

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

ORGANIZATION FOR
COMPETITIVE MARKETS;
JAMES DINKLAGE; and
JONATHAN and CONNIE
BUTTRAM,

Petitioners,

v.

U.S. DEPARTMENT OF
AGRICULTURE; SONNY
PERDUE, in his official capacity as
SECRETARY OF AGRICULTURE;
and the UNITED STATES OF
AMERICA,

Respondents.

Case No. 17-_____

PETITION FOR REVIEW

Pursuant to Sections 202(a)-(b) of the Packers and Stockyards Act (“PSA”), 7 U.S.C. § 192(a)-(b); 28 U.S.C. §§ 2342-2344; 5 U.S.C. § 706; and Rule 15(a) of the Federal Rules of Appellate Procedure, Petitioners Organization for Competitive Markets (“OCM”) and Mr. Jim Dinklage, Mr. Jonathan Buttram, and Ms. Connie Buttram (OCM members) hereby seek judicial review of two orders of the United States Department of Agriculture (“USDA”), published at 82 Fed. Reg. 48,594 (Oct. 18, 2017) and 82 Fed. Reg. 48,603 (Oct. 18, 2017). Copies of these orders

are attached as Attachment A. In the challenged orders (“the Withdrawals”), USDA withdrew both an interim final rule, *see* 81 Fed. Reg. 92,566 (Dec. 20, 2016), and a Notice of Proposed Rulemaking, *see* 81 Fed. Reg. 92,703 (Dec. 20, 2016), collectively known as the Farmer Fair Practices Rules. This Court has jurisdiction under 28 U.S.C. § 2342, and venue lies in this Court under 28 U.S.C. § 2343 because OCM has its principal office in Lincoln, Nebraska, and because Mr. Dinklage resides in Orchard, Nebraska.

Sections 202(a) and 202(b) of the PSA make it unlawful for “any packer or swine contractor” to “[e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device,” 7 U.S.C. § 192(a), or “[m]ake or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect,” *id.* § 192(b). Pursuant to these provisions, USDA published, in December 2016, the Farmer Fair Practices Rules—designed to provide robust protections for independent farmers by ensuring that large agribusinesses are held accountable for a wide variety of unfair business practices, including bad faith breaches of contract, retaliatory actions, opaque pricing schemes, and forced arbitration agreements. USDA determined that these rules were essential for independent farmers to continue operating in a market dominated by a small number of powerful buyers.

The Farmer Fair Practices Rules consisted of an interim final rule and proposed regulations. In the interim final rule (the “IFR”), USDA made clear that a farmer could establish that a packer or swine contractor had violated Section 202(a) or Section 202(b) of the PSA without proving that the packer’s or swine contractor’s actions caused, or would be likely to cause, competitive harm to the market, as opposed to individualized harm to the victim of the unfair practice. 81 Fed. Reg. at 92,567-68. In this way, the IFR codified USDA’s longstanding interpretation of the PSA and was promulgated to supplant contrary judicial interpretations that had been adopted by courts in four circuits.¹ *Id.* at 92,568 & n.13. In the proposed regulations, USDA sought to (1) clarify the types of conduct that USDA considers to be unfair, unjustly discriminatory, or deceptive, and thus a violation of Section 202(a) of the PSA; and (2) identify criteria that USDA would consider in determining whether a packer or swine contractor had engaged in activity that constituted an undue or unreasonable preference or advantage in violation of Section 202(b) of the PSA. 81 Fed. Reg. at 92,703. Adoption of these rules was necessary, in part, to satisfy a statutory mandate in the 2008 Farm Bill that USDA “promulgate regulations with respect to the Packers and Stockyards

¹ *Terry v. Tyson Farms, Inc.*, 604 F.3d 272 (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 (10th Cir. 2007); *London v. Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir. 2005).

Act . . . to establish criteria that the Secretary will consider in determining” whether, *inter alia*, “an undue or unreasonable preference or advantage has occurred in violation of such Act.” Pub. L. No. 110-246, § 11006, 122 Stat. 1651, 2120 (2008) (codified at 7 U.S.C. § 228 note).

USDA has now reversed course. Under the direction of Secretary Perdue, USDA has withdrawn the Farmer Fair Practices Rules, and, in so doing, re-stacked the deck for multinational meat packing corporations at the expense of independent farmers. According to Secretary Perdue, predatory business practices are “moral actions” that “regulation and litigation” do not “actually solve.”² USDA’s only stated grounds to support its decision fall well short of the reasoned consideration required by the APA.

USDA first insists that the Farmer Fair Practices Rules must be withdrawn because they conflict with the decisions of courts in four circuits. USDA’s reasoning, however, gets it backward. The existence of contrary circuit precedent weighs in favor of, not against, regulation because a codified agency interpretation would be afforded *Chevron* deference that otherwise is unavailable if USDA remains silent. That is all the more so here where USDA’s mandate under GIPSA

² Cindy Zimmerman, *GIPSA Rules Withdrawn by Administration*, AgWired (Oct. 17, 2017), <http://agwired.com/2017/10/17/gipsa-rules-withdrawn-by-administration/>.

is to protect independent farmers from predatory trade practices, and the court decisions in question predate USDA's rule making and did not have the benefit of the agency's expertise that is the foundation for *Chevron* deference.³ USDA next suggests that the public did not have sufficient opportunity to comment on the Farmer Fair Practices Rules. But this is belied by the record: the Farmer Fair Practices Rules were published after the USDA had held three public meetings and received over 61,000 comments. *See* 81 Fed. Reg. at 92,566-68. Moreover, the Farmer Fair Practices Rules themselves opened a comment period during which USDA received almost 2,000 additional comments. *See* 82 Fed. Reg. at 48,595-96. Finally, in withdrawing the Farmer Fair Practices Rules, USDA entirely failed to account for the fact that parts of those rules were statutorily mandated by the 2008 Farm Bill. *See* 7 U.S.C. § 228 note.

In these respects and others, the Withdrawals are arbitrary, capricious, and contrary to the PSA in violation of 5 U.S.C. § 706(2)(A), and by withdrawing the Farmer Fair Practices Rules without replacing them, USDA has unlawfully withheld agency action under the 2008 Farm Bill in violation of 5 U.S.C. § 706(1).

³ Indeed, the Tenth Circuit acknowledged as much when addressing the precise issue later codified by the Farmer Fair Practices Rules: “[r]egulations promulgated by an agency exercising its congressionally granted rule-making authority are clearly entitled to *Chevron* deference. . . . Here, however, the Secretary has not promulgated a regulation applicable to the practices the [Plaintiffs] allege violate § 202(a).” *Been*, 495 F.3d at 1226-27.

Accordingly, Petitioners respectfully request that this Court vacate the unlawful withdrawal orders and reinstate the Farmer Fair Practices Rules, or provide such other relief as this Court deems appropriate.

Dated: December 14, 2017

Respectfully submitted,

/s/ Karianne M. Jones

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I certify that on December 14, 2017, the foregoing petition was filed using the Court's CM/ECF system. I further certify that I will serve one paper copy of the foregoing petition on each party via U.S. Postal Service Certified Mail at the addresses listed below:

Sonny Perdue, Secretary of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20250

U.S. Department of Agriculture
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United States
c/o Jefferson B. Sessions III
U.S. Office of the Attorney General
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

/s/ Karianne M. Jones

ATTACHMENT A

DEPARTMENT OF AGRICULTURE**Grain Inspection, Packers and Stockyards Administration****9 CFR Part 201**

RIN 0580-AB28

Scope of Sections 202(a) and (b) of the Packers and Stockyards Act**AGENCY:** Grain Inspection, Packers and Stockyards Administration, USDA**ACTION:** Final rule; withdrawal.

SUMMARY: The United States Department of Agriculture's (USDA) Grain Inspection, Packers and Stockyards Administration (GIPSA), Packers and Stockyards Program is withdrawing the interim final rule (IFR) published in the **Federal Register** on December 20, 2016. Had the IFR become effective, it would have added a paragraph to the regulations issued under the Packers and Stockyards Act (P&S Act) addressing the scope of sections 202(a) and (b) of the P&S Act, which enumerate unlawful practices under the Act. Specifically, the IFR would have added a paragraph to the regulations further explaining the scope of sections 202(a) and (b) of the P&S Act such that certain conduct or actions, depending on their nature and the circumstances, could be found to violate the P&S Act without a finding of harm or likely harm to competition.

GIPSA accepted and analyzed comments on the IFR received on or before March 24, 2017. In addition, in the April 12, 2017 **Federal Register**, GIPSA solicited and analyzed comments received on or before June 12, 2017, on four alternative actions regarding the disposition of the IFR. After careful review and consideration of all comments received, GIPSA is withdrawing the IFR.

DATES: The interim final rule published on December 20, 2016 (81 FR 92566), is withdrawn as of October 18, 2017.

FOR FURTHER INFORMATION CONTACT: S. Brett Offutt, Director, Litigation and Economic Analysis Division, Packers and Stockyards Program, GIPSA, 1400 Independence Ave. SW., Washington, DC 20250-3601, (202) 720-7051, s.brett.offutt@usda.gov.

SUPPLEMENTARY INFORMATION: GIPSA is issuing this final rule to withdraw the interim final rule that would have revised the current regulations implementing the P&S Act to state that a finding of harm or likely harm to competition was not needed to find a violation of section 202(a) or (b) of that Act (7 U.S.C. 181-229c). See 7 U.S.C.

192(a) and (b). Below is the basis for this decision. The first section provides background on the interim final rule and on the proposed rule disposing of the interim final rule. The second and third sections discuss the public comments GIPSA received on the interim final rule and the proposed rule, respectively. The fourth section discusses GIPSA's action, the justification for that action, and responds to the comments received. The last section provides the required impact analyses, including the Regulatory Flexibility Act, the Paperwork Reduction Act, and the relevant Executive Orders.

I. Background

The P&S Act at 7 U.S.C. 192(a) states that it is unlawful for any packer, swine contractor, or live poultry dealer to "[e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device." Further, section 192(b) provides that it is unlawful for those same types of business entities to "[m]ake or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect." In the June 22, 2010 **Federal Register** (75 FR 35338-35354), GIPSA published a notice of proposed rulemaking (NPRM) that would make several revisions to the regulations implementing the P&S Act, including one revision that would add a paragraph (c) to 9 CFR 201.3 to codify the agency's longstanding interpretation that, in some cases, a violation of 7 U.S.C. 192(a) or (b) can be established without proof of likelihood of competitive injury. 75 FR at 35340; see also *id.* at 35351 (proposed rule text for § 201.3(c)). GIPSA originally set the comment period for the NPRM to close on August 23, 2010, and later extended it until November 22, 2010 (75 FR 44163).

The appropriations acts for fiscal years 2012 through 2015 precluded USDA from finalizing the NPRM, including the proposed § 201.3(c). The appropriations acts for fiscal years 2016 and 2017, however, did not include this preclusion. Accordingly, on December 20, 2016, GIPSA published in the **Federal Register** (81 FR 92566-92594) an interim final rule (IFR) adopting essentially the same language in proposed § 201.3(c) as § 201.3(a). GIPSA invited interested persons to submit comments on the IFR on or before its effective date of February 21, 2017.

On February 7, 2017, GIPSA published in the **Federal Register** (82 FR 9489) a notice delaying the effective

date of the IFR to April 22, 2017. The notice also extended the deadline for submitting comments to March 24, 2017. The delay and extension were consistent with the memorandum of January 20, 2017, to the heads of executive departments and agencies from the Assistant to the President and Chief of Staff entitled "*Regulatory Freeze Pending Review*."

On April 12, 2017, GIPSA published a notice in the **Federal Register** (82 FR 17531) delaying the effective date for the IFR for an additional 180 days, from March 24, 2017, to October 19, 2017. This extension allowed additional time for USDA to consider adequately all comments received and to make an informed policy decision.

Concurrent with this notice, GIPSA published in the **Federal Register** (82 FR 17594) a proposed rule presenting four alternatives for disposing of the IFR: (1) Allow the interim final rule to become effective, (2) suspend the interim final rule indefinitely, (3) delay the effective date of the interim final rule further, or (4) withdraw the interim final rule. The proposed rule gave interested persons until June 12, 2017, to comment on the four alternatives.

GIPSA has analyzed the comments received on the interim final rule published on December 20, 2016. It has also evaluated the comments received in response to the proposed rule published on April 12, 2017, regarding disposition of that rule. Now, GIPSA is withdrawing the interim final rule.

II. Interim Final Rule—Discussion of Comments

GIPSA solicited comments concerning the IFR for a period of 90 days ending on March 24, 2017. GIPSA received 344 timely comments. Commenters were from all sectors of the livestock and poultry industries, including livestock producer groups; poultry grower interest groups; packers; poultry company associations; farmers and farmers' organizations; consumer organizations and consumers; and an animal rights group.

A common theme of those opposed to the IFR was that it would lead to increased litigation. Commenters said that without the requirement to show harm to competition, the IFR would embolden producers and growers to sue for any perceived slight by a packer or integrator. Fear of litigation would cause packers and integrators to vertically integrate further, increase their volume of captive supplies, and rely even more on those suppliers and growers they currently use. Therefore, these commenters suggested the IFR would

result in new suppliers being shut out of markets.

A major poultry trade association said that the IFR failed to describe what conduct or actions would constitute a violation of the P&S Act with sufficient clarity for people to understand prohibited or permitted conduct or actions and that this ambiguity would lead to arbitrary and discriminatory enforcement. It said that the IFR is not entitled to deference because, among other things, the plain language of 7 U.S.C. 192(a) and (b) requires a showing of competitive injury. Finally, it noted that, although the Department of Justice (DOJ) filed amicus briefs with several appellate courts arguing against the need to show competitive harm, DOJ's legal arguments failed to sway those courts' decisions.

A livestock packing industry association pointed out that the Administrative Procedure Act (APA) (5 U.S.C. 551–559) requires the public to have an opportunity to comment timely on proposed rules. Because the substance of the IFR was part of the June 2010 NPRM, this commenter believed the rulemaking record was “stale” and said that GIPSA should have re-opened the comment period to refresh the rulemaking record or have terminated the rulemaking proceeding. Further, having failed to do so, GIPSA should not be entitled to deference.

Two trade associations representing the pork and beef industries also opposed the IFR. These commenters said that GIPSA failed to identify specific systemic problems needed to justify it. Although GIPSA provided examples of conduct or actions that could be challenged under the IFR, they said that GIPSA provided no evidence that the referenced conduct or actions occur in the pork or beef industries, and, therefore, it was not clear if these problems occur in those industries. If problems existed, they felt that GIPSA should have tailored the rule to address those problems instead of issuing one that was over-inclusive and impacted the entire meat industry.

These commenters also said that GIPSA failed to address adequately the judicial decisions interpreting 7 U.S.C. 192 that ran counter to the IFR. They said that court decisions held that the words used in 7 U.S.C. 192, such as “unfair” and “unjust,” came from other antitrust statutes and reasoned their anti-competitive meaning transferred over to the P&S Act. They said that GIPSA also failed to argue against the conclusion drawn by multiple courts that the legislative history of the P&S Act shows that Congress intended § 192 to require competitive injury. Finally,

they noted that GIPSA failed to show that its interpretation was in fact a longstanding one. They argued that this failure undermined the argument that the courts should defer to GIPSA's interpretation.

Commenters opposed to the IFR also said that it would discourage incentives, premiums, and payment plans offering price differentials to producers or growers for supplying higher quality product or greater production efficiency. They claimed that the ambiguity of the terms used in the IFR would encourage limiting or abandoning alternative marketing arrangements that provide compensation that is both certain and necessary for producers to use in making financial investments.

Self-identified contract growers for a major poultry company provided similar comments, saying that the IFR was not in the best interests of contract poultry growers, poultry companies, or consumers. They said that the pay system used in the poultry industry encouraged innovation and investment in the best practices and equipment. They predicted that the IFR might lead to changes to the pay system by removing incentives for innovation and investment, resulting in the U.S. poultry industry becoming less competitive in global markets and threatening jobs here in the U.S.

A large poultry processing and livestock slaughtering corporation, along with many of its individual employees submitting form letters, said that GIPSA failed to prove the IFR was economically justified. The corporation argued that protection of competition must be the “underpinning” of a regulation issued under the P&S Act and that GIPSA's competition-related justifications for the IFR were insufficient because the agency: (1) Failed to sufficiently cite economic studies to demonstrate that there is an imbalance of market power between livestock producers and poultry growers and (2) failed to show that regulated entities have an incentive to treat livestock producers and poultry growers in a manner that results in a lower supply of growers willing to contract. Moreover, this corporation claimed that the cost to the industry of the IFR would be \$1 billion over the next decade, without specific quantifiable benefit.

Supporters of the IFR included individual livestock producers, poultry growers, and farmers' organizations. They pointed to the hundreds of thousands or millions of dollars farmers invest to grow or produce for a company. Many expressed their belief that farmers need the IFR's protection to avoid losing their operations and their

investments because of unfair, deceptive, and/or retaliatory practices. Support for the IFR was also rooted in the belief that requiring harm to competition was an impossibly high standard for individual farmers to meet.

These commenters said increased concentration and imbalances of power in the marketplace facilitate abuse. They argued that small family farmers should not have to compete with one another because of the strong hold corporate and commercial farms and packers have on the agricultural sector. One commenter emphasized that it was unfair, unjustly discriminatory, or unduly preferential to require poultry growers to participate in a compensation system in which growers do not have full control over their production inputs. They said production inputs can be manipulated to the detriment of disfavored growers; and because there are limited contracting options, growers may not have the means to challenge abuses. Thus, family farmers face unfair practices because corporate concentration leads to power imbalances and this growing corporate concentration leaves consumers with fewer choices in the grocery stores.

Supporters of the IFR also said it provided common-sense protections for farmers. They argued that the purpose of the P&S Act was to protect farmers from unfair treatment by companies and not just from anticompetitive practices. They said that the IFR simply ensured that farmers could challenge unfair treatment without having to bring a federal antitrust case. One commenter stated that as long as competitive injury is the law there is no deterrent preventing companies from treating an individual farmer as it wishes.

III. Disposition of the Interim Final Rule—Discussion of Comments

In the April 12, 2017 proposed rule, GIPSA stated that there were significant policy and legal issues addressed within the IFR that warranted further review by USDA. For these reasons, the proposed rule requested public comments on four alternative actions that USDA could take with regard to the disposition of the IFR. The four alternatives listed in the proposed rule were as follows: (1) Allow the IFR to become effective; (2) suspend the IFR indefinitely; (3) further delay the effective date of the IFR; or (4) withdraw the IFR. The proposed rule gave interested persons until June 12, 2017, to comment on the four alternative actions.

USDA received 1,951 timely comments. Of those comments, 1,466 preferred alternative 4 (*i.e.*, to withdraw the IFR). Another 469 preferred

alternative 1 (*i.e.*, to allow the IFR to become effective as planned). One commenter preferred alternative 2 (*i.e.*, to suspend the IFR indefinitely). This commenter, however, also said that GIPSA should “allow the rule to die,” possibly indicating a real preference for alternative 4, withdrawal, as opposed to an indefinite suspension. No one voiced a preference for alternative 3 (*i.e.*, to further delay the IFR’s effective date). Fifteen individuals provided comments on the proposed rule but did not state a preference.

Many commenters who provided comments on the IFR also provided comments on this proposed rule, making largely the same arguments. Supporters of withdrawal were again concerned about increased litigation and vertical integration, reduction or elimination of alternative marketing agreements, and decreased market access for producers and growers. Those favoring the IFR reiterated their concern that increased concentration led to unfair practices and undue preferences against farmers. They believed that the IFR provided farmers the tools to address unfair practices and undue preferences.

IV. Justification for Withdrawal of the Interim Final Rule and Response to Comments

After reviewing the IFR and carefully considering the public comments, GIPSA is withdrawing the IFR because of serious legal and policy concerns related to its promulgation and implementation. First, the interpretation of 7 U.S.C. 192(a)–(b) embodied in the IFR is inconsistent with court decisions in several U.S. Courts of Appeals, and those circuits are unlikely to give GIPSA’s proposed interpretation deference. Additionally, the IFR’s justification for dispensing with notice and comment for “good cause” was inadequate to satisfy the APA’s requirements.

A. Courts Are Unlikely To Give Deference to the Interim Final Rule

The purpose of the IFR was to clarify that conduct or actions may violate 7 U.S.C. 192(a) and (b) without adversely affecting, or having a likelihood of adversely affecting, competition. This reiterated USDA’s longstanding interpretation that not all violations of the P&S Act require a showing of harm or likely harm to competition.

Contrary to comments that GIPSA failed to show that USDA’s interpretation was longstanding, USDA has adhered to this interpretation of the

P&S Act for decades.¹ DOJ has filed amicus briefs with several federal appellate courts arguing against the need to show the likelihood of competitive harm for all violations of 7 U.S.C. 192(a) and (b).²

However, as commenters have noted and GIPSA acknowledges, several federal appellate courts have declined to defer to USDA’s interpretation (see discussion of cases below). There is good reason to believe that several of those courts would continue to do so even if USDA’s interpretation were codified in a final rule.

When determining whether an agency’s interpretation of a statute that it administers is entitled to deference, the Supreme Court explained in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,³ that courts look at whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.⁴

The courts have granted *Chevron* deference “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that

¹ *E.g.*, *In re Ozark County Cattle Co.*, 49 Agric. Dec. 336, 365 (1990); *In re Rodman*, 47 Agric. Dec. 885, 912–13 (1988); *In re Itt Cont’l Baking Co.*, 44 Agric. Dec. 748, 781 (1985) (citing Packers and Stockyards cases from 1957 through 1983); *c.f.* *Sioux City Stock Yards Co. v. United States*, 49 F. Supp. 801, 806 (N.D. Iowa 1943) (“[T]he statute, neither expressly nor impliedly, makes any [finding that a market injury was being threatened] a jurisdictional prerequisite to the Secretary’s power to act.”); *In re Macy Live Poultry Co.*, 1 Agric. Dec. 479 (1942) (finding proof of weight fraud alone sufficient to sanction a live poultry dealer).

² *E.g.*, Brief for Amicus Curiae the United States of America in Support of Plaintiff-Appellant, *Terry v. Tyson Farms, Inc.*, 604 F.3d 272 (6th Cir. 2010) (No. 08–5577), 2008 WL 5665508 at 11–26; En Banc Brief for Amicus Curiae the United States of America in Support of Plaintiffs-Appellees, *Wheeler v. Pilgrim’s Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (No. 07–40651), 2009 WL 7349991 at 9–29.

³ 467 U.S. 837 (1984).

⁴ *Id.* at 842–43 (endnotes omitted).

authority.”⁵ Moreover, even if a court has spoken as to the interpretation of a statute, “[a] court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”⁶

In the IFR, GIPSA acknowledged that multiple federal circuit courts had held that harm to competition is required to prove violations of 7 U.S.C. 192(a) and (b). For example, in the Eleventh Circuit case of *London v. Fieldale Farms Corp.*,⁷ the plaintiffs alleged that defendant impermissibly terminated plaintiffs’ contract.⁸ The court held that plaintiffs’ failure to allege harm to competition was fatal to their 7 U.S.C. 192(a) claim.⁹ The court stated that “in order to prevail under the [P&S Act], a plaintiff must show that the defendant’s deceptive or unfair practice adversely affects competition or is likely to adversely affect competition.”¹⁰

In the Tenth Circuit case of *Been v. O.K. Industries, Inc.*,¹¹ the plaintiffs, who were growers, alleged that a variety of defendants’ actions with respect to the growers’ contracts were unfair.¹² The court concluded that plaintiffs must show that defendants’ conduct harmed or was likely to harm competition under 7 U.S.C. 192(a) stating:

We are concerned here only with whether unfairness requires a showing of a likely injury to competition, not whether deceptive practices require such a showing. We therefore join the [sic] those circuits requiring a plaintiff who challenges a practice under § [192(a)] to show that the practice injures or is likely to injure competition.¹³

In the Fifth Circuit case of *Wheeler v. Pilgrim’s Pride Corp.*,¹⁴ the plaintiffs alleged that one grower wrongfully received superior contract terms and that the disparity was unfair and deceptive under 7 U.S.C. 192(a) and (b).¹⁵ The *en banc* court rejected this argument, finding “[t]o support a claim

⁵ *Mayo Found. for Medical Educ. and Res. v. United States*, 562 U.S. 44, 45 (2011) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001)).

⁶ *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967, 982 (2005) (emphasis added).

⁷ 410 F.3d 1295 (11th Cir. 2005).

⁸ *Id.*

⁹ *Id.* at 304.

¹⁰ *Id.*

¹¹ 495 F.3d 1217 (10th Cir. 2007).

¹² *Id.* at 1223.

¹³ *Id.* at 1230.

¹⁴ 591 F.3d 355 (5th Cir. 2009).

¹⁵ *Id.* at 357.

that a practice violates subsection (a) or (b) of § 192 there must be proof of injury, or likelihood of injury, to competition.”¹⁶

In the Sixth Circuit case of *Terry v. Tyson Farms, Inc.*,¹⁷ the plaintiff alleged, among other things, that the defendant poultry company cancelled his contract because plaintiff asserted his regulatory right to observe the weighing of his birds.¹⁸ He claimed this violated 7 U.S.C. 192(a) and (b).¹⁹ The court disagreed and held that “in order to succeed on a claim under § 192(a) and (b) of the [P&S Act], a plaintiff must show an adverse effect on competition.”²⁰ The *Terry* court cited cases from sister circuits, and claimed that seven of the circuits agreed with its legal conclusion.²¹ The *Terry* court also claimed that this “tide” of opinions from other circuits has “now become a tidal wave.”²²

Many commenters argued that the plain language of the P&S Act requires competitive injury and that GIPSA therefore is not entitled to deference for a conflicting regulation. GIPSA recognizes that at least two federal circuits are unlikely to defer to USDA’s interpretation. In the Fifth Circuit, the *Wheeler* court said that “deference . . . is unwarranted where Congress has delegated no authority to change the meaning the courts have given to the statutory terms”²³ The court held USDA was not entitled to deference “because the PSA is unambiguous.”²⁴ Likewise, the Eleventh Circuit refused to defer to USDA stating, “[t]his court gives *Chevron* deference to agency interpretations of regulations promulgated pursuant to congressional authority. The [P&S Act] does not delegate authority to the Secretary to adjudicate alleged violations of [7 U.S.C. 192] by live poultry dealers. Congress left that task exclusively to the federal courts.”²⁵ It went on to say that “[b]ecause Congress plainly intended to prohibit only those unfair, discriminatory or deceptive practices adversely affecting competition a contrary interpretation of [7 U.S.C. 192(a)] deserves no deference.”²⁶

Commenters supporting the IFR cited the current court precedent as justification for its promulgation. They said showing harm to competition was a difficult standard to meet; and as long as it remains a requirement, growers and producers would continue to be subjected to unfair business practices, and their businesses would be at risk. GIPSA agreed with this view when it promulgated the IFR; however, current precedent poses a significant legal issue. As discussed above, the courts only grant *Chevron* deference to an agency’s interpretation of a statute under its purview when the statute is ambiguous and the agency’s interpretation is reasonable.²⁷

If the IFR becomes effective, it will conflict with Fifth, Sixth, Tenth, and Eleventh Circuit precedent. This conflict creates serious concerns. GIPSA is cognizant of the commenters who support this IFR becoming effective and of their concerns regarding a perceived imbalance of bargaining power. Also, GIPSA recognizes that the livestock and poultry industries have a vested interest in knowing what conduct or actions violate 7 U.S.C. 192(a) and (b). However, a regulation conflicting with relevant Circuit precedent will inevitably lead to more litigation in the livestock and poultry industries. Protracted litigation to both interpret this regulation and defend it serves neither the interests of the livestock and poultry industries nor GIPSA.

To be sure, some commenters overstated the hostility in the case law to USDA’s longstanding position. Contrary to some commenters’ claims, GIPSA disagrees that the remaining U.S. Circuit Courts of Appeals that have had occasion to address the issue (Fourth, Seventh, Eighth, and Ninth Circuits) have gone as far as *London, Been, Wheeler, and Terry*, to declare that harm or likelihood of harm to competition is required in *all* cases brought under 7 U.S.C. 192(a) and (b).

Some courts affirmed the position of the USDA that certain practices are unfair *because* they are likely to harm competition. In the Eighth Circuit case of *IBP v. Glickman*,²⁸ the USDA brought an action against a packer respondent for alleged unlawful use of the packer’s right of first refusal.²⁹ Among other things, the USDA’s Judicial Officer ruled that there was potential harm to competition based on the allegation that the respondent was not participating in

the bidding for cattle.³⁰ While the *IBP* court did not agree with the Judicial Officer’s factual findings, the court agreed that the legal standard the Judicial Officer applied was the correct one: “[w]e have said that ‘a practice which is likely to reduce competition and prices paid to farmers for cattle *can be found an unfair practice under the Act, and be a predicate for a cease and desist order.*’ ”³¹

Likewise, in the Ninth Circuit case of *De Jong Packing Co. v. USDA*,³² the appellate court agreed that collusion to force conditional bidding on livestock auctions was anti-competitive in nature holding:

The government contends that the purpose of the Act is to halt unfair trade practices in their incipiency, before harm has been suffered; that unfair practices under [7 U.S.C. 192] are not confined to those where competitive injury has already resulted, but includes those where there is a reasonable likelihood that the purpose will be achieved and that the result will be an undue restraint of competition. We agree.³³

Other courts have only required a showing of harm or likelihood of harm to competition for the conduct or action at issue without generalizing their holdings to all violations of 7 U.S.C. 192(a) and (b). In the Fourth Circuit case of *Philson v. Goldsboro Mill Co.*,³⁴ the plaintiff turkey growers claimed their contract was terminated in retaliation for “vocalization of their grievances” and that defendant’s conduct was, among other things, an unfair or deceptive practice in violation of the P&S Act.³⁵ The court held that, while “it is unnecessary to prove *actual* injury to establish an unfair or deceptive practice [under 7 U.S.C. 192(a) and (b)], a plaintiff must nonetheless establish that the challenged act is *likely* to produce the type of injury that the Act was designed to prevent.”³⁶ Thus, the court held that the district court did not err in instructing the jury that plaintiff must prove that “the defendants’ conduct was likely to affect competition adversely in order to prevail on their claims under the Packers and Stockyard Act.”³⁷

In the Seventh Circuit case of *Pacific Trading Co. v. Wilson & Co.*,³⁸ the plaintiffs claimed that the defendant packers had knowingly delivered “off

¹⁶ *Id.* at 363.

¹⁷ 604 F.3d 272 (6th Cir. 2010).

¹⁸ *Id.* at 274.

¹⁹ *Id.* at 277.

²⁰ *Id.* at 279.

²¹ *Id.* at 277–79 (citing cases from the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits and electing to join those circuits).

²² *Id.* at 277.

²³ *Wheeler v. Pilgrim’s Pride Corp.*, 591 F.3d 355, 362 (5th Cir. 2009).

²⁴ *Id.* at 373 n.3.

²⁵ *Id.* at 1304 (internal citations omitted).

²⁶ *Id.* (internal quotations and citations omitted).

²⁷ *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

²⁸ 187 F.3d 974 (8th Cir. 1999).

²⁹ *Id.* at 975–76.

³⁰ *Id.* at 976.

³¹ *Id.* at 977 (quoting *Farrow v. USDA*, 760 F.2d 211, 214 (8th Cir. 1985)) (emphasis added in *IBP*).

³² 618 F.2d 1329 (9th Cir. 1980).

³³ *Id.* at 1336–37.

³⁴ 164 F.3d 625, Nos. 96–2542, 96–2631, 1998 WL 709324 (4th Cir. Oct. 5, 1998).

³⁵ *Id.* at *2.

³⁶ *Id.* at *4 (emphasis in original).

³⁷ *Id.*

³⁸ 547 F.2d 367 (7th Cir. 1976).

condition” hams in violation of 7 U.S.C. 192(a).³⁹ The court concluded that “the plaintiffs have failed to state a claim upon which relief can be granted under the Packers and Stockyards Act. For the purpose of that statute is to halt unfair business practices which adversely affect competition, not shown here”⁴⁰

One of the cases from the Eighth Circuit commonly cited by commenters as requiring a showing of harm to competition for all violations of 7 U.S.C. 192(a) and (b), does not convincingly support the commenters’ position. In *Jackson v. Swift Eckrich, Inc.*,⁴¹ the plaintiffs claimed that 7 U.S.C. 192 entitled them the opportunity to obtain the same type of contract that defendant offered other independent growers.⁴² The court disagreed stating that “[w]e are convinced that the purpose behind § 202 of the [P&S Act], 7 U.S.C. 192, was not to so upset the traditional principles of freedom of contract. The [P&S Act] was designed to promote efficiency, not frustrate it.”⁴³ But, the court also appeared to acknowledge that other alleged violations of the P&S Act did not require a showing of harm to competition. Specifically, the court explained that:

With regard to the claims of ‘other’ [P&S Act] violations, the breach of contract claim, and the fraud claim, the district court found that a jury question existed. We agree. The Jacksons presented evidence that Swift Eckrich had violated a number of PSA regulations, that it did not use the condemned carcass calculation formula provided in the floor contracts, and that it recorded bird weights without actually performing any measurements.⁴⁴

On the other hand, other Eighth Circuit cases have required a showing of a likelihood of competitive injury when a plaintiff alleges that a practice is unfair *because* of its relationship to prices, bidding, or competition.⁴⁵

Nevertheless, because at least two courts of appeals have held that the text of the P&S Act unambiguously forecloses USDA’s longstanding interpretation, allowing the IFR to go

into effect would create an unworkable legal patchwork. Based on the comments received and the above legal analysis, GIPSA is withdrawing the IFR.

B. The Interim Final Rule Was Insufficiently Supported by a “Good Cause” Exception to the Administrative Procedure Act’s Notice and Comment Procedure

GIPSA is also withdrawing the IFR because we believe it did not satisfy the APA’s notice and comment requirements at 5 U.S.C. 553(b) and (c). GIPSA justified promulgating the IFR without notice and pre-promulgation opportunity for comment because we reasoned that its solicitation of comments over a five month period on the June 2010 NPRM satisfied those requirements. 81 FR at 92570. GIPSA reached this conclusion because proposed 9 CFR 201.3(c) in the June 2010 NPRM was largely the same as 9 CFR 201.3(a) in the IFR. Upon further examination, we recognize that this justification is not sufficient to meet the APA’s bar for establishing “good cause” sufficient to dispense with normal notice and comment procedures.

To promulgate a rule as an interim final rule and forego the normal notice and comment procedure, an agency must invoke a “good cause” exception under the APA and explain its rationale within the rule itself.⁴⁶ To establish “good cause,” the agency must demonstrate that the normal procedure would be “impracticable, unnecessary, or contrary to the public interest.”⁴⁷ “[T]he inquiry into whether good cause has been properly invoked must proceed on a case-by-case basis, with a sensitivity to the totality of the factors at play.”⁴⁸ When agencies invoke “good cause,” “the good cause exception is to be ‘narrowly construed and only reluctantly countenanced.’”⁴⁹

Within the good cause inquiry, courts have identified situations that are “impracticable, unnecessary, or contrary to the public interest,” based on a consideration of multiple factors. Those factors include:

the scale and complexity of the regulatory program the agency was required to implement; any deadlines for rulemaking imposed by the enabling statute; the diligence with which the agency approached the rulemaking process; obstacles outside the agency’s control that impeded efficient

completion of the rulemaking process; and the harm that could befall members of the public as a result of delays in promulgating the rule in question.⁵⁰

A situation is “impracticable” if “the agency cannot both follow section 553 and execute its statutory duties.”⁵¹ “Unnecessary” refers to situations where the rule at issue is “technical or minor”⁵² or where it “is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public.”⁵³ Finally, “contrary to the public interest” arises when there is “real harm to the public, not mere inconvenience to the Agency,”⁵⁴ and it “connotes a situation in which the interest of the public would be defeated by any requirement of advance notice,” such as a situation when announcing a rule would enable the harm the rule was designed to prevent.⁵⁵

The sole justification for invoking “good cause” in the IFR was that its June 2010 NPRM soliciting public comment satisfied the APA’s notice and comment requirements. Courts have acknowledged that an agency does not always have to “start from scratch” and initiate new notice and comment proceedings to re-promulgate a rule.⁵⁶ On the other hand, the “mere presence of a prior notice and comment record” does not automatically “render the solicitation of new comments unnecessary.”⁵⁷ “Although the [APA] does not establish a ‘useful life’ for a notice and comment record, clearly the life of such a record is not infinite.”⁵⁸ Accordingly, “[i]f the original record is still fresh, a new round of notice and comment might be unnecessary. Such a finding, however, must be made by the agency and supported in the record; it is not self-evident.”⁵⁹

We are unable to identify circumstances sufficient to dispense

⁵⁰ *Northern Mariana Islands v. United States*, 686 F.Supp.2d 7, 14–15 (D.D.C. 2009) (internal citations omitted).

⁵¹ *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 n.2 (9th Cir. 1992) (quoting *Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983)).

⁵² *Id.*

⁵³ *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94 (D.C. Cir. 2012) (quoting *Util. Solid Waste Activities Group v. EPA*, 236 F.3d 749, 755, (D.C. Cir. 2001)).

⁵⁴ *Action on Smoking and Health v. Civ. Aeronautics Board*, 713 F.2d 795, 801–02 (D.C. Cir. 1983).

⁵⁵ *Util. Solid Waste Activities Group*, 236 F.3d at 755 (quoting United States Department of Justice, Attorney General’s Manual on the Administrative Procedure Act 31 (1947)).

⁵⁶ *Mobile Oil Corp. v. EPA*, 35 F.3d 579, 584 (D.C. Cir. 1994).

⁵⁷ *Action on Smoking and Health v. Civ. Aeronautics Board*, 713 F.2d 795, 801 (D.C. Cir. 1983).

⁵⁸ *Id.* at 800.

⁵⁹ *Mobile Oil Corp.*, 35 F.3d at 584.

³⁹ *Id.* at 369.

⁴⁰ *Id.* at 369–70.

⁴¹ 53 F.3d 1452 (8th Cir. 1995).

⁴² *Id.* at 1458.

⁴³ *Id.*

⁴⁴ *Id.* at 1458–59 (internal citations omitted).

⁴⁵ See *Farrow v. USDA*, 760 F.2d 211, 214 (8th Cir. 1985) (“We agree with the JO that a practice which is likely to reduce competition and prices paid to farmers for cattle can be found an unfair practice under the Act, and be a predicate for a cease and desist order. We conclude that this is so even in the absence of evidence that the participants made their agreement for the purpose of reducing prices to farmers or that it had that result.”).

⁴⁶ 5 U.S.C. 553(b)(B).

⁴⁷ *Id.*

⁴⁸ *Woods Psychiatric Inst. v. United States*, 20 Cl. Ct. 324, 332–33 (1990) (citing *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984)).

⁴⁹ *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir.1992) (quoting *State of New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980)).

with traditional notice and comment procedures. Although a large number of comments were received over a five-month period, USDA is unwilling to assert—and the record does not support the inference that—the June 2010 NPRM was still “fresh.”⁶⁰ Accordingly, the IFR’s good cause explanation is unlikely to withstand judicial scrutiny. As one commenter said, the record from the June 2010 rulemaking was “stale.” Thus, according to the commenter, GIPSA should have re-opened the comment period to refresh the rulemaking record or terminated the rulemaking record. GIPSA’s decision to seek post-promulgation comment in the IFR, noting the high stakeholder interest, the intervening six years since the NPRM, and an interest in open and transparent government, suggests that the agency recognized the need to refresh the rulemaking record.

Failing “to incorporate an adequate statement of good cause for dispensing with prior notice and comment has not been held fatal if good cause indeed existed,”⁶¹ but we can offer no further justifications as to why the normal notice and comment procedure was “impracticable, unnecessary, or contrary to the public interest.” The “impracticable” prong was not applicable because GIPSA could have executed its statutory duties by issuing a new proposed rule and soliciting comments in compliance with the APA. The “unnecessary” prong was also not applicable because GIPSA estimated the implementation costs of the rule for the livestock and poultry industries would be millions of dollars. For this reason alone, the IFR was not “technical or minor.” Finally, there was no evidence that prior notice and opportunity for comment would have been “contrary to the public interest,” as the IFR memorialized GIPSA’s well known and longstanding interpretation.

GIPSA thus recognizes that no good cause existed. Neither Congress nor a court mandated that GIPSA issue § 201.3(a), nor were there any deadlines for its issuance.⁶² Because § 201.3(a) only reiterated USDA’s longstanding interpretation of the P&S Act as confirmed in the 2010 NPRM, the impacted livestock and poultry industries should have been aware of the interpretation, thereby negating the necessity to issue the rule immediately.⁶³ Also, there was no evidence that the public would suffer

harm following the normal notice and comment procedure.⁶⁴ Although appropriations acts prevented GIPSA from taking any action for three years, this congressionally mandated delay alone is insufficient to constitute good cause.

For the reasons discussed above, GIPSA concludes that its possible justifications for issuing the rule as an interim final rule fail to meet any of the prongs of the “good cause” exception, individually or cumulatively. Therefore, the prior decision to forgo notice and comment was flawed and compels GIPSA to withdraw the IFR.

V. Required Impact Analyses

A. Effective Date

The IFR addressing the scope of 7 U.S.C. 192(a) and (b) will become effective on October 19, 2017, unless withdrawn or suspended. Pursuant to the APA at 5 U.S.C. 553(d)(3), GIPSA finds good cause for making this final rule effective less than 30 days after publication in the **Federal Register** because it would be contrary to the public interest to delay any further.

Justifiable good cause includes situations where the interest of the public is defeated when following the normal procedure would create the harm the rule was designed to prevent.⁶⁵ This situation is present here. A significant purpose in withdrawing the IFR is to avoid conflict with federal appellate courts. If the IFR goes into effect before this final rule to withdraw it can go into effect, the conflict with the federal appellate courts will occur. Accordingly, to eliminate this potential conflict, it is necessary to have this rule become effective immediately.

Additionally, because GIPSA erred in promulgating the IFR without following the APA’s normal notice and comment procedure, it is in the public’s interest for GIPSA to respect the rule of law and withdraw the IFR. Immediately withdrawing the IFR prevents confusion in the livestock and poultry industries that may occur if the interim rule was only briefly effective. Thus, this final rule will be effective upon publication in the **Federal Register**.

B. Executive Orders 12866 and 13771, and Regulatory Flexibility Act

This final rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget. This final rule is an Executive Order 13771 deregulatory action. Assessment of the cost of allowing the interim final rule to take effect and the cost savings attributed to not allowing the interim final rule to take effect may be found in the economic analysis below.

The first section of the analysis discusses the two regulatory alternatives considered and presents a summary cost-benefit analysis of each alternative. GIPSA then discusses the impact on small businesses.

Cost-Benefit Analysis of § 201.3(a) Regulatory Alternatives Considered

Executive Order 12866 requires an assessment of costs and benefits of potentially effective and reasonably feasible alternatives to the planned rulemaking and an explanation of why the planned regulatory action is preferable to the potential alternatives. In the IFR, GIPSA considered three alternatives. The first alternative considered was to maintain the status quo and not finalize § 201.3(a). The second alternative considered was to issue § 201.3(a) as an IFR. The third alternative considered was to issue § 201.3(a) as an IFR but exempt small businesses, as defined by the Small Business Administration, from having to comply with the rule. GIPSA chose the second alternative, to issue § 201.3(a) as an IFR. The IFR announced GIPSA would add a paragraph to section 201.3 of the regulations addressing the scope of 7 U.S.C. 192(a) and (b). After multiple delays of the effective date, the IFR was scheduled to become effective on October 19, 2017.

In preparing this final rule, GIPSA initially considered four alternatives, as described in Section III above. After soliciting comments on the four alternatives, GIPSA is only further analyzing two of the alternatives, allowing the IFR to become effective (alternative 1) and withdrawing the IFR (alternative 4). GIPSA is only further analyzing these two alternatives because all of the commenters who selected a preferred alternative selected alternatives 1 and 4, save one commenter. That commenter, as discussed in Section III, appears to have had a real preference for alternative 4.

In analyzing these two alternatives, GIPSA used the same data and analysis as presented in the IFR. GIPSA used the

⁶⁰ See *id.*

⁶¹ *Kollett v. Harris*, 619 F.2d 134, 144–45 (1st Cir. 1980).

⁶² *Id.* at 15.

⁶³ *Id.*

⁶⁴ See *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 n.15 (5th Cir. 1979) (listing as examples of harm regulations “involving government price controls, because of the market distortions caused by the announcement of future controls” and regulations involving “gas stations, where temporary shortages and discriminatory practices were found to have deprived some users of any supply and led to violence”).

⁶⁵ See *Util. Solid Waste Activities Group v. EPA*, 236 F.3d 749, 755 (D.C. Cir. 2001).

same data and analysis because only a relatively short period of time has elapsed since the economic analysis was conducted for the IFR. Therefore, the underlying facts and reasoning used in the estimates prepared for the IFR have not changed to any material extent. Also, because of the relatively short period of time since the publication of the IFR, the livestock and poultry industries have not had time to make significant changes in their structures, practices, or methodologies—if they have made any changes. Moreover, GIPSA anticipated that many firms would take a “wait and see” approach and would not make significant changes to their operations or procurement practices until they were sure that the IFR would become effective.

Given the multiple delays of the effective date of the IFR and the proposed rule seeking comments on the disposition of the IFR, GIPSA believes that few, if any, livestock and poultry producers and stakeholders changed their operations or procurement practices in reliance on the assumption that the IFR would become effective. In fact, *no* commenters on this proposed rule said they changed their operations or procurement practices, nor has GIPSA otherwise been made aware of anyone or any business making changes to their operations or procurement practices in reliance on the IFR’s becoming effective. Therefore, the conditions in the livestock and poultry industries likely remain as they were when the IFR was published.

Alternative One: Allow the Interim Final Rule To Become Effective

The costs and benefits described for alternative number two in the IFR, to finalize the IFR, equate to current alternative 1, allowing the IFR to become effective. In the absence of any action by GIPSA, the IFR will become effective on October 19, 2017, and the costs and benefits associated with the rule will start to be incurred once the IFR becomes effective. Although none of these costs or benefits associated with the IFR result under current practice, they will result from allowing the IFR to become effective. As such, GIPSA analyzed the post-regulatory world in preparing the regulatory analysis associated with the IFR as the best estimate of the legal status quo.

As described in the IFR, given the applicability of the regulation to the livestock and poultry industries in their entirety, it was difficult to predict how those industries would respond. Therefore, in the IFR, GIPSA assigned a range to the expected costs of the regulation. At the lower boundary of the

cost spectrum, GIPSA considered the scenario where the only costs were increased litigation costs and where there were no adjustments by the livestock and poultry industries to reduce their use of Alternative Marketing Agreements (AMA) or incentive pay systems—such as poultry grower ranking systems—and there were no changes to existing marketing or production contracts. For the upper boundary of the cost spectrum, GIPSA considered the scenario in which the livestock and poultry industries adjusted their use of AMAs and incentive pay systems and made systematic changes in its marketing and production contracts to reduce the threat of litigation.⁶⁶

GIPSA estimated the annualized costs of § 201.3(a) to range from \$6.87 million to \$96.01 million at the three percent discount rate and from \$7.12 million to \$98.60 million at the seven percent discount rate. The range of potential costs is broad. GIPSA relied on its expertise to arrive at a point estimate range of expected annualized costs. GIPSA expected that the cattle, hog, and poultry industries would primarily take a “wait and see” approach to how courts would interpret § 201.3(a), and the industries would only slightly adjust their use of AMA’s and performance-based payment systems in the meantime. GIPSA estimated that the annualized cost of § 201.3(a) would be \$51.44 million at a three percent discount rate and \$52.86 million at a seven percent discount rate based on an anticipated “wait and see” approach and limited industry adjustments.

Although GIPSA was unable to quantify the benefits of § 201.3(a), GIPSA determined that this rule did

⁶⁶ GIPSA specifically looked at the following range of expected costs if the interim final rule became effective:

A. Lower Boundary of Cost Spectrum-Litigation Costs of Preferred Alternative (81 FR 92578–92580).

B. Lower Boundary-Ten-Year Total Costs of the Preferred Alternative (81 FR 92580–92581).

C. Lower Boundary-Net Present Value of Ten-Year Total Costs of the Preferred Alternative (81 FR 92581).

D. Lower Boundary-Annualized NPV of Ten-Year Total Costs of the Preferred Alternative (81 FR 92581).

E. Upper Boundary of Cost Spectrum-Preferred Alternative (81 FR 92581–92585).

F. Upper Boundary-NPV of Ten-Year Total Costs of the Preferred Alternative (81 FR 92585).

G. Upper Boundary-Annualized Costs of the Preferred Alternative (81 FR 92585).

H. Sensitivity Analysis of the Upper Boundary (81 FR 92585).

I. Range of Annualized Costs of the Preferred Alternative (81 FR 92585–92586).

J. Point Estimate of Annualized Costs of the Preferred Alternative (81 FR 92586).

K. Sensitivity Analysis of Point Estimates of Annualized Costs (81 FR 92586–92587).

provide a qualitative benefit. The primary qualitative benefit would be broader protection and fair treatment for livestock producers, swine production contract growers, and poultry growers, which could lead to more equitable contracts. GIPSA contended that the enactment of § 201.3(a) would allow for the increased ability to enforce the P&S Act for violations of 7 U.S.C. 192(a) and (b), which do not result in harm or likely harm to competition. GIPSA believed that increased enforcement actions would help in reducing the ability of packers, swine contractors, and live poultry dealers to monopolize or exercise market power. This, in turn, would help provide livestock producers, swine production contract growers, and poultry growers with some degree of negotiating power parity. GIPSA also believed that enforcement could serve as a deterrent to future violations of 7 U.S.C. 192(a) and (b).

Alternative Two: Withdraw the Interim Final Rule

Withdrawing the IFR negates the \$51.44 million with a range of \$6.87 million to \$96.01 million at a three percent discount rate and \$52.86 million with a range of \$7.12 million to \$98.60 million at a seven percent discount rate in projected annualized costs described above that would be incurred should the IFR become effective. It also means that the qualitative benefit of § 201.3(a)—broader protection and fair treatment for livestock producers, swine production contract growers, and poultry growers, which may lead to more equitable contracts are not expected to occur as a result of this rule. Instead, GIPSA expects that packers and live poultry dealers would continue with their current practices and that current rates of enforcement of the 7 U.S.C. 192(a) and (b) would remain unchanged.

Cost-Benefit Comparison of Regulatory Alternatives

Alternative 1, allowing the IFR to become effective, results in annualized costs estimated at \$51.44 million with a range of \$6.87 million to \$96.01 million at a three percent discount rate and \$52.86 million with a range of \$7.12 million to \$98.60 million at a seven percent discount rate. As stated above, GIPSA was unable to quantify the benefits of § 201.3(a), but it did identify qualitative benefits of allowing the IFR to become effective. The primary qualitative benefit of this alternative was broader protection and fair treatment for livestock producers, swine production contract growers, and poultry growers, which may lead to

more equitable contracts. Benefits to the industries and the markets were projected to come from improvements to the parity of negotiating power and from increased enforcement serving as a deterrent to future violations. Upon further consideration of comments, the amount of increased enforcement may have been overestimated, because GIPSA was only enshrining in the rulemaking USDA's longstanding view that proof of likelihood of harm to competition is not required in all instances. Additionally, GIPSA's estimates were based on the assumption that all courts would enforce the IFR, ignoring the case law to the contrary. Notwithstanding an expected lack of deference by the Federal Circuits to the regulation, an increase in litigation is unavoidable in the livestock and poultry industries to not only interpret this regulation, but also to uphold it. This serves neither the interests of the livestock and poultry industries nor GIPSA.

Alternative 2, withdrawing the IFR, would result in the benefit of eliminating the projected annualized costs of \$51.44 million with a range of \$6.87 million to \$96.01 million at a three percent discount rate and \$52.86 million with a range of \$7.12 million to \$98.60 million at a seven percent discount rate that would be incurred if the IFR became effective. These figures represent the cost savings from withdrawing the IFR, however, these savings come at the arguable cost of the qualitative benefit GIPSA identified in the IFR. The projected broader protection and fair treatment for livestock producers, swine production contract growers, and poultry growers, which might possibly lead to more equitable contracts, will be lost.

Having considered both alternatives, GIPSA believes that alternative 2, withdrawing the IFR, is the best option.

Regulatory Flexibility Act Analysis of Withdrawing the Interim Final Rule

The Small Business Administration (SBA) defines small businesses by their North American Industry Classification System Codes (NAICS).⁶⁷ SBA considers broiler and turkey producers and swine contractors, NAICS codes 112320, 112330, and 112210 respectively, to be small businesses if sales are less than \$750,000 per year. Live poultry dealers, NAICS 311615, are considered small businesses if they have fewer than 1,250 employees. Beef and pork packers, NAICS 311611, are defined as small

businesses if they have fewer than 1,000 employees.

The Regulatory Flexibility Analysis in the IFR published on December 20, 2016, analyzed the impact of enacting the IFR on small businesses (81 FR 92591–92594). As part of the analysis, GIPSA identified the approximate number of entities subject to the IFR that were small businesses and analyzed the costs for those small businesses to implement § 201.3(a), both in the first full year of implementation (at that time 2017), and annualized over a ten-year period. Because of the relatively short period of time since the publication of the IFR, the numbers of subject entities that are small businesses have not appreciably changed; therefore, the same number of entities that were small businesses that would have been impacted by implementing the IFR are the same entities that would be impacted by withdrawing the IFR.

The Census of Agriculture (Census) indicates there were 558 farms that sold their own hogs and pigs in 2012 and that identified themselves as contractors or integrators. GIPSA estimated that about 65 percent of swine contractors had sales of less than \$750,000 in 2012 and would have been classified as small businesses. These small businesses accounted for only 2.8 percent of the hogs produced under production contracts. Additionally, there were 8,031 swine producers in 2012 with swine contracts and about half of these producers would have been classified as small businesses.

Based on U.S. Census data on county business patterns, in 2013, there were approximately 59 live poultry dealers employing fewer than 1,250 people each, which would have been classified as small businesses. GIPSA records for 2014 indicated there were 21,925 poultry production contracts in effect, of which 13,370, or 61 percent, were held by the largest six live poultry dealers, and 90 percent (19,673) were held by the largest 25 firms. These 25 firms are all in the large business SBA category, whereas the 21,925 poultry growers holding the other end of the contracts are almost all small businesses by SBA's definitions. GIPSA determined that poultry dealers classified as large businesses are responsible for about 89.7 percent of the costs on poultry contracts and therefore, by extension, small businesses would be responsible for 10.3 percent of the costs. GIPSA records, as of June 2016, included 227 firms reporting the slaughter of hogs. Of these, 219 would be classified as small businesses. GIPSA estimated that small businesses accounted for approximately 17.8 percent of the hogs slaughtered in

2015. For that same year, GIPSA records, included 293 firms reporting the slaughter of cattle. Of these, 287 would be classified as small businesses.

As discussed earlier, because of the relatively short period of time since the publication of the IFR, the livestock and poultry industries have not changed their structures, practices, or methodologies. Also, GIPSA correctly predicted that many firms would take a "wait and see" approach and would not want to make significant changes to their operations or procurement practices until they were sure that the IFR would become effective. Consequently, no small businesses should incur any costs from the IFR's withdrawal.

Based on this analysis, GIPSA certifies that withdrawal of the IFR is not expected to have a significant economic impact on a substantial number of small business entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*).

C. Executive Order 12988

GIPSA reviewed this final rule under Executive Order 12988, Civil Justice Reform. This action is not intended to have retroactive effect nor will it preempt state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures that must be exhausted before any judicial challenge to this final rule. Nothing in this final rule is intended to interfere with a person's right to enforce liability against any person subject to the P&S Act under authority granted in section 308 of the P&S Act.

D. Executive Order 13175

GIPSA reviewed this final rule in accordance with the requirements of Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Although GIPSA has assessed the impact of this final rule on Indian tribes and determined that this final rule does not, to its knowledge, have tribal implications that require tribal consultation under Executive Order

⁶⁷ See: http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.

13175, GIPSA offered opportunities to meet with representatives from Tribal Governments during the comment period for the June 2010 NPRM (June 22 to November 22, 2010) with specific opportunities in Rapid City, South Dakota, on October 28, 2010, and Oklahoma City, Oklahoma, on November 3, 2010. GIPSA invited all tribal governments to participate in these venues for consultation. GIPSA has received no specific indication that the final rule will have tribal implications and has received no further requests for consultation as of the date of this publication. If a Tribe requests consultation, GIPSA will work with the Office of Tribal Relations to ensure

meaningful consultation is provided where changes, additions, and modifications herein are not expressly mandated by Congress.

E. Paperwork Reduction Act

This final rule does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). It does not involve collection of new or additional information by the federal government.

F. E-Government Act Compliance

GIPSA is committed to compliance with the E-Government Act, to promote the use of the internet and other

information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects in 9 CFR Part 201

Contracts, Livestock, Poultry, Trade practices.

■ Accordingly, the interim final rule amending 9 CFR Part 201 that was published at 81 FR 92566–92594 on December 20, 2016, is withdrawn.

Randall D. Jones,

Acting Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. 2017–22593 Filed 10–17–17; 8:45 am]

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DEPARTMENT OF AGRICULTURE**Grain Inspection, Packers and Stockyards Administration****9 CFR Part 201**

RIN 0580-AB27

Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act**AGENCY:** Grain Inspection, Packers and Stockyards Administration, USDA.**ACTION:** Proposed rule; notification of no further action.

SUMMARY: The Department of Agriculture's (USDA) Grain Inspection, Packers and Stockyards Administration (GIPSA), Packers and Stockyards Program (P&SP) is notifying the public that after review and careful consideration of the public comments received, GIPSA will take no further action on the proposed rule published on December 20, 2016.

DATES: As of October 18, 2017, GIPSA will take no further action on the proposed rule published on December 20, 2016, at 81 FR 92703.

FOR FURTHER INFORMATION CONTACT:

S. Brett Offutt, Director, Litigation and Economic Analysis Division, P&SP, GIPSA, 1400 Independence Ave. SW., Washington, DC 20250-3601, (202) 720-7051, s.brett.offutt@usda.gov.

SUPPLEMENTARY INFORMATION: On December 20, 2016, GIPSA published in the **Federal Register** (81 FR 92703) and invited comments on a proposed rule to amend the regulations issued under the Packers and Stockyards Act (P&S Act) (7 U.S.C. 181-229c). GIPSA intended that the proposed rule would clarify the conduct or action that GIPSA considers unfair, unjustly discriminatory, or deceptive in violation of 7 U.S.C. 192(a). The proposed rule also identified criteria that the Secretary would use to determine if conduct or action by packers, swine contractors, or live poultry dealers constitutes an undue or unreasonable preference or advantage in violation of 7 U.S.C. 192(b). GIPSA published a document in the February 7, 2017, **Federal Register** (82 FR 9533) to extend the comment period for the proposed rule from February 21, 2017, to March 24, 2017. GIPSA received 866 comments on the proposed rule.

Commenters opposing the proposed rule stated that the purpose of the P&S Act is to protect competition, not individual competitors or market participants. The commenters commonly claimed that the proposed rule would increase litigation industry-

wide. Commenters stated that if the requirement to show harm to competition was no longer applicable, the proposed rule would embolden producers and growers to sue for any perceived slight by a packer, swine contractor, or live poultry dealer. Commenters also pointed out that the proposed rule contains vague terms and phrases including: "legitimate business justification," "retaliatory action," "similarly situated," "reasonable time to remedy," "arbitrary reason," and "but is not limited to." They argued that those terms and phrases are overbroad and create ambiguity regarding the conduct or action that would be permitted or prohibited. They speculated that this ambiguity would lead to broad interpretations that would make compliance difficult, and that this uncertainty would generate litigation.

Also, commenters noted that the proposed rule conflicts with case law in multiple U.S. Courts of Appeals that have ruled that 7 U.S.C. 192(a) and (b) only authorize a cause of action if the conduct at issue harms, or is likely to harm, competition. The Department of Justice (DOJ) filed amicus briefs with several of these courts, but DOJ's legal arguments failed to persuade the courts. Commenters further wrote that at least two of these U.S. Courts of Appeals are unlikely to grant deference to the proposed rule if finalized. Also, commenters argued that Congress considered and ultimately declined to enact legislation in 2007 that would have overturned the judicial decisions interpreting 7 U.S.C. 192(a) that require a showing of harm or likely harm to competition.

Producers, growers, and farm trade groups generally supported the proposed rule, with some exceptions. Commenters who expressed support often noted that many farmers invest millions of dollars of their own money on new—or upgrades to existing—production facilities in order to meet the contractual demands of packers, swine contractors, or live poultry dealers. Many wrote that farmers need the proposed rule to protect them from unfair, deceptive, or retaliatory practices that can cause farmers to lose their operations and investments. These commenters stated that this proposed rule provided long overdue protection to farmers and clarified to the industry the conduct or action that is a violation of the P&S Act.

The proposed rule closely relates to the interim final rule (IFR) published in the **Federal Register** (81 FR 92566) on December 20, 2016, which stated that conduct or actions can violate 7 U.S.C. 192(a) or (b) of the P&S Act without a

finding of harm or likely harm to competition. In the IFR, GIPSA formalized its longstanding interpretation of 7 U.S.C. 192(a) and (b). In the preamble to the proposed rule, GIPSA explained that the rule was consistent with the IFR because proposed 9 CFR 201.210(b) and 201.211 give examples of conduct that does not require likelihood of harm to competition to violate 7 U.S.C. 192(a) and (b). GIPSA withdrew the IFR because, among other reasons, it is inconsistent with court decisions in several Courts of Appeals and those courts are unlikely to give GIPSA's interpretation deference.

As the comments noted, this proposed rule, like the IFR, conflicts with legal precedent in several Circuits. These conflicts pose serious concerns. GIPSA is cognizant of the commenters who support allowing the proposed rule and their concerns regarding the imbalance of bargaining power. Also, we recognize that the livestock and poultry industries have a vested interest in understanding what conduct or actions violate 7 U.S.C. 192(a) and (b). This proposed rule, however, would inevitably generate litigation in the livestock and poultry industries. Protracted litigation to both interpret this regulation and defend it serves neither the interests of the livestock and poultry industries nor GIPSA.

Also, as the preamble to the proposed rule noted: "For several decades, GIPSA has brought administrative enforcement actions against packers for violations of the regulations under the P&S Act without demonstrating harm or likely harm to competition." In the proposed rule itself, GIPSA linked the proposed rule to practices that are already violations of the regulations and statute, such as 9 CFR 201.82, and 7 U.S.C. 228b. GIPSA also predicted that the proposed rule would not increase administrative enforcement actions against packers because GIPSA designed the regulations to follow its current interpretation of 7 U.S.C. 192(a) and (b). On the other hand, some commenters wrote that the breadth of the proposed regulation would suppress innovative contracting because regulated entities would fear the increased risk of litigation presented by ambiguous terms in the proposed rule. As stated previously, commenters noted producers and growers might be emboldened to sue for any perceived slight.

Executive Order 13563 directs, as a matter of regulatory policy, that USDA identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends; to

account for benefits and costs, both quantitative and qualitative; and to tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives. To the extent the proposed rule codified longstanding practice, the prescriptions of the proposed rule could have the unintended consequence of preventing future market innovations that might better accommodate rapidly evolving social and industry norms. In the past,

GIPSA has approached the elimination of specific unfair and deceptive practices on a case-by-case basis. Continuing this approach will better foster market-driven innovation and evolution, and is consistent with the obligation to promote regulatory predictability, reduce regulatory uncertainty, and identify and use the most innovative and least burdensome tools for achieving regulatory ends.

Therefore, after review and careful consideration of the public comments received, GIPSA will take no further action on the December 20, 2016, proposed rule referenced above.

Randall D. Jones,

*Acting Administrator, Grain Inspection,
Packers and Stockyards Administration.*

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