



1015 15<sup>th</sup> Street, NW, Suite 930  
Washington, DC 20005-2622



U.S. Poultry & Egg  
ASSOCIATION

1530 Cooledge Road  
Tucker, GA 30084

November 22, 2010

***SUBMITTED ELECTRONICALLY***

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

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

Dear Ms. Butler:

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

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

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

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

## **EXECUTIVE SUMMARY**

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

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

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

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

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

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

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

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

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

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

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

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

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

**A. The Obligation in Proposed Section 201.94 to Maintain Written Justification for Differential Pricing Increases Administrative Costs without Providing Corresponding Benefits to Growers.**

The proposed rule would require poultry dealers to maintain written records that provide “justification” for differential pricing or any deviation from standard price or contract terms offered to poultry growers. Although GIPSA’s proposal presents this mandate in the framework of record keeping and record retention, it is much more burdensome. It requires an undefined record collection for each transaction in which dealers engage with growers. The recordkeeping requirement also has a substantive component in that it would not permit any deviation from standard pricing or contract terms in the absence of documentation, no matter how obvious the business justification for the transaction in question. Therefore, while the rule cloaks certain matters in the garb of recordkeeping obligations, they are, in practical effect, forms of price regulation regarding poultry dealer payments to growers. <sup>2/</sup>

The proposed rule vaguely states that dealers would be required to document “justification” for differential treatment of growers, but fails to define this term. Although the preamble states that processors “must have a legitimate business reason for that differential treatment,” this requirement is not included in the text of the actual proposed rule which simply requires the maintenance of “written records that provide justification for differential pricing or any deviation from standard price or contract terms offered to poultry growers.” The preamble claims that the justification “need not be extensive” and provides an example of adequate justification for livestock packers, but also indicates that determination of sufficient justification would depend on “the particular circumstances of any pricing disparity.” Accordingly, there is no clear guidance for poultry dealers to know what type of documentation would be required for any pricing differentials. Recordkeeping burdens would require a case-by-case assessment of the facts, which would be very onerous considering the volume of transactions that live poultry dealers engage in annually.

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<sup>2/</sup> *Proposed GIPSA Rules Relating to the Chicken Industry: Economic Impact*, Dr. Thomas Elam, FarmEcon LLC (“Elam Report”) at 15 (“The most effective producers could be under-compensated, and the least effective could receive compensation in excess of the true market value of their services.”).

By failing to define “justification” in the regulation and only providing vague guidelines in the preamble, GIPSA leaves it to the courts to determine what type of justification would be required by the rule. This would require time-intensive and costly litigation. The definition of “justification” is essential in order for poultry dealers to determine what records are necessary to maintain. Poultry dealers need clear direction on the level of detail that would be required to justify differences in pay rates. Until a definition is established judicially, poultry dealers might be hesitant to engage in differential payment of growers for fear of ensuing litigation. <sup>3/</sup> Furthermore, it might be impossible to document the intangible factors that might form the basis for differential payment, such as historic relationship and market reputation.

Even if poultry dealers were able to determine what records would be required as “justification,” this requirement would create significant administrative and cost burdens. GIPSA cites no corresponding benefit to growers that would result from these increased burdens on industry. GIPSA’s stated rationales for this requirement are only found in the economic assessment section of the preamble. (The primary section of the preamble only vaguely explains what “justification” is required but fails to provide a rationale for the requirement.) GIPSA claims that the potential benefits include “ensuring that decisions and actions are made based on prices determined by supply-demand conditions” and that “increased information transparency reduces decision-making costs of such transactions in the marketplace.” These explanations of the rationale for the rule are vague, do not justify the burdens imposed by the rule, and are nonsensical on their face.

If anything, decision making costs might be increased by this requirement because each poultry dealer would need to implement a system to track and document differential payments. This might decrease the speed of doing business, as all contracts and payments would require an additional level of review before being entered into because the prices paid for transactions of like items often differ over time and between geographic locations. Moreover, GIPSA never explains how what is framed as a recordkeeping obligation can possibly “ensur[e] that decisions and actions are based on prices determined by supply-demand conditions.” As a matter of basic economics, prices are *always* set by “supply-demand conditions” *regardless* of any record-keeping requirements. In addition, no recordkeeping requirement can possibly increase “information transparency.” Records would *reflect* information already in the market *not add to it*. In addition, the recordkeeping requirements could, in fact, provide disincentives for market-based compensation. <sup>4/</sup> The asserted rationales border on the frivolous and are nothing more than a makeweight for imposition of an unnecessary and unreasonable burden on live poultry dealers.

Additionally, the rule does not specify whether this requirement would apply retroactively to contracts already in existence. The preamble states “[t]hese actions are not intended to have

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<sup>3/</sup> Elam Report at 15 (“Chicken companies may elect to reduce grower payment differentials in order to avoid administrative costs and potential litigation.”).

<sup>4/</sup> Elam Report at 18 (“[T]o the extent that chicken companies would choose to not pay growers based on the true value of their services, this requirement would likely impose a lost performance cost burden far in excess of any administrative burden.”).

retroactive effect, although in some instances they merely reiterate GIPSA's previous interpretation of the P&S Act." It appears that such requirements would only apply to new contracts going forward after the date of implementation of a final rule, but the agency should specify such to prevent confusion if it were to issue a final regulation on this provision (which we oppose). If the rule does apply retroactively, *ex post facto* written justification of differential treatment could be difficult and costly to document. Contracts currently in existence contain pay rates and incentives that have been adjusted based on a number of considerations, including, but not limited to, capital improvements, age of houses, and grower cost of living. [5/](#)

**B. Under Proposed Section 201.210, Poultry Dealers Would be Required to Provide Growers with Information Beyond Their Control, Maintain Undefined Documentation for Premium Payments, and Continue Relationships with Growers in Breach of Contract.**

Section 201.210 of the proposed rule raises a number of practical concerns. Proposed section 201.210(a)(3) would require poultry dealers to provide growers, upon request, with "the statistical information and data used to determine compensation paid to the contract grower or producer under a production contract, including, but not limited to, feed conversion rates, feed analysis, origination and breeder history." Much of this information is already routinely provided to growers. However, GIPSA should clarify the proposal to make clear that poultry dealers are only required to provide information that is in fact used to determine compensation. If the rule were to require poultry dealers to provide information that is not used to determine compensation, such as original and breeder history, it would impose an unnecessary burden on dealers to provide information that may not be within their control.

Currently, many poultry dealers supply detailed close-out sheets to growers for every flock raised. (These are also known as "settlement sheets.") The settlement sheet typically includes the quantity of chickens raised, the basis for payment premiums and discounts based on bird performance, information on bird quality, death loss, feed conversion, and other measures specified in the grower's contract. Feed analysis and breeder history are not typically included in payment calculations. Requiring consideration of these factors that companies do not typically include in payment calculations would substantially increase costs. [6/](#)

It would be irrational for a poultry dealer to manipulate breeder history and feed analysis to disadvantage certain growers. It is against the interest of live poultry dealers to diminish the incentives, or impair the ability of, growers to raise the best quality broilers possible. Furnishing low quality feed or chicks, which represent about 85% of the cost of raising chickens, would significantly increase the costs of chicken production. Furthermore, it would be almost impossible for poultry dealers to have sufficiently detailed knowledge of feed and chick quality to direct below-average inputs to selected growers. If a poultry dealer wants to terminate a grower, furnishing low quality feed and chicks would be an expensive, self-defeating means of achieving that goal. Additionally, any random variability in the quality of feed and chicks would

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[5/](#) Elam Report at 20-22 (assessing the impacts on current contracts).

[6/](#) Elam Report at 18-19.

tend to average out over time, so that there is no long term impact on grower payments from any short term variations. Thus, this proposed section is a solution in search of a problem.

Because furnishing a feed assay and breeder analysis would add to live chicken production costs and require information not currently considered by poultry dealers in determining compensation, they should not be required by a final rule. Addition of this information would result in an added cost burden with little, or no, benefit to either the grower or the poultry dealer.

Proposed section 201.210(a)(5) would only permit premiums for grower compensation if the poultry dealer has documentation of the reasons for the premium. The same is true for any reductions in compensation for lower quality performance. There is a heavy administrative burden and cost that would unnecessarily and unjustifiably result from this obligation. Moreover, the practical effect could be to reward the less effective and efficient growers at the expense of the best and most efficient growers because many poultry dealers might be hesitant to pay premiums due to the administrative burdens and corresponding risk of litigation. Dr. Elam found that this would result in an adverse impact on the poultry industry and consumers. <sup>7/</sup> Additionally, as with proposed section 201.94, it is unclear what type of documentation would be considered sufficient to meet this obligation.

The proposal also provides in section 201.210(a)(6) that poultry dealers would not be permitted to terminate a poultry growing arrangement based solely on a poultry grower's failure to comply with an applicable law, regulation, or rule unless the dealer immediately reports the violation to law enforcement authorities. This significantly shields growers operating in breach of their legal obligations. When coupled with proposed section 201.218 (reasonable period of time to remedy a breach of contract), this section could make it extremely difficult to terminate growers operating in breach of their reasonable legal and contractual obligations.

Finally, proposed section 201.210(a)(1) would introduce a "reasonable person" standard into the determination of whether an unjustified material breach of a contractual duty was unscrupulous, deceitful, or in bad faith. The preamble includes no discussion of how this standard would be defined, leaving interpretation to the courts in future litigation. This introduces considerable uncertainty for poultry dealers, as it is not clear what experience or perspective such "reasonable person" would apply in making such a determination. It also is unclear whether traditional legal interpretations of the "reasonable person" standard would be imported for this determination.

**C. The Considerations for Undue Preferences or Advantages in Proposed Section 201.211 Could as a Practical Matter Unjustifiably Prohibit Poultry Dealers from Engaging in Differential Treatment of Growers.**

The proposed rule would establish certain criteria for the Secretary to consider when determining whether an undue or unreasonable preference, advantage, prejudice, or disadvantage had occurred in violation of the Act. For the reasons discussed below, these criteria are unconstitutionally vague. Additionally, the proposal fails to consider that the P&S Act does not

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<sup>7/</sup> Elam Report at 15.

prohibit differential treatment. Rather, it only prohibits *unfair* differential treatment. The proposed rule ignores this key difference and essentially would prohibit poultry dealers from engaging in differential treatment of growers unless they comply with burdensome regulations. Furthermore, it might not be feasible to meet these requirements because of the broad geographic distribution of poultry growers and volume of growers with which many poultry dealers contract.

Under proposed section 201.211(a), in determining whether an undue or unreasonable preference or advantage or undue or unreasonable prejudice or disadvantage had occurred, GIPSA would consider whether contract terms “based on number, volume or other condition, or contracts with price determined in whole or in part by the volume of livestock sold are made available to all poultry growers, livestock producers or swine production contract growers who individually or collectively meet the conditions set by the contract.” This consideration interferes with the freedom of contract and, as a practical matter, could essentially mandate that most or all growers be offered the same contract provisions even though some can perform much more effectively and efficiently than others. Additionally, the proposal fails to consider the added burdens and inefficiencies that might result from collective growing arrangements. It also is unclear how broadly the standards apply. For example, it is unknown whether the same requirements would apply to growers in different regions of the country.

Proposed section 201.211(b) includes consideration of “whether price premiums based on standards for product quality, time of delivery and production methods are offered in a manner that does not discriminate against a producer or group of producers that can meet the same standards.” This proposal fails to recognize the mandate in the P&S Act that poultry dealers are permitted to give preferences and advantages so long as they are not undue or unreasonable. The proposal also fails to consider the statutory terms “undue” and “unreasonable” in reference to price premiums and discrimination. This is a direct conflict with the P&S Act. Furthermore, it is unclear how a group of producers would be able to demonstrate that they can meet the same standards or how a dealer can demonstrate that they could not.

Finally, section 201.211(c) would consider “whether information regarding acquiring, handling, processing, and quality of livestock is disclosed to all producers when it is disclosed to one or more producers.” In the final rule, GIPSA should specify explicitly that this provision does not apply to poultry dealers. As written, it appears that poultry dealers are exempted from this aspect of the rule because it only references livestock, not poultry. This point should be clarified. If it does apply to poultry dealers, this aspect of the proposed rule would impose an affirmative duty on a poultry dealer to notify every grower of numerous aspects of transactions or agreements, which would be quite onerous and is unjustified. It also is unclear what types of “information” would be required by the rule.

**D. GIPSA Fails to Justify the Need for Disclosure of Sample Contracts Under Proposed Section 201.213.**

The requirement that all contracts must be disclosed to GIPSA for publication would likely result in additional administrative costs, ultimately hurting producers, growers, and consumers. The proposed rule essentially could reduce or eliminate competition between growers by requiring

disclosure of the key details of all agreements. Furthermore, disclosure of contracts is contrary to free market principles of private contracting. Publication of contracts might have the long-term result of adversely affecting competition. [8/](#)

GIPSA has not demonstrated why it is in the public interest for these contracts to be made public. The preamble attempts to justify the requirement on the basis that it would increase the amount of information available to livestock growers on available contract terms. There is no justification in the preamble as to how this provision would benefit poultry growers, other than that the rule would “increase transparency in the marketplace.” However, this is not the case because contracts are inherently situation-specific. One dealer’s contracts are unlikely to be helpful for another dealer’s growers because they are the result of facts and circumstances that are not readily identifiable from the contract itself. Similarly, multiple growers that contract with the same dealer are unlikely to benefit from viewing each others’ contracts because most companies have a standard contract that only varies in terms of base pay, but does not change between growers. Therefore, disclosure of contracts would not increase the amount of useful information available to poultry growers to make informed business decisions.

It also is unclear under the proposal how the terms “sample copy” or “unique type of contract” would be defined. Poultry dealers have no guidance as to how to determine what contracts would need to be filed. Additionally, it is unclear if the term “unique type of contract” would include any type of contract that varies in any term or provision from other contracts that the poultry dealer has already submitted, regardless of how minor the variation might be. Similarly, it is unclear whether a contract that was altered would be regarded as “unique” if the alterations differentiated it in any way from otherwise-identical contracts. It is arbitrary and capricious for GIPSA to promulgate these requirements without defining the key terms or justifying the need for contract disclosure.

Additionally, this requirement could impose a significant burden on industry due to the volume of contracts engaged in by poultry dealers. It also would be unnecessarily time consuming for poultry dealers to identify and delete confidential business information from each contract they would be required to submit. If this rule were to be finalized (which we oppose), GIPSA should, at a minimum, expand the permissible time period for submission of contracts to 35 days. This would permit poultry dealers to make a monthly submission to the agency, decreasing the administrative burdens that result from requiring contracts to be submitted within 10 days of being entered into and allowing more time for deletion of confidential business information. The agency should also make a corresponding change to the amount of time within which poultry dealers would have to inform the agency that contracts are no longer in use.

**E. The Tournament Systems Proposal in Section 201.214 Would Create Inefficiencies and Is Unfair to High Performing Growers.**

The proposed rule for tournament payment systems would likely result in an inefficient system of poultry growing that would be fundamentally unfair to the best growers and would decrease

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[8/](#) Elam Report at 19.

incentives for quality and innovation. It would be arbitrary and capricious for GIPSA to adopt the proposed rule regarding tournament system compensation because the regulation would protect inefficient growers and harm the best growers.

Under the current tournament system structure, growers typically are compensated based on the quality of their broilers, the number that survive the grow-out process, and the amount of feed and supplies that growers used. Under this system, the most efficient growers are compensated more than the least efficient growers. Thus, two growers that produce the same “type and kind” of poultry might receive different compensation depending on their productivity and efficiency. Growers with more advanced facilities and processes will likely produce poultry more efficiently and are rewarded accordingly through greater compensation. This compensation structure aligns with fundamental free market principles to encourage efficiency and incentivize performance. Because this is an economically efficient system, similar practices are commonly employed in other sectors of agriculture. <sup>9/</sup>

GIPSA has not established an adequate basis for overhauling the tournament system of grower compensation. The preamble only cites unattributed and unsubstantiated “complaints” as a basis for making these sweeping changes. As discussed in section II.C. below, unattributed statements are not a legally sufficient basis for rulemaking. If the agency fully researched the facts, it would recognize that the practices at issue do not create a “reasonable likelihood of competitive injury,” as the agency avers. Rather, tournament systems are an efficient and effective means of rewarding the best growers for performing above average and incentivizing less effective growers to improve their performance.

Furthermore, the agency’s statements in the preamble reveal that it does not understand the fundamental workings of tournament pay systems. The preamble states that “some live poultry dealers have established pay schedules under which poultry growers that raise and care for the same type and kind of poultry receive different rates of pay . . . [and poultry dealers have] paid some poultry growers less than the base pay amount in the poultry growing arrangement.” The definition of “base pay” in many existing contracts under tournament systems is the “expected” pay rate with average grower performance. This differs from and is higher than the “guaranteed minimum” pay rate. A lower rate than the base pay may be paid based on low performance, but in no case may it be below the guaranteed minimum rate. Payment calculations are structured so that payments below the base pay rate are not only possible, but are expected. GIPSA’s failure to understand this fundamental aspect of tournament systems is indicative of the agency’s lack of understanding of the current economic benefits from tournament systems. Furthermore, because “base pay” is not defined by the proposed rule, it is unclear whether GIPSA’s rule would actually

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<sup>9/</sup> For example, grain dealers commonly make price bids for grain on a daily basis. The bid, referred to as the “posted price,” is the amount a grain dealer will pay for grain that meets the quality standards for a certain type of grain. The actual price paid will be higher or lower than the posted price, depending on the quality of samples of grain delivered to the dealer. Posted prices also differ by location. This is an economic equivalent to base pay in chicken grower contracts.

affect the guaranteed minimum pay rate, not the base pay rate. As written, the rule would incentivize dealers to make the current minimum pay rate the new base pay rate. <sup>10/</sup>

Our concerns with the tournament system proposal fit within two broad areas: compensation and housing type. The current tournament system structure for compensation operates efficiently because it ranks growers based on performance. By increasing the burdens required to compensate growers at different base pay rates (and imposing an undefined set of requirements for compensation above that base pay rate under proposed section 201.94), GIPSA's proposal would reduce the efficiencies in the system. This would essentially result in an illogical system of compensation that is structured for ranking but does not readily allow ranking to occur because all growers of the same type and kind of poultry would be required to receive the same base pay. Poultry dealers might be unlikely to compensate growers above base pay because of concerns about litigation under sections 201.94 and 201.210(a)(5) of the proposal. Furthermore, the requirements for housing type contemplate differences between housing types to be black and white, when in reality the differences in housing are shades of grey that are not easily distinguishable. As further discussed below, the proposal also fails to define terms that are material to implementing the rule. Without definitions for key terms, poultry dealers could need to have many different settlement groups, which could increase economic inefficiencies from the associated administrative burdens.

### **1. Changes to Compensation Under the Tournament Systems Proposal Would Reward Inefficient Growers at the Expense of Efficient Growers.**

The proposed rule could significantly revise the acceptable procedures for compensation of growers through tournament systems. By requiring the same base pay for all growers raising the same type and kind of poultry, GIPSA's proposal would likely take money away from the most progressive, competitive, and efficient growers and redistribute it to less competitive and efficient growers. <sup>11/</sup> If all poultry growers of the same bird type must receive the same base pay, farmers who made greater investments in their facilities and processes might not be compensated accordingly. Progressive growers who invested more in their housing or growers with new construction built at a greater cost than older houses would nonetheless get the same base pay as growers with older housing. Although these growers could be compensated above the base pay rate, some poultry dealers might be unlikely to provide premium compensation due

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<sup>10/</sup> Elam Report at 15 (“The equal base pay requirements of this section would create incentives for chicken companies to change the definition of ‘Base Pay’ from current use, often ‘expected pay for average performance,’ to a minimum pay rate of the lowest performing grower. Under the PR all growers would likely see lower base payments. All growers would receive either the base pay, or base pay plus a premium.”).

<sup>11/</sup> Elam Report at 15 (“The Proposed Rules would distort market-based prices and terms contained in chicken company contracts with growers. The proposed rules could distort economic signals for both growers and chicken companies. The result would likely be reduced rates of efficiency improvements and innovation that benefit the entire chicken industry and consumers.”).

to the administrative burdens and potential for litigation. This would likely result in a disincentive for innovation, modernization, and upgrading of houses. In time, payment without regard to factors such as type or age of housing could result in lower quality, more expensive chickens and decreased food safety as a result of the lack of improvements. <sup>12/</sup>

The most economically likely result would be for poultry dealers to reduce their base pay to the amount of pay due to those in the bottom of a settlement group. This is because it would be economically inefficient to compensate all growers at the current highest pay rate (because many growers do not earn that pay). It is also possible that some poultry dealers might choose the current mid-point of compensation or base pay rate as a more “fair” alternative, but this also could hurt the best growers and benefit the least competitive growers. It is also possible that the least competitive growers might be terminated to make the base pay rate more equitable for the best producers.

The proposed system is economically inefficient because the price paid by poultry dealers to growers (i.e., the contract base pay) should reflect the underlying economic value of the good or service delivered. If all growers must be compensated at the same base pay rate, this would likely result in payments in excess of actual economic value for low quality grower services and less than actual economic value for the strongest producers. Such excess payments would result in wasted expense for poultry dealers and cause false price signals to growers. The result would be increased production costs for poultry dealers coupled with a decreasing incentive for growers to deliver high quality chickens because compensation would not be tied to performance or quality. Instead, grower payment should reflect the quality of the grower’s services, without setting an artificial base pay rate that would reward those who perform the least effectively and efficiently. <sup>13/</sup>

Additionally, large poultry dealers operate over multi-state geographic areas with differing production costs and competitive conditions. To the extent the rules contemplate requiring the same base pay nationwide for all growers regardless of the geographic area in which they are situated, the rules would ignore these differences. Such a system would result in pay rates that do not reflect local economic conditions, introducing further economic inefficiencies. Base pay rates on a national level might result in under-compensation in some regions and over-compensation in others.

## **2. Grouping by Housing Types is Impractical and Burdensome.**

The proposed rule would require poultry dealers to rank growers in settlement groups with other growers with “like house types.” The rule does not define “like house types,” leaving yet

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<sup>12/</sup> The discussion in section I.G. *infra* regarding capital improvement requirements expands on our concerns regarding the lack of incentives for facility improvements.

<sup>13/</sup> Elam Report at 15 (“Current payment scales have been established over many decades of negotiation between growers and chicken companies. Imposing regulatory rigidity and forcing the re-writing of base pay and performance scales could be difficult, and entail substantial investment in time and resources.”).

another provision open to invite costly lawsuits. There is no standard definition of “house type” in the poultry industry. Rather, each poultry dealer has its own classification system and standards and would group growers’ houses differently. It is also unclear how the threshold between categories would be defined, as there are no bright line differences in characteristics between housing types. In reality, no two house types are exactly alike.

Additionally, a single grower might employ more than one type of housing in its operation. This grower would thus require multiple contracts and would participate in multiple tournament systems. This would be inefficient, unnecessarily complex, and excessively costly for both the grower and the poultry dealer. Similarly, some poultry dealers might have only a few growers that use a certain house type, resulting in a settlement group that is impracticably small to operate. In some cases, the group would be so small that there would be no meaningful competition within groups. If the number of farms within a group is very low, this could operate to the growers’ disadvantage in some situations.

Furthermore, GIPSA does not appear to have considered the interaction between this provision and the capital improvements proposal in sections 201.216 and 201.217. If a grower were to choose not to improve their facilities and other growers do opt to do so, it is unclear whether they would be grouped together for compensation purposes under a tournament system because “house type” is not defined. If they are grouped together, the grower that failed to implement improvements would have to be paid at least the same base pay as the grower that did implement the improvements. This would result in a skewed incentive system for both parties. If the growers are not grouped together, poultry dealers would be required to implement a complex and burdensome system of grouping that might result in an unwieldy number of compensation groups.

### **3. The Proposal Raises Numerous Additional Questions and Concerns.**

In addition to the inherent flaws in GIPSA’s proposal to overhaul the tournament pay systems, there are several implementation issues, definitions, and unique aspects of tournament system contracts that are not considered by the proposed rule. First, the proposal requires that all growers raising the same “type and kind” of poultry receive the same base pay but fails to define “type and kind.” The meanings of these terms are essential for dealers to implement any final rule. Without definitions established by GIPSA, the meaning of the terms would be left to the courts in costly litigation, which would introduce further economic inefficiencies into the system. Numerous questions arise from the lack of a definition. For example, are birds from different breeder flocks or from different aged breeders that settle in the same week the same “type and kind”? Are vaccinated and unvaccinated birds the same type and kind?

Second, the proposal does not consider the challenges of compliance that would exist until all current contracts have expired. Because the rule would not have retroactive effect, a final rule would only apply to contracts entered into, amended, altered, modified, renewed, or extended after the final rule’s effective date. For some period of time thereafter, contracts in force might contain base pay rates and other pay provisions that differ from those in new or revised contracts. As a result, tournament base pay rates would not be uniform for some period of time after the

final rule becomes effective, until all existing contracts have expired. A recent NCC survey on contract duration showed that 59% of current grower contracts are longer than flock-to-flock and 28% of contracts are of a duration of 5 years or longer. It would be administratively burdensome for poultry dealers to comply with the rule for some contracts and comply with previous compensation systems for other contracts. Poultry dealers would, essentially, be running two compensation systems side-by-side, one under existing contracts and one under new contracts subject to the rule. Furthermore, a poultry dealer might be forced into litigation to justify this appropriate use of multiple base pay rates. Additionally, if a poultry dealer were to decide to abandon the tournament pay system altogether in order to avoid these burdens, it might be in breach of its current contracts.

Third, poultry growers might have challenges obtaining investment capital under a revised tournament system compensation structure because it could result in lowered contract base pay. Currently, lenders will generally make loans to chicken growers who can show that their contracts will result in a certain cash flow. However, if growers can no longer expect to receive above-average compensation as a result of a reduction in base pay, there might be more challenges in obtaining loans. This too could result in decreased poultry quality and possible food safety concerns as fewer capital improvements are implemented by growers. If there is less investment, there might be higher costs for production of fewer chickens. Furthermore, a decrease in grower investment in housing might result in poultry dealers building more company-owned growing facilities, which would be a detriment to growers who are no longer needed. Additionally, lower base pay would make it harder for growers to obtain financing from lending institutions, resulting in a further lowering of overall grower performance and possible subsequent decreases in compensation because of the decreasing quality of chickens.

Finally, poultry dealers might be operating under a very large number of pay scales under the proposed rule, including groupings of both housing and bird types. This would lead to inefficiencies from increased administrative overhead costs. Poultry dealers might be more likely to decrease the number of growers they contract with in order to decrease the number of tournament systems they operate, or might be incentivized to cease contracting with growers altogether.

**F. The Proposal in Section 201.215 Regarding Suspension of Delivery of Birds is Unnecessarily Restrictive.**

Under the proposal, GIPSA establishes specific criteria to consider when assessing whether reasonable notice has been provided for suspension of delivery of birds. Although the 2008 Farm Bill authorized GIPSA to take action in this area, GIPSA's proposal is unnecessarily restrictive of poultry dealers' abilities to suspend delivery to growers. The proposal would require that notice of such intent be provided to growers at least 90 days prior to the date of suspension of delivery. Because it takes approximately 2 months to grow out a flock of broiler chickens, the proposal essentially would require that notice be given two flocks in advance of suspension of delivery for broilers. This period is too long and should be reduced.

The only exception in the proposal to the 90 day notice requirement is for “catastrophic or natural disaster, or other emergency.” The proposal fails to consider unforeseen changes in circumstances, although there are numerous other situations that are not contemplated by the proposed rule where suspension might be necessary. For example, marketplace changes might make a suspension or reduction in bird deliveries advisable for all parties concerned. By imposing an obligation to continue bird deliveries for 90 days, GIPSA might be requiring both growers and dealers to engage in excessive chicken production that is against their economic interests. [14/](#)

Under proposed section 201.2(p), “suspension of delivery of birds” means “the failure of a live poultry dealer to deliver a new poultry flock before the date payment is due for a poultry grower’s previous flock.” Poultry dealers might need more than the number of days between payment for the prior flock and placement of the next flock in order to adjust supply of poultry to be consistent with market demands. As a practical matter, in order to comply with the mandate in the proposal, some dealers might have to consider lengthening payment periods from the date of their receipt of the current flock for which payment is being made. This provision would encourage poultry dealers to reduce flock size or to restrict the number of growers with whom they contract to increase flexibility to respond to changing economic conditions.

Furthermore, this rule is likely to be particularly burdensome to small and very small poultry dealers, for whom the inability to stop or slow bird placements quickly would likely result in severe economic hardships. In this way, the proposal might give a competitive advantage to larger poultry dealers that have more resources to absorb losses related to excess inventories.

It is not clear how this provision interacts with proposed section 201.218, relating to giving growers a reasonable period of time to remedy a breach of contract. Read together, it appears that the provisions could prevent a poultry dealer from suspending delivery of birds to a grower that is in breach of contract without first giving 90 days notice of suspension of delivery and a reasonable period of time to remedy the breach of contract. By essentially requiring poultry dealers to maintain delivery to growers, despite their breach, the proposed rule could create potentially serious animal welfare problems. For example, if a grower were to fail to take the actions necessary for the health or welfare of the birds under its care, a dealer would be obligated to continue delivery of birds for an additional two growout periods. The requirement of 90 days notice for suspension of delivery could endanger the health or wellbeing of the birds, while also mandating placement of an additional flock onto farms with known animal welfare violations. Additionally, poultry dealers could be forced to maintain their relationships with growers who are in breach of contract, and there likely would be decreased incentives for growers not to

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[14/](#) Elam Report at 14 (“Hot summer weather, for example, may increase death loss and cause lower performance if birds are placed at normal density. Adverse business developments, such as the 2008-2009 recession, may indicate that placements for a company be reduced or suspended in order to better balance supply with expected demand. If the Proposed Rules force chicken companies to temporarily produce in excess of demand, the market value of chicken products could be reduced below cost. Producing chicken at a loss is not in the best interest of chicken companies, or contract growers.”).

breach contracts with dealers because they would be guaranteed at least 90 days continued performance thereafter. Accordingly, the proposal should be revised to apply only to situations when dealers choose to suspend delivery for their own purposes, but not when dealers suspend delivery because of breach of contract by growers. A revised proposal also should consider a time period of less than 90 days, as growers informed of planned suspension could have little incentive to do a good job for the two flocks of newly placed broilers delivered thereafter.

Furthermore, the waiver provision of the proposal, which would require a poultry dealer to apply to the Administrator for a waiver in case of a catastrophic or natural disaster, or other emergency, provides little certainty. The word “emergency” is undefined and it is not clear whether it would include animal welfare or food safety-related breaches of contract or a substantial drop in market demand for chicken. Additionally, there is no requirement in the proposed rule that GIPSA grant such a waiver and there is no time limit specified for the agency to respond to such a request. Filing an administrative application in the midst of such an emergency would likely be burdensome and impractical. Instead of merely permitting such application, GIPSA should establish a rule that *per se* recognizes suspension of delivery to be appropriate in such situations, placing the burden on any parties who might feel aggrieved to request review by the Administrator after the fact.

**G. The Capital Investment Requirements in Sections 201.216 and 201.217 Would Detrimentially Affect Poultry Industry Growth, Competitiveness, and Food Safety.**

The proposed criteria regarding capital investments include numerous undefined terms and requirements and would prevent poultry dealers from implementing necessary innovations to encourage efficient production and food safety. Over the past 50 years, the chicken industry has grown from the number three to the number one provider of animal protein in the U.S. meat diet. One basis for this growth is continual, cost reducing, investment in contract grower facilities. <sup>15/</sup> Proposed sections 201.216 and 201.217 would significantly inhibit further growth of the industry and put U.S. poultry at a competitive disadvantage on the international level. <sup>16/</sup> If these regulations were in place 50 years ago, today’s chicken industry would be smaller, employing fewer people (and hiring fewer growers), and consumers would have less but more expensive chicken. <sup>17/</sup> Although the 2008 Farm Bill mandated that GIPSA issue regulations concerning acceptable capital investment requirements, there was no legal mandate for the regulation to be as restrictive or counterproductive as the proposed rule. It is also important to recognize that the term “requirements” is a misnomer because capital improvements are not unilateral mandates.

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<sup>15/</sup> Elam Report at 6-8.

<sup>16/</sup> Elam Report at 8 (“Imposition of regulations that would reduce the industry’s ability to innovate and increase efficiency would damage not only the chicken industry, but the entire U.S. economy. Consumers would pay higher prices, potential job creation would be lost, and export competitiveness would be at risk.”).

<sup>17/</sup> Elam Report at 12 (“Had the improvements in feed efficiency . . . not occurred, the current conversion rate would be about 10% higher . . .”).

Rather, all capital improvements are freely entered into as part of the bargained for exchange between the dealer and the grower.

The proposed criteria, essentially, would prohibit mandatory capital investment requirements because growers would have to be provided discretion to decide against the capital investment requirement. No required capital investment would be permitted unless the contract duration is of a sufficient period of time to permit the grower to recoup 80% of the cost of the required capital investment. It is unclear from the preamble how or why GIPSA determined that growers would have to be able to recoup 80% of the cost of the required capital investment. This number appears to be entirely arbitrary. Of course, this begs the question of why it is necessary at all to require recoupment of investment by growers, as this requirement is highly atypical. This is tantamount to requiring poultry dealers to pay a price that ensures a certain rate of return, which is arbitrary and capricious.

Our concerns with these proposed requirements fall within three broad categories: (1) the large number of vague and undefined terms in the proposal; (2) the detrimental effect of the regulation on technological innovation and food safety; and (3) additional practical factors that GIPSA has not taken into consideration.

### **1. The Proposal is Rife with Vague and Undefined Terms.**

The numerous undefined terms in proposed section 201.216 would result in great uncertainty about the requirements imposed on poultry dealers under the regulation. Without regulatory definitions from GIPSA, the meaning of these terms would likely need to be litigated. As discussed throughout these comments, litigation is a resource-intensive endeavor that likely would result in increased costs for all parties involved. The rule would be best served by omitting some of these terms altogether rather than attempting to define the terms. The following questions are among those left unanswered by the undefined terms included in the proposed rule:

- The rule would prohibit requirements of capital investments by some contract growers if the same requirements are not also made of “other similarly situated poultry growers.” How broadly or narrowly is “similarly situated” defined? This key information is necessary to understand the impact of the rule. If defined broadly, the rule might essentially prohibit poultry dealers from requiring any capital investments unless the same requirement is made of all growers. The best course of action would be for GIPSA to omit this requirement and not attempt to define “similarly situated” because the restriction fails to account for nuanced differences between growers that might not be evident in the agency’s definition.
- The rule would permit consideration by the Administrator of “the age of, and recent upgrades to or capital investments in” the poultry growers’ operations. These considerations are too vague to be meaningful. The age and timing of investments is less indicative of the need for additional investments than are the nature and quality of the facility upgrades.

- What would the Administrator consider to be a “catastrophic or natural disaster, or other emergency” such that a live poultry dealer may apply for a waiver of section 201.216(c)?
- What would be considered to be “threats of coercion” regarding proposed improvements? Without a clear definition, a grower might argue that encouragement or suggestions to voluntarily implement capital improvements is coercion. Similarly, friendly sharing of information about new technologies could also be erroneously considered as such, as might a decision to choose to do business with a grower that voluntarily agreed to make improvements instead of a grower that declined to do so.
- How would a “reasonable time period” to implement the required capital investments be defined? If this is a case-by-case assessment of the facts, the rule should state this expressly.

It also is not clear how the requirement that a capital investment must “reasonably be expected to be recouped by the poultry grower” would be applied. Forecasts of returns are subject to substantial variability based on unknown factors such as poultry demand, utility rates, weather, and the grower’s ability to manage the new technology. Furthermore, the most significant factor in determining returns on grower investments is the grower’s ability to implement, utilize, and benefit from new technology. Although NCC and USPOULTRY’s member companies generally attempt to assist growers in understanding how to take advantage of new technology, the ultimate outcome of a capital investment is still largely out of their control. A rudimentary example clearly illustrates this point: If studies show that a new type of light bulb increases broiler growth, a grower who installs these bulbs but fails to turn them on will not recover the cost of its investment.

There is also no indication of how the reasonableness of any such expectation is to be determined. For example, GIPSA gives no indication of what assumptions should be made about the future state of the economy and how it might affect the demand and pricing for poultry, about the impact that individual grower business decisions might have on the grower’s ability to recover its investment, or on how or why poultry dealers could or should be made legally responsible for assuming all of these risks as a practical matter. This could force individual poultry dealers to reexamine their contracting philosophy and the number of growers with whom they do business in order to determine what approach best suits their individual business strategies. Accordingly, this could conceivably result in greater selectivity as to the growers with whom they will work over time. Growers unwilling or unable to modernize their facilities might not compare favorably with others in any such review. [18/](#)

## **2. The Proposed Rule Would Hurt Innovation and Food Safety Efforts.**

The proposal could also result in a marked decrease in the quality of growing facilities over time. The prohibition in proposed section 201.217 concerning required equipment changes if existing

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[18/](#) Elam Report at 11 (“To realize the potential efficiency of genetics and fees supplied by the chicken companies, housing and related equipment used to raise live chickens must be regularly improved.”).

equipment is in good working order would stifle innovation. The lack of time periods in this provision could result in a prohibition on requiring growers to replace grossly outdated technology that was required by the poultry dealer many years prior. For example, if a poultry dealer previously accepted or approved equipment 20 years prior, but the equipment is still in “good working order,” the dealer would not be permitted to require a capital investment without providing adequate compensation incentives. It also is unclear what condition would constitute “good working order” and what amount of compensation incentives would be deemed “adequate.”

The same concerns arise from proposed section 201.217(d), which would prohibit a reduction of birds placed with a grower or termination of a contract based solely on the failure of a grower to make equipment changes so long as existing equipment is in “good working order.” This would promote the use of outdated technology and stifle innovation. Additionally, this provision does not reflect current practice in the poultry industry. Poultry dealers typically include in their contracts the right to ensure that grower facilities are in “good working order” before placing birds in a house. Each dealer operates under a different meaning of this phrase. By codifying the “good working order” requirement but not defining a meaning, this regulation might result in costly litigation to define what is and is not “good working order.”

Additionally, the prohibition in this section on reductions in the number of birds placed with a grower could have several unintended consequences. Currently, many poultry dealers have programs whereby they reduce stocking density in grower facilities when conditions in those facilities do not meet company standards. Stocking density is also reduced under certain adverse weather conditions, regardless of the condition of equipment in the grower’s house. Reductions in placement density are intended to benefit not only the dealer but also the grower, by improving bird performance and reducing mortality losses. Typically, growers are informed of the reasons for the decrease in placements and, if necessary, are offered advice on remedying concerns. Under the proposed rule, dealers could be required to place excess numbers of birds in substandard houses or during adverse weather conditions. This might result in increased costs for both the dealer and the grower because of lower bird performance and increased mortality rates.

It also is not clear to what extent the applicability of this rule could be taken and how “requirement” would be defined. At what point does a recommendation become a requirement? If a grower were to fail to follow a dealer’s recommendations to adopt new technology or replace existing equipment, its performance might decline relative to growers that voluntarily invest in and maintain their houses. If such a grower were ultimately terminated for poor performance, it might argue under the proposed rule that the dealer’s recommendations to upgrade and repair their equipment were in fact requirements for maintaining a contract which they had no discretion to decide against.

A related concern with this proposal is its implications for food safety. Technology is continuously improving and, increasingly, food safety can be improved early in the production chain based on practices used by growers. By discouraging capital investment requirements and protecting use of outdated equipment, the proposal would likely result in long term challenges

for implementing food safety improvements. We request that GIPSA submit this section of the proposal to USDA's Food Safety and Inspection Service (FSIS) for review of potential conflicts in this regard. The proposed rule should be modified to provide an exception for capital improvements that are necessary to comply with changes that might be legally mandated or voluntarily implemented, such as changes necessary to effectuate food safety objectives.

### **3. The Proposal Raises Numerous Additional Questions and Concerns.**

We have several additional macro concerns with the proposal. First, it is impossible to foresee at the time of investment all of the facts necessary to evaluate the feasibility of recouping 80% of the investment. Capital investment requirements are typically backed by an assessment by a dealer that there is a net benefit for the grower and the dealer from implementing the changes. However, as with any long term business forecast, there are many uncontrollable factors that can affect returns. This proposal fails to account for the inherent uncertainties in the poultry industry and the challenges of forecasting long term returns.

Second, we also are concerned with the provision in proposed section 201.216(c) that would prohibit capital investment requirements if the poultry dealer were to reduce substantially or end operations at the processing facility within 12 months of requiring the additional capital investment. This aspect of the proposal fails to consider the business realities that often necessitate closing facilities. It is extremely unlikely that a facility could be certain of its own future at the time of requiring capital investments. If, due to unforeseen circumstances, the facility were required to reduce substantially or end operations, the rule would retrospectively deem the capital investment requirement to be an unfair practice in violation of the Act. This provision also creates a large potential liability for every poultry dealer whenever they require capital investments.

Third, the proposal does not consider the impacts on small or large businesses, treating growers as fungible. In proposed sections 201.2(n) and (o), the proposal would establish that all capital investments costing \$25,000 or more fall within the scope of the regulation. This uniform threshold fails to account for differences in farm size, disregarding the fact that a large grower might have numerous houses such that a \$25,000 investment is nominal. On the other end of the spectrum, the proposal could put a significant number of small growers with older facilities out of business. Poultry dealers might elect against entering into multi-year contracts on smaller, older facilities because there would be no cost-effective way to end the contract. This would especially be the case if growers with newer facilities were to build more houses. Poultry dealers would have incentives to invest in their most viable growers and terminate or avoid further relationships with the least viable growers that have out-of-date facilities.

Ultimately, the considerable uncertainty about the meaning of these terms and the natural inclination against involvement in litigation might result in poultry growers making fewer capital investments. As Dr. Elam's economic analysis shows, the business and litigation risks imposed by this proposal would likely discourage investments in innovation that lower production

costs. <sup>19/</sup> This might result in poultry that costs more than it would if the best available technology were in use by growers. Fewer capital improvements also could result in lower bird performance, decreased bird welfare, and higher production costs. Additionally, there might be negative consequences for food safety if dealers are not permitted to require certain capital improvements of growers. Taken as a whole, the higher costs and decreased innovation that might result from this provision of the proposed rule might cause a decline of the competitiveness of the U.S. poultry industry both domestically and in international markets.

#### **H. Proposed Section 201.218 Regarding a Reasonable Period of Time to Remedy a Breach of Contract is Unduly Restrictive.**

Per the requirement in the 2008 Farm Bill, the proposed rule would establish criteria for the Secretary to consider when determining whether a poultry dealer has provided a grower with a “reasonable” period of time to remedy a breach of contract that could lead to contract termination. The proposed rule would essentially require poultry growers to notify growers of breach of contract or failure to act within 90 days of finding the breach and would set a minimum period of 14 days for the grower to rebut the allegations included in a notice of breach. The proposed rule is shortsighted in that it fails to allow a poultry dealer to terminate contracts quickly when necessary.

Under the proposed rule, a grower engaging in abuse or neglect of birds or otherwise endangering animal welfare could not be terminated immediately. A poultry dealer would not be permitted to terminate the contract or suspend receipt of birds until after the 14 day response period, no matter how egregious the grower’s actions. This could result in continued harm to birds and might also require the poultry dealer to receive shipments from such grower and delivery further flocks to the grower, or else risk acting unreasonably under the Act. Similarly, a grower engaging in behavior that could cause food safety risks also should not be permitted to continue growing birds for 14 days after the breach is noticed. The proposal should be amended to permit immediate termination in such circumstances.

The proposal also forecloses termination of contracts if notice is not given to the dealer within 90 days of “finding the breach or failure.” <sup>20/</sup> In certain situations, it might not be clear at what point in time sufficient facts were available to constitute such a finding. Sometimes, the breach might result from a repeated course of minor violations or other piecemeal behaviors by which there is no clear date when the breach can be determined to be found. This requirement might result in litigation being filed routinely by terminated growers challenging what poultry dealers knew when. To prevent these wasteful lawsuits, GIPSA should revise the proposal to clarify what is meant by “finding the breach” or to remove this requirement altogether.

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<sup>19/</sup> Elam Report at 10-13.

<sup>20/</sup> Although it is not entirely clear, this provision also seems to establish a limitations period of 90 days for dealers to object to a breach at the risk of a waiver of its contract rights. GIPSA lacks authority to promulgate this restriction because there is no indication of Congressional intent to preempt state statutes of limitation in this regard.

**I. The Arbitration Provisions in Proposed Section 201.219 Should be Revised to Better Define the Regulation’s Terms.**

The section regarding arbitration illustrates appropriate restraint by the agency in promulgating a regulation that does not grossly exceed the scope of Congress’s mandate in the 2008 Farm Bill. We do note, however, that the consideration of costs as compared to those in a typical employer/employee arbitration, as set forth in proposed section 201.219(a)(3), might not be a reliable parallel. The issues in arbitration involving growers differ significantly from those involving employees. Grower issues are potentially more complex, and thus arbitration might be more costly. Additionally, the use of the term “reasonable” in the proposal, as to costs, time limits, and the appropriate scope of discovery, is vague and might result in litigation regarding the fairness of arbitration. This result is contrary to public policy, as the purpose of arbitration is to avoid litigation. GIPSA should define expectations for what costs, time limits, and discovery would be considered “reasonable” in order to prevent resource-intensive litigation.

**II. THE PROPOSED RULE EXCEEDS THE CONGRESSIONAL MANDATE, AS WELL AS EXISTING LAW, AND IS ARBITRARY AND CAPRICIOUS.**

The proposed rule is an arbitrary and capricious violation of GIPSA’s obligations as an administrative agency and rulemaking body as provided by the Administrative Procedure Act [21/](#) and applicable case law and regulatory policies. The proposal exceeds the scope of the Congressional mandate in the 2008 Farm Bill, is based on unsubstantiated allegations of unnamed individuals, and indicates prejudgment on behalf of the agency. Furthermore, GIPSA failed to comply with its obligations under Executive Order 12866, conducting, at best, a superficial economic analysis that fails to assess the rule’s effect on consumers and industry. For these reasons, the proposal should be withdrawn.

**A. GIPSA’s Proposal Exceeds the Congressional Mandate in the 2008 Farm Bill.**

The proposed rule was issued under the guise of mandates in the 2008 Farm Bill but, in fact, goes well beyond the scope of that law’s direction. The 2008 Farm Bill mandated that GIPSA promulgate regulations under the P&S Act to establish criteria that the Secretary of Agriculture would consider in determining:

1. Whether an undue or unreasonable preference or advantage has occurred in violation of the P&S Act;
2. Whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement;
3. When a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of such Act;
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

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[21/](#) 5 U.S.C. § 551 et seq.

could lead to termination of the poultry growing arrangement or swine production contract; and

5. Whether the arbitration process provided in a contract provides a meaningful opportunity for the grower or producer to participate fully in the arbitration process. [22/](#)

The proposed rule goes far beyond the limited grants of authority in the 2008 Farm Bill. Instead of setting forth the criteria that the Secretary would use in addressing certain issues, it imposes numerous requirements that seek to alter substantive statutory law and redefine the relationship between live poultry dealers and their contract growers. Congress gave the agency no authority for such action.

Congress considered and expressly rejected many of the provisions included in the proposed rule. Specifically:

- Proposed section 201.94 on business justifications contains requirements originally proposed by Senator Jon Tester. Senator Tester offered an amendment that proposed prohibiting the payment of premiums or discounts unless there are records “documenting the reason(s) and substantiating the revenue and cost justification.” [23/](#) This amendment was defeated on the Senate floor by a vote of 40-55. [24/](#)
- Proposed section 201.3’s abrogation of the requirement that the agency or a private plaintiff prove competitive injury to show a violation of sections 202(a) and (b) of the P&S Act originated in Senate Agriculture Committee Chairman Tom Harkin’s Discussion Draft of the 2008 Farm Bill Livestock Title. That draft proposed to remove the competitive injury requirement. [25/](#) This provision was omitted from Chairman Harkin’s mark up of the livestock title of the bill that was presented to the Senate Agriculture Committee and was never adopted, and nothing in the final bill altered the existing competitive injury requirement.
- Sections 201.216 and 201.217 can be traced to the Senate’s Competitive and Fair Agricultural Markets Act of 2007, the precursor to the 2008 Farm Bill Livestock Title, which required “reasonable additional consideration, including compensation or a modification to the terms of the production contract” for contracts requiring additional capital investments. [26/](#) Although this provision was included in the version of the 2008 Farm Bill passed by the Senate, it was struck from the bill in the final Conference Report. [27/](#)
- The concepts regarding fairness in section 201.210, such as requirements that the Secretary of Agriculture promulgate regulations relating to unfair, unjustly

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[22/](#) Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651, §§ 11005-11006 (2008).

[23/](#) 153 Cong. Rec. S.14410 (Tester amendment to Farm Bill on Senate floor).

[24/](#) 153 Cong. Rec. S.15418.

[25/](#) S. 622, 110th Cong. (1st Sess. 2007) (as introduced by Senator Harkin, Feb. 15, 2007).

[26/](#) H.R. 2419, as amended and passed by Senate on Dec. 14, 2007.

[27/](#) H.R. Rep. 110-627.

discriminatory, or deceptive acts, devices, or anticompetitive practices in agriculture, were included in various early versions of the 2008 Farm Bill, such as Chairman Harkin's mark up, but were excluded from the final bill. [28/](#)

Congress's rejection of these provisions indicates that it neither intended for GIPSA to issue regulations of such broad effect nor conferred such expansive rulemaking authority on the agency. It is particularly significant that Congress considered and rejected bill language that would have eliminated the "competitive injury" requirement from the P&S Act. [29/](#) This decision cannot and should not be undermined by regulatory action. In fact, GIPSA selectively recognizes such in the preamble. In discussing the options considered when promulgating this regulation, the agency states that it decided against imposing more restrictive arbitration limits because doing so "is not in line with the spirit of the Farm Bill." This and many other aspects of this rule, however, are directly contrary not only to the "spirit" of the Farm Bill but to the actual legislation itself, as they impose obligations that Congress expressly refused to include in the Act.

When it passed the 2008 Farm Bill, Congress also had full notice of the circuit courts' consistent interpretations requiring a showing of competitive injury under section 202 of the P&S Act. "Congress legislates against the background of existing jurisprudence, unless the statute explicitly says otherwise." [30/](#) Nothing in the text of the 2008 Farm Bill itself or its legislative history suggests that Congress intended to disturb the construction of section 202 unanimously adopted by eight circuits. Congress is both "presumed to be aware of [a]...judicial interpretation of a statute" and "to adopt that interpretation when it re-enacts a statute without change." [31/](#) These presumptions apply to the passage of the 2008 Farm Bill since its provisions directly affected the P&S Act. To overcome the presumptions, there must be "some statutory or

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[28/](#) Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651 (2008).

[29/](#) See, e.g., *Pacific Gas & Elec. Co. v. Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190, 220 (1983) (noting that Senate language had been deleted from the final bill to insure that there be no preemption); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 441-42 (1987) (rejection of Senate language limiting the Attorney General's discretion in granting asylum in favor of House language authorizing grant of asylum to any refugee demonstrated that Congress did not intend by its silence to enact language it had earlier discarded); *Doe v. Chao*, 540 U.S. 614, 622 (2004) ("drafting history show[s] that Congress cut the very language in the bill that would have authorized any presumed damages," thereby eliminating "any possibility of imputing harm and awarding presumed damages.").

[30/](#) *Scott v. United States*, 2010 WL 3659478, at \*3 (S.D. Fla. Sept.15, 2010) (citing *Young v. United States*, 535 U.S. 43, 49-50, 11 S. Ct. 1036, 152 L.Ed.2d 79 (2002)). See also *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 267-68, 112 S. Ct. 1311, 1317-18, 117 L.Ed.2d 532 (1992); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S. Ct. 317, 325, 112 L.Ed.2d 275 (1990); *Cannon v. University of Chicago*, 441 U.S. 677, 696-97, 99 S. Ct. 1946, 1957-58, 60 L.Ed.2d 560 (1979).

[31/](#) *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. ----, 129 S. Ct. 2484, 2492, 174 L.Ed.2d 168 (2009) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S. Ct. 866, 55 L.Ed.2d 40 (1978)).

legislative indication that Congress so intended” another outcome. <sup>32/</sup> Because Congress intentionally rejected language eliminating the competitive injury requirement of the Act, the 2008 Farm Bill “is presumed to be harmonious with existing law and its judicial construction.” <sup>33/</sup> GIPSA’s contrary regulatory action both undermines the continuity between the case law and the statute and flatly contradicts Congressional intent. <sup>34/</sup>

### **B. GIPSA Lacks Legal Authority to Regulate All Stages of Poultry Production.**

Under proposed section 201.3(a), GIPSA seeks to apply the proposed regulation to “all stages of a live poultry dealer’s poultry production, including pullets, laying hens, breeders and broilers, excluding hens that only produce table eggs.” This mandate exceeds the scope of GIPSA’s authority under the P&S Act, which only regulates a live poultry dealer’s relationship with “poultry growers” who are “engaged in the business of raising and caring for live poultry for slaughter.” <sup>35/</sup> Pullets, laying hens, and breeders are not produced “for slaughter.” The entities raising pullets and caring for laying hens and breeders, therefore, are not “live poultry dealers” under the P&S Act, because they are not “obtaining live poultry” for the “purpose of either slaughtering it or selling it for slaughter by another.” <sup>36/</sup> Similarly, the arrangements between live poultry dealers and pullet growers or laying hens and breeder operations are not “poultry growing arrangements” because the poultry covered by those arrangements are not being raised “for slaughter.” <sup>37/</sup> Rather, they are being raised as breeding stock to produce broiler chicks.

Furthermore, the preamble fails to justify this broad expansion of the poultry industry sectors that fall within its regulatory purview. In fact, there is no discussion of this proposed section at all in the preamble, and GIPSA did not expressly solicit public comment on this aspect of the proposed rule. Accordingly, not only is the proposed rule unauthorized by statute but its adoption would be arbitrary and capricious because the rulemaking record is devoid of factual support to warrant this attempted misuse of regulatory power. <sup>38/</sup>

### **C. Regulations Based on Unsubstantiated Allegations Are Arbitrary and Capricious.**

Throughout the preamble, GIPSA seeks to support the proposed rule with unsubstantiated allegations from unidentified individuals. Unverified and undocumented anecdotal evidence of

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<sup>32/</sup> *Estate of Wood v. C.I.R.*, 909 F.2d 1155, 1160 (8th Cir. 1990).

<sup>33/</sup> *Johnson v. First Nat’l Bank of Montevideo*, 719 F.2d 270, 277 (8th Cir. 1983).

<sup>34/</sup> As described more fully below, GIPSA does not have any authority to abrogate the competitive injury requirement of sections 202(a) and (b).

<sup>35/</sup> 7 U.S.C. § 182(a)(8).

<sup>36/</sup> 7 U.S.C. § 182(a)(10).

<sup>37/</sup> 7 U.S.C. § 182(a)(9).

<sup>38/</sup> It is a “well-established principle of administrative rulemaking that an agency’s failure to cogently explain why it has exercised its discretion in a given manner renders its decision arbitrary and capricious.” *Wiley v. Bowen*, 824 F.2d 1120 (D.C. Cir. 1987) (per curiam) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 48 (1983)).

purported abuses in the poultry industry are the sole basis for the proposals. For example, the preamble states “producers have reported to GIPSA,” “GIPSA has received complaints,” and “GIPSA has been informed” without citing any specific facts. Similarly, the agency cites “telephone calls,” “complaints,” and “comments.” GIPSA fails to provide actual evidence in the record to substantiate the allegations upon which it rests many of the provisions of the proposed rule.

Mere supposition and allegations included in the preamble do not establish a sufficient record to support the agency’s claims. Courts will not defer to a declaration of fact that is “capable of exact proof” but unsupported by evidence. [39/](#) GIPSA has failed to meet its burden of providing “substantial” evidence in support of its rulemaking. [40/](#) That default alone makes the proposed rule arbitrary and capricious. [41/](#)

#### **D. The Agency and Administrator Exhibit Bias Against Industry.**

Agency statements demonstrate that GIPSA has prejudged the issues prior to completion of the rulemaking process. The unprecedented “Misconceptions and Explanations” document released during this rulemaking illustrates the agency’s bias in advance of receiving comments on the proposed rule. This document was issued as a means of defending and seeking support for the proposal, which further shows the arbitrary and capricious nature of the agency’s actions. Moreover, the document was factually flawed and misrepresented the effects of the proposed rule, also illustrating the agency’s bias in this rulemaking. GIPSA fails to understand or has chosen to ignore the serious adverse effects its proposed rule would have on the poultry industry and on consumers.

Additionally, the scope and substance of the proposed rule raise significant questions about biases that may result from the agency Administrator’s background and outspoken advocacy. Prior to assuming his current position, the Administrator was a plaintiffs’ attorney who routinely brought lawsuits against live poultry dealers under the P&S Act. He lost numerous cases because of his failure to meet the legal requirement to prove competitive injury under the Act and now is overseeing the rulemaking to eliminate that very requirement. Additionally, he was previously a member of R-CALF USA (Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America) and helped to found the Organization for Competitive Markets (OCM). Notably, both of these groups are outspoken supporters of the proposal. Because he has an “unalterably closed mind on matters critical to the disposition of the proceeding,” as illustrated by his personal history of bringing lawsuits against the poultry industry under the P&S

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[39/](#) *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1155 (D.C. Cir. 1987).

[40/](#) *Id.* (quoting *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1313 (D.C. Cir. 1991)).

[41/](#) *McDonnell Douglas Corp. v. U.S. Dept. of the Air Force*, 375 F.3d 1182, 1191 (D.C. Cir. 2004); *see also Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 605 (D.C. Cir. 2007) (“An agency’s ‘declaration of fact that is capable of exact proof but is unsupported by any evidence’ is insufficient to make the agency’s decision non-arbitrary”) (quoting *McDonnell Douglas*, 375 F.3d at 1191 n. 4).

Act and obvious personal stake in the proposal, the Administrator should be disqualified from further participation in the rulemaking. [42/](#)

**E. GIPSA Failed to Fulfill its Economic Analysis Obligations Under Executive Order 12866.**

Executive Order 12866 sets forth principles to ensure that federal agencies “promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need.” [43/](#) GIPSA’s proposal violates numerous provisions of that Executive Order, including the following:

- “When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impact, and equity.”
- “Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.”
- “Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objective, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.”
- “Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.” [44/](#)

The proposal would increase costs and decrease innovation, predictability, and flexibility for regulated entities. Additionally, it would impose burdens on all parts of society, including large and small businesses as well as consumers. The rule is likely to increase litigation because of its substance – for example, elimination of the “competitive injury” requirement for cases under sections 202(a) and (b) of the P&S Act – and its vagueness and incoherence as reflected in the numerous undefined terms throughout the text. There is no indication that GIPSA considered alternative forms of regulation, particularly market-based incentives, to achieve its goals, rather than arbitrarily mandating extensive requirements for the behavior of regulated entities.

In addition to these defects, GIPSA’s proposal fails to comply with Executive Order 12866’s requirement that a “significant regulatory action,” defined as an agency action having an annual

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[42/](#) See *Ass’n of Nat’l Advertisers v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979).

[43/](#) Exec. Order 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

[44/](#) *Id.* at 51735-36.

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

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

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

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

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<sup>45/</sup> Exec. Order 12866.

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

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

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

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

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

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

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<sup>46/</sup> 7 U.S.C. § 192(a)-(b).

<sup>47/</sup> 75 Fed. Reg. 35338, 35340 (June 22, 2010).

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

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

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

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

There is no dispute that the purpose of section 202 of the P&S Act is the elimination of monopolistic or other anticompetitive practices. Only a year after the Act’s passage, the Supreme Court in *Stafford v. Wallace* recognized that the “chief evil” that section 202 sought to address was “the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and *arbitrarily to increase the price to the consumer, who buys.*” [51/](#) “Another evil,” according to the Court, was “exorbitant charges, duplication of

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

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

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

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

commissions, deceptive practices in respect of prices, in the passage of the live stock through the stockyards, *all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers, on the other.*" [52/](#)

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

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

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

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[52/](#) *Id.* (emphasis added).

[53/](#) See 75 Fed. Reg. at 35840-41 (claiming that judicial decisions requiring competitive injury to establish a violation of section 202 "incorrectly assume that harm to competition was the only evil Congress sought to prevent by enacting the P&S Act" and noting that *Stafford* cites "multiple 'evils' that the P&S Act sought to remedy").

[54/](#) *Stafford*, 258 U.S. at 515.

[55/](#) *Id.*

[56/](#) *Id.*

[57/](#) *De Jong Packing Co. v. United States Dep't of Agric.*, 618 F.2d 1329, 1335 n.7 (9th Cir.), *cert. denied*, 449 U.S. 1061 (1980) (P&S Act "incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation"); *Armour & Co. v. United States*, 402 F.2d 712, 722 (7th Cir. 1968) ("Congress gave the Secretary no mandate to ignore the general outline of long-time antitrust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged.").

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

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

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

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

[59/](#) *Brooke Group*, 509 U.S. at 225.

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

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

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

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[61/](#) *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 276-79 (6th Cir. 2010); *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (en banc); *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1230 (10th Cir. 2007); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006); *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir.), *cert. denied*, 546 U.S. 1034 (2005); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *Philson v. Goldsboro Milling Co.*, 1998 WL 709324 at \*4-5 (4th Cir., Oct. 5, 1998); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985); *De Jong*, 618 F.2d at 1336-37; *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir. 1976); *see also Armour & Co.*, 402 F.2d 712.

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

[63/](#) *Terry*, 604 F.3d 272; *Wheeler*, 591 F.3d 355.

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

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

[66/](#) *Id.*

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

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

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

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

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

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

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

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[67/](#) See *supra* note 62.

[68/](#) 604 F.3d 272 (6th Cir. 2010).

[69/](#) 591 F.3d 355 (5th Cir. 2009) (en banc). The agency also fails to note that it participated in *London v. Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir. 2005), in which the Eleventh Circuit also rejected the arguments it makes on this issue in the preamble.

[70/](#) *IBP*, 187 F.3d 974; *Farrow*, 760 F.2d 211; *De Jong*, 618 F.2d 1329; *Armour & Co.*, 402 F.2d 712.

[71/](#) 75 Fed. Reg. 35340.

[72/](#) *Id.* at 35340 n.32.

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>78/</sup> *Morissette*, 342 U.S. at 263.

<sup>79/</sup> *Moskal v. United States*, 498 U.S. 103, 121 (1990) (quoting F. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L.R. 527, 537 (1947)).

<sup>80/</sup> Although resort to the legislative history of the P&S Act is unnecessary for a proper construction of sections 202(a) and (b), that legislative history also confirms that Congress understood the terms used in the statute to address anticompetitive conduct. *See* H.R. Rep. No. 67-77, at 2-10 (1921) (detailed discussion of Supreme Court cases construing the language of the Interstate Commerce Act and the Federal Trade Commission Act).

<sup>81/</sup> 75 Fed. Reg. 35340

<sup>82/</sup> *See supra* Section III.A.3.

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

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

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

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

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[83/](#) *Wheeler*, 591 F.3d at 371 (Jones, J., concurring).

[84/](#) *See infra* Section IV.

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

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

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

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

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

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

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<sup>86/</sup> *Hochfelder*, 425 U.S. at 213.

<sup>87/</sup> *Id.* at 214 (quoting *Dixon v. United States*, 381 U.S. 68, 74 (1965) (quoting *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936))).

<sup>88/</sup> *Morrison*, 130 S. Ct. at 2881 (2010) (regulation promulgated under a statute “does not extend beyond conduct encompassed by [the statute’s] prohibition”) (quoting *United States v. O’Hagan*, 521 U.S. 642, 651 (1997)); *Hochfelder*, 425 U.S. at 214.

<sup>89/</sup> *See, e.g.*, 75 Fed. Reg. 35351-52, Proposed Rule §201.210(1)-(7) (prohibiting certain vaguely defined practices without any requirement that there be competitive injury); *Id.* at 35352, Proposed Rule 201.211 (prohibiting additional practices that do not result in competitive injury).

<sup>90/</sup> 75 Fed. Reg. 35351, Proposed Rule 201.2(u).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[99/](#) *See supra* at Section III.A.

[100/](#) *Chevron*, 467 at 841-43.

[101/](#) *See supra* at Section III.A.

[102/](#) *Chevron*, 467 U.S. at 841-43.

[103/](#) 545 U.S. 967 (2006).

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

[105/](#) *Id.* at 982-83.

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

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

#### IV. THE PROPOSED RULE IS UNCONSTITUTIONALLY VAGUE.

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

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[106/](#) *London*, 410 F.3d at 1304 (“Because *Congress plainly intended to prohibit ‘only those unfair, discriminatory or deceptive practices adversely affecting competition,’* a contrary interpretation of Section 202(a) deserves no deference.”) (quoting *Philson v. Cold Creek Farms*, 947 F. Supp. 197, 200 (E.D.N.C. 1996)) (emphasis added); *Terry*, 604 F.3d at 279 (“we deem the construction of this nearly 90-year old statute *to be a matter of settled law*”) (emphasis added); *Wheeler*, 591 F.3d at 362 (deference “unwarranted where Congress has delegated no authority to *change the meaning the courts have given to the statutory terms*”) (emphasis added); *id.* at 366 (Jones, J., concurring) (“It would be a mistake to assume that the plain meaning rule requires interpretation of the PSA in a linguistic vacuum, ignoring how its terms were used by Congress or understood at the time of the Act’s passage.”); *id.* at 367 (Jones, J., concurring) (“‘Unfair’ was not an inkblot in 1921. Congress could not have expected, then, that its use of the term would occasion a free-ranging inquiry into the equities of business practices; rather, Congress intended, *and made plain by its choice of language*, that injury to competition would be an element of the inquiry.”) (emphasis added).

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

[108/](#) *Brand X*, 545 U.S. at 984.

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

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

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

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

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[110/](#) *Skilling v. United States*, 130 S. Ct. 2896, 2927-28 (2010).

[111/](#) *Gentile v. State Bar*, 501 U.S. 1030, 1048-50 (1991) (invalidating state bar disciplinary rule under the void-for-vagueness doctrine).

[112/](#) 274 U.S. 445, 453-65 (1927).

[113/](#) 255 U.S. 81 (1921).

[114/](#) 234 U.S. 216 (1914).

[115/](#) *Id.* at 223.

[116/](#) The proposed rule cannot be salvaged by a limiting construction. Even the agency will not be able to provide any reasonable guidance about what the vague provisions of the rule mean unless it pre-determines “market values” and “reasonable expected full economic values” and thereafter imposes its guesses on those on entities subject to the proposed rule. The absurdity of

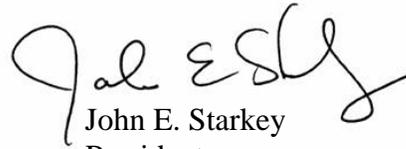
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In conclusion, for the reasons stated herein, GIPSA should not adopt the proposed rule. We request that GIPSA either withdraw the proposed rule altogether or withdraw all aspects of the proposed rule not mandated by the 2008 Farm Bill and reissue a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

Respectfully submitted,



George Watts  
President  
National Chicken Council



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

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