonable preference" (§ 202(b)), reflects Congress' intent to prohibit only practices likely to harm competition.[56] But "Congress gave the Secretary no mandate to ignore the general outline of antitrust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged."[57]

The limited legislative history cited in the preamble to the IFR undermines GIPSA's interpretation. GIPSA cites the 1935 law in which Congress subjected live poultry dealers to §§ 202(a) and 202(b), but Congress was concerned about the "various unfair, deceptive, and fraudulent practices and devices" to which GIPSA points precisely because they "are an undue restraint and unjust burden upon interstate commerce."[58] Even if the 1957 House Report cited could cast light on provisions enacted in 1921, the Report describes the problem §§ 202(a) and 202(b) are designed to remedy as "the problem of monopoly and unfair competition."[59] GIPSA cannot cite, because it does not exist, any legislative history that would support its asserted roving mandate to regulate practices it deems to be "unfair."

Congress Has Not Enacted Legislation Overturning the Cases Holding That §§ 202(a) and (b) Require an Adverse Effect on Competition.

Any doubt that the IFR exceeds the Secretary's authority is dispelled by Congressional refusal to amend the Act and overturn the long history of cases discussed above. Contrary to GIPSA's assertion Congress has not elected to amend § 202 to reflect the agency's so-called "longstanding" interpretation of the law and there have been opportunities to do so.

In 2007 Congress considered and rejected a proposal to amend § 202(a) to provide that a business practice can 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 practice or device."[60] 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.[61] But the legislation did not pass in either the Senate or

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[56] *See, e.g., London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005); *Been*, 495 F.3d at 1229-30.

[57] *Armour*, 402 F.2d at 722; *see also, e.g., IBP*, 187 F.3d at 977 (the "statutory language requires that the practice or device be unfairly or unjustly discriminatory and not merely discriminatory," which means that it must "potentially suppress or reduce competition" to be "proscribed by the Act").

[58] 81 *Fed. Reg.* at 92568, Pub. L. 74-272, 49 Stat. 648, 648 (1935)).

[59] 81 *Fed. Reg.* at 92568, H.R. Rep. No. 85-1048, at 5221 (1957).

[60] S. 622, § 202; *see also* H.R. 2135, § 202.

[61] 153 *Cong. Rec.* S2025-01, S2053 (2007).

the House and the failure of Congress to amend § 202 "after years of judicial interpretation supports adherence to the traditional view" that a finding of harm or likely harm to competition is required.[62]

Likewise, in 2008 Congress could have amended the PSA to accommodate GIPSA's interpretation of the law when it directed the agency to promulgate the four provisions discussed above. Congress did not do so. Even as recently as October 2016, Congress amended the PSA concerning certain payment provisions. Congress is very much aware of the controversy surrounding many elements of the 2010 proposed rules, including the considerable disagreement about section 201.3(a), which became the IFR. Yet, when given the chance to amend the law to reflect GIPSA's view, Congress declined.[63]

As the Supreme Court recently explained, "[i]f a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation."[64] Here, "[w]hen it amended the [PSA], Congress was aware of this unanimous [circuit court] precedent," made "a considered judgment to retain the relevant statutory text," and even "rejected a proposed amendment that would have eliminated" the interpretation that GIPSA has now proposed.[65] Thus, "Congress's decision . . . to amend the [PSA] while adhering to the operative language in [Section 202] is convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals finding" that § 202 requires proof of injury or likelihood of injury to competition.[66]

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[62] *Wheeler*, 591 F.3d at 362 (quoting *Gen. Dynamics v. Cline*, 540 U.S. 581, 593-94 (2004)).
[63] 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).
[64] *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) (citation and internal quotation marks omitted).
[65] *Id.* at 2519-20.
[66] *Id.* at 2520.

The IFR does not reflect a Longstanding Agency Interpretation of the Packers and Stockyards Act.

The implications and impact of the IFR are far reaching. 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."[67] The agency says "[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."[68]

GIPSA's assertion is at odds, however, with its response to a petition submitted by the Western Organization of Resource Councils (WORC).[69] In a 1997 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.[70]

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.[71]

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[67] 75 *Fed. Reg.* 35338, 35340 (June 22, 2010).
[68] *Id.*
[69] 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.
[70] *Id.* at 15-16, citing OGC Memorandum to the Chief Economist, June 20, 1996, p. 5 (Attachment 2).
[71] *Id.* at 16. (Emphasis added).

The Eleventh Circuit also concluded that the government failed to establish that its interpretation was the Department of Agriculture's "consistent view" of section 202(a).[72] That the government's interpretation is a mere litigating position also means it is not entitled to deference.[73]

As recently as 1997 the agency understood and accepted the position that 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.

II. THE IFR IS POOR PUBLIC POLICY.

Not only is the IFR legally infirm, it is poor policy. The agency received countless comments advising that the language in section 201.3(a) will hurt the very livestock producers and poultry growers the Act is intended to protect. From the comments received and its own study the agency knows that producers will be most hurt if using alternative marketing arrangements and other grower production contracts is diminished and the agency also knows regulated entities will decrease or abandon using those agreements with the looming threat of litigation.[74]

Notwithstanding that advice, the agency published the IFR hoping it will spur numerous lawsuits intended to change the behavior of entities subject to the Act's jurisdiction. Executive Order 12866 required GIPSA to conduct a cost-benefit analysis of the IFR. It is telling that the agency's analysis consists almost entirely of a review of how much litigation will ensue and its costs, depending on how regulated entities react or change behavior.[75] A regulation that conflicts with long settled case law, harms the constituents it should protect, and is intended to change behavior by encouraging excessive litigation is not good public policy.

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[72] *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).

[73] 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").

[74] See United States Dept. of Agriculture. Grain Inspection, Packers and Stockyard Administration. *GIPSA Livestock and Meat Marketing Study*. Vol. 1. Research Triangle Park: RTI International, 2007.

[75] See 81 *Fed. Reg.* 92577-92594.

III. THE INTERIM FINAL RULE IS BARRED BY THE PRESIDENTIAL EXECUTIVE ORDER ON REDUCING REGULATION AND CONTROLLING REGULATORY COSTS.

On January 30, 2017, the President issued an Executive Order on Reducing Regulation and Controlling Regulatory Costs that prohibits GIPSA from allowing the IFR to take effect. Section 2 of that Executive Order imposes a "Regulatory Cap for Fiscal Year 2017" comprised of three parts. First, an agency must "identify at least two existing regulations to be repealed" whenever it "publicly proposes for notice and comment or otherwise promulgates a new regulation." Executive Order § 2(a). Second, absent an exception from the Office of Management and Budget, the "total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero." Executive Order § 2(b). Third, "any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations." Executive Order § 2(c).

These requirements prohibit GIPSA from allowing the Interim Final Rule to take effect. GIPSA has not identified the two regulations to be repealed—which, under the Executive Order, is a necessary precondition to promulgate a final rule—and the total incremental costs of the rule far exceeds zero. By GIPSA's own analysis of the rule would impose almost $100 million, and in reality, based on the RTI analysis the costs will be much higher. This is not the prudent management of costs "required to comply with Federal regulations" that the Executive Order should mandate.

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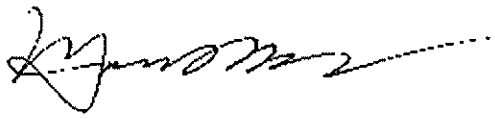
The IFR eliminates the "harm to competition" standard that gives meaning to the Act's prohibition on an "unfair, unjustly discriminatory, or deceptive practice" an "undue preference." Through the IFR GIPSA is encouraging legal challenges to contractual provisions and practices that have been in place for years but the agency provides no guidance about what actions and contractual practices are prohibited. Such a circumstance violates due process and the administrative law requirement that rules provide fair notice of the conduct they prohibit, as well as Executive Order 12866, which requires an agency to "draft its regulations and guidance documents to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty."[76] NAMI respectfully requests that the IFR be withdrawn.

Respectfully submitted,



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[76] Executive Order 12866 subsection 1(b)(120.