No. 17-3723

In the

United States Court of Appeals

for the

Eighth Circuit

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

Petitioners,

– v. –

U.S. DEPARTMENT OF AGRICULTURE; SONNY PURDUE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE; AND THE UNITED STATES OF AMERICA,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

SUMMARY OF THE CASE

This case concerns the Department of Agriculture's failure to abide a statutory mandate, and to heed the requirements of the Administrative Procedure Act, in withdrawing regulations that would have helped farmers seek redress for unlawful treatment. In the 2008 Farm Bill, Congress required the Department to promulgate, within two years, regulations setting forth the criteria it uses to determine whether an "undue or unreasonable preference or advantage" has been given in violation of section 202(b) of the Packers and Stockyards Act, 7 U.S.C. § 192(b). Almost eight years later, the Department still has not complied. Further, while the Department initiated rulemaking in partial response to Congress's directive, and promulgated the Farmer Fair Practices Rules in 2016, it abruptly changed course in 2017, withdrawing the Rules without adequate justification and announcing that it intended to proceed no further with the task Congress set for it.

This Petition presents the questions whether the Department has unlawfully withheld agency action by failing to heed Congress's mandate, 5 U.S.C. § 706(1), and whether its orders withdrawing the Rules are arbitrary and capricious, *id.* § 706(2)(A). Given the importance and complexity of these questions, Petitioners respectfully submit that oral argument may aid the Court's resolution of this matter and suggest 20 minutes per side.

CORPORATE DISCLOSURE STATEMENT

Petitioner the Organization for Competitive Markets ("OCM") is a non-governmental, nonprofit corporation. OCM has no parent or subsidiary. Neither OCM, nor its affiliates, have ever issued shares or debt securities to the public.

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES AND REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

In December 2016, the United States Department of Agriculture published regulations to strengthen protections for farmers under the Packers and Stockyards Act, a landmark law passed by Congress in 1921 to reform the agricultural market and shield its participants from unfair and discriminatory practices. The Department's rules, known as the Farmer Fair Practices Rules, responded to a statutory mandate in the 2008 Farm Bill and would have provided necessary clarity regarding what conduct violates certain provisions of the Act.

Less than a year later, despite acknowledging that there had been no change in the underlying facts, the Department changed course and withdrew the Rules. Because the Department has not adequately explained its new policy, and because it is continuing to flout Congress's directive, Petitioners—individual farmers and the Organization for Competitive Markets, an association that advocates on their behalf—appeal to this Court.

Sections 202(a) and (b) of the Packers and Stockyards Act prohibit agricultural corporations from engaging in "unfair, unjustly discriminatory, or deceptive" practices, and from "making or giving of any undue or unreasonable preference or advantage" in the marketplace. 7 U.S.C. §§ 192(a), (b). In its December 2016 Interim Final Rule (the "IFR"), 81

Fed. Reg. 92,566 (Dec. 20, 2016), App.1, the Department formalized its longstanding interpretation that claimants under sections 202(a) and (b) need not demonstrate that the unfair conduct at issue distorts competition in the market as a whole—*i.e.*, that they need not prove "competitive injury." At the same time, the Department published a Notice of Proposed Rulemaking (the "NPRM"), 81 Fed. Reg. 92,703 (Dec. 20, 2016), App.30, to propose regulations that provided specific examples of conduct that constitutes an "unfair practice" under section 202(a) and, in response to Congress's mandate in the 2008 Farm Bill, that established criteria the Department would consider in determining whether an unfair preference had been given in violation of section 202(b).

The Farmer Fair Practices Rules aimed to provide contract and independent farmers with some semblance of bargaining power in an increasingly concentrated market. Such farmers contract with large agribusinesses—packers and processors—to grow and raise livestock and poultry. However, as packers and processors have consolidated, farmers have found themselves with only a limited number of possible buyers in any given region. This means that farmers lack bargaining power and are often forced to accept contracts on a take-it-or-leave-it basis. Because a farmer can be pushed out of the market if the few buyers in a region refuse to buy that farmer's product, or refuse to buy at a reasonable price, fear of retaliation—a fear that has been borne out by Petitioners' own experiences—pressures farmers to capitulate. The Rules responded to these market realities; the Rules' withdrawal ignores them, leaving farmers on the same unlevel playing field as before.

The Rules' withdrawal also violates the law. Although agencies can pursue new agendas (within the bounds Congress has established), they cannot ignore statutory commands, change course without explanation, or pretend that no change has occurred. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Department has violated each of these precepts, ignoring Congress's directive in the 2008 Farm Bill, putting forth inadequate explanations, and failing to grapple with its changed position as to the Rules' necessity. The Department's actions violate the Administrative Procedure Act, 5 U.S.C. §§ 706(1), (2)(A), and Petitioners respectfully request that the Court vacate the Department's orders withdrawing the Rules and require the Department to comply with Congress's mandate in the 2008 Farm Bill.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 2342, which provides that "[t]he court of appeals…has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of…all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under section 210(e), 217a, and 499g(a) of title 7." 28 U.S.C. § 2342(2); *see Nw. Airlines v. Goldschmidt*, 645 F.2d 1309, 1313-14 (8th Cir. 1981) ("the word 'order' for purposes of special review statutes" is interpreted "expansively, to permit direct review (in the courts of appeals) of regulations promulgated through informal notice-and-comment rule-making" (citations omitted)). The Department's orders on review here were issued under chapter 9 of title 7 (the Packers and Stockyards Act).

STATEMENT OF ISSUES

1. Whether the Department has unlawfully withheld agency action, 5 U.S.C. § 706(1), by missing by almost eight years (and counting) a Congressionally-prescribed deadline to promulgate certain regulations under the Packers and Stockyards Act. *See* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 11006, 122 Stat. 1651, 2120, Add.12; *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis omitted); *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999).

2. Whether the Department has acted arbitrarily and capriciously, 5 U.S.C. § 706(2)(A), by issuing orders, *see* 82 Fed. Reg. 48,594 (Oct. 18,

2017), App.51; 82 Fed. Reg. 48,603 (Oct. 18, 2017), App.60, withdrawing an interim final rule and announcing no further action on a notice of proposed rulemaking without adequate explanation. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009); *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

BACKGROUND

I. The Packers and Stockyards Act

Congress enacted the Packers and Stockyards Act in 1921 "to comprehensively regulate packers, stockyards, marketing agents and dealers." *Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co.*, 498 F.2d 925, 927 (10th Cir. 1974).[1] The "chief evil" that Congress sought to regulate 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." *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922). "Another evil" Congress wanted to

[1] Petitioners' presentation draws substantially from amicus briefs the United States has filed in the past to defend the robust protections that the Packers and Stockyards Act provides to individual farmers. *E.g.*, Brief for Amicus Curiae the United States of America in Support of Plaintiff-Appellant, *Terry v. Tyson Farms, Inc.*, No. 08-5577, 604 F.3d 272 (6th Cir. 2010), 2008 WL 5665508; En Banc Brief for Amicus Curiae the United States of America in Support of Plaintiffs-Appellees, *Wheeler v. Pilgrim's Pride Corp.*, No. 07-40651, 591 F.3d 355 (5th Cir. 2009) (en banc), 2009 WL 7349991.

combat was "exorbitant charges, duplication of commissions, [and] deceptive practices in respect of prices," *id.* at 515, as this Court has repeatedly recognized, *see, e.g.*, *Bruhn's Freezer Meats v. U.S. Dep't of Agric.*, 438 F.2d 1332, 1337 (8th Cir. 1971). And as this Court has acknowledged, because the Act "is remedial legislation," it "should be liberally construed to further its life and fully effectuate its public purpose." *Id.* at 1336.

Today, as relevant here, section 202 of the Act, codified at 7 U.S.C. § 192, declares that "[i]t shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to," among other things,

> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect….

7 U.S.C. § 192.

The Act authorizes the Department of Agriculture to enforce violations of section 202 by packers and swine contractors through formal adjudication. *Id.* § 193. While the Act does not authorize the Department to enjoin violations by live poultry dealers, individuals injured by such violations, and by those committed by packers and swine contractors, may sue in federal district court to recover "the full amount of damages sustained in consequence of such violation[s]." *Id.* § 209.

II. The 2008 Farm Bill and the Department's Promulgation of the Farmer Fair Practices Rules

In the Packers and Stockyards Act, Congress granted the Department general authorization to issue implementing regulations. *Id*. § 228. In the 2008 Farm Bill, given rising concentration in agricultural markets, Congress mandated that the Department issue specific regulations under the Act and established a strict timeline. *See* Food, Conservation, and Energy Act of 2008 (the "2008 Farm Bill"), Pub. L. No. 110-246, § 11006, 122 Stat. 1651, 2120, Add.12. As relevant here, Congress required the Department, "[a]s soon as practicable, but not later than 2 years after" the 2008 Farm Bill's enactment—*i.e.*, by June 18, 2010—to "promulgate regulations…to establish criteria that the Secretary will consider in determining…whether an undue or unreasonable preference or advantage has occurred in violation of" section 202(b) of the Packers and Stockyards Act. *Id.* § 11006(1), 122 Stat. at 2120, Add.12. The Department still has not done so, and has recently made clear its intention not to do so, in disregard of Congress's mandate.

A. The Department Initiates Rulemaking: June 2010 Notice of Proposed Rulemaking

The Department once intended otherwise. Starting shortly after the 2008 Farm Bill's passage, the Department's Grain Inspection, Packers and Stockyards Administration ("GIPSA") held public meetings and began gathering comments and data to support the required rulemaking. *See* 75 Fed. Reg. 35,338, 35,339 (June 22, 2010).[2] In June 2010, based on the "comments, information, and recommendations" GIPSA received, and based on its "expertise, experience, and interactions in the livestock and poultry industries," *id.* at 35,339, the Department issued proposed regulations that, as relevant here, accomplished two key objectives. *See also* 81 Fed. Reg. at 92,567, App.2 (summarizing the history of the rulemaking).

<u>Proposed 9 C.F.R. § 201.211.</u> *First*, in response to Congress's mandate in section 11006(1) of the 2008 Farm Bill, the Department proposed new 9 C.F.R. § 201.211 "to address undue or unreasonably preferential treatment of poultry growers, swine production contract growers

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[2] In November 2017, Secretary of Agriculture Sonny Perdue announced the elimination of GIPSA as a standalone agency and stated it would be re-established under the Fair Trade Practices program within the Department's Agriculture Marketing Service. *See* Dep't of Agric., Secretary's Mem. 1076-018, Improving Customer Service and Efficiency (Nov. 14, 2017), https://www.ocio.usda.gov/sites/default/files/docs/2012/SM%201076-18.pdf.

or livestock producers" by "establish[ing] criteria that the Secretary may consider in determining if [such] differential treatment" violates the prohibition against "undue or unreasonable preference[s] or advantage[s], or …undue or unreasonable prejudice[s] or disadvantage[s]" in Section 202(b) of the Packers and Stockyards Act. 75 Fed. Reg. at 35,343; *see id.* at 35,352 (proposed criteria). The Department explained that GIPSA had learned of the prevalence of such treatment, *id.* at 35,343, and that the proposed regulation would "[b]enefit[]…the industry and the market" by "establishing parity of negotiating power between" livestock producers and packers, and between poultry growers and live poultry dealers, *id.* at 35,346.

Proposed 9 C.F.R. §§ 201.3, 201.210. *Second*, under the Packers and Stockyard Act's general rulemaking authority, the Department responded to the "increased use of contracting in the marketing and production of livestock and poultry" and to "market concentration," *id.* at 35,338, by confirming that claimants under sections 202(a) and 202(b) need not prove competitive injury to establish a violation, *see id.* at 35,341 (proposed 9 C.F.R. § 201.3), and by providing specific examples of conduct deemed unfair under section 202(a) of the Act, *see id.* at 35,342 (proposed 9 C.F.R. § 201.10).

In proposing 9 C.F.R. § 201.3, the Department first reaffirmed its "longstanding" position that "a violation of section 202(a) or (b) can be proven without proof of likelihood of competitive injury." *Id.* at 35,340. The Department explained that its interpretation is consistent with the Act's "legislative history and purposes" and with "other sections of the…Act using similar language." *See id.* at 35,340-41. But because certain courts of appeals had adopted a different construction, holding that claimants under sections 202(a) and (b) must establish competitive injury, *see id.* at 35,341 & nn.31-32, and had in certain instances refused to defer to the Department's interpretation because it had not previously been enshrined in a regulation, the Department proposed 9 C.F.R. § 201.3 to confirm that "[c]onduct can be found to violate section 202(a) and/or (b) of the Act without a finding of harm or likely harm to competition," *id.* at 35,351.

Finally, in proposing 9 C.F.R. § 211.210, the Department explained that GIPSA had "been informed by growers and producers" that they "are sometimes at a distinct disadvantage in negotiating the terms of an agreement" with dealers and packers; that dealers and packers have "exert[ed] their disproportionate positions of power by misleading or retaliating against" growers and producers; and that growers and producers are forced to "acquiesce" to packers' and dealers' "terms for entering into a contract or growing arrangement, or acquiesce to unfair conduct[,] in order to continue in business." *Id.* at 35,342. Accordingly, the Department proposed 9 C.F.R. § 211.20 to confirm "the broad coverage of section 202(a)," including by providing "examples of conduct deemed unfair." *Id.* (listing examples).

B. The Department Promulgates the Farmer Fair Practices Rules: December 2016 IFR and NPRM

The appropriations acts for fiscal years 2012-2015 prevented the Department from finalizing certain of the regulations that it had proposed in June 2010, including proposed 9 C.F.R. §§ 201.3, 201.210, and 201.211. 81 Fed. Reg. at 92,567, App.2. Subsequent appropriations acts did not include this limitation, however, and in December 2016, the Department published the IFR and NPRM—the Farmer Fair Practices Rules.

The IFR. The Department issued as an interim final rule a provision similar to that which it had proposed, in June 2010, to confirm that claimants under sections 202(a) and (b) of the Packers and Stockyards Act need not establish competitive injury. *Id.* at 92,570, App.5. Specifically, the IFR provided that:

> The appropriate application of sections 202(a) and (b) of the Act depends on the nature and circumstances of the challenged conduct or action. A finding that the challenged conduct or action adversely affects or is likely to adversely affect competition is not necessary in all cases. Certain conduct or action can be found to violate sections 202(a) and/or (b) of the Act without a finding of harm or likely harm to competition.

Id. at 92,594, App.29 (to be codified at 9 C.F.R. § 201.3(a)).[3] The Department once again explained how its longstanding interpretation "is consistent with the language and structure of the…Act, as well as its legislative history and purposes." *Id.* at 92,567, App.2; *see id.* at 92,567-70, App.2-5. The Department defended its interpretation against contrary interpretations adopted by certain courts of appeal and explained that it was promulgating the IFR to provide additional reasons for courts to defer to its construction. *See id.* at 92,568 & nn.13-16, App.3, 92,570 & nn.21-27, App.5.

The Department acknowledged that the IFR might "initially encourage litigation"—indeed, increased private enforcement was the Department's aim: the IFR's purpose was to "lower costs" to producers and growers "should they bring legal action for an alleged violation of section 202(a) or section 202(b)." *Id.* at 92,571, App.6. As the Department stated,

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[3] In the June 2010 notice of proposed rulemaking, this provision was to be codified at 9 C.F.R. § 201.3(c), but because of its "primary importance," in the December 2016 IFR the Department "chang[ed] its designation from (c) to (a)." 81 Fed. Reg. at 92,566, App.1.

"[b]y removing the burden to prove harm or likely harm to competition in all cases, this interim final rule promotes fairness and equity in the livestock and poultry industries." *Id.* Specifically, after providing a lengthy explanation of certain "structural issues" in agricultural markets that produce contracts with "detrimental effects" on growers and producers, the Department explained that "[t]hese structural issues and market failures will be mitigated by relieving plaintiffs from the requirement to demonstrate competitive injury." *Id.* at 92,576, App.11. The Department concluded that the IFR's "primary benefit" would be to "increase[]" the ability of producers and growers to "enforce[]" sections 202(a) and (b) of the Act so as to "reduce instances of unfair, unjustly discriminatory, or deceptive practices or devices and undue or unreasonable preferences, advantages, prejudices, or disadvantages and increased efficiencies in the marketplace." *Id.* at 92,588, App.23.

Finally, the Department explained why it was issuing 9 C.F.R. § 201.3 as an interim final rule with opportunity for additional comment. Because the Department had solicited comments on the provision in its June 2010 proposed rule, it concluded that it had "fulfilled the notice and comment requirements of the Administrative Procedure Act." *Id.* at 92,570, App.5. Indeed, the IFR was informed by three public meetings, five joint public workshops, and over 61,000 comments. *See id.* at 92,566-67, App.1-2.

"However," the Department continued, "given the significant level of stakeholder interest in this regulatory provision, the intervening six years, and in the interests of open and transparent government," it had "decided to promulgate the rule as an interim final rule and provide an additional opportunity for public comment." *Id.* at 92,570, App.5. The Department stated that after the comment period closed, it would publish another document in the Federal Register addressing the comments and making any amendments to the IFR. *See id.* at 92,570-71, App.5-6.

The NPRM. The NPRM, issued simultaneously with the IFR, proposed revised versions of 9 C.F.R. §§ 201.210, 201.211. 81 Fed. Reg. at 92,704-07, App.33-34. In addition to restructuring the proposed 9 C.F.R. § 201.210 somewhat, the Department again set forth "a non-exhaustive list of the types of conduct or action that [the Department] believes is unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the…Act regardless of whether the conduct harms or is likely to harm competition." *Id.* at 92,704, App.31. The Department noted that neither the Act nor the Department's regulations had ever defined certain of the Act's key terms, and explained that its list was "intended to reduce confusion regarding" what constitutes unlawful conduct. *Id.* at 92,704-05, App.32-33 (explaining the examples). Crucially, the first example the Department identified as a violation of section 202(a), in proposed 9 C.F.R.

§ 201.210(b)(1), was "retaliatory action or threat of retaliatory action by a packer, swine contractor or live poultry dealer…when done in response to lawful communication, association, or assertion of rights by a livestock producer, swine production contract grower, or poultry grower." *Id.* at 92,704, App.31.

As to the proposed 9 C.F.R. § 201.211, the Department again acknowledged Congress's mandate in section 11006(1) of the 2008 Farm Bill, addressed comments it had received in response to the June 2010 proposed rule, and explained its revised, proposed criteria for what constitutes an undue or unreasonable advantage under section 202(b) of the Act. *See id.* at 92,705-07, App.32-34. As in the IFR, given structural issues in the market, the Department's aim in the NPRM was to facilitate private enforcement of the Act and deter unlawful behavior, and thereby "lower overall costs throughout the entire production and marketing complex of all livestock, poultry, and meat." *Id.* at 92,717, App.44. And like the Department's proposed 9 C.F.R. § 201.210, its proposed 9 C.F.R. § 201.211 emphasized the particular problems that attend retaliation: "Packers, swine contractors or live poultry dealers who treat some producers and growers more favorably than producers or growers who choose to exercise their rights are giving an undue preference or advantage to a group of producers or growers to the detriment of others," and their "conduct violates section 202(b)." *Id.* at 92,706, App.33.

III. The Department Withdraws the Farmer Fair Practices Rules

In October 2017, the Department changed course and withdrew the Farmer Fair Practices Rules, rescinding the IFR and abandoning the NPRM.

<u>Rescission of the IFR.</u> After delaying the IFR's effective date several times and soliciting comment on certain alternatives that it had proposed, on October 18, 2017, the Department withdrew its interpretation of sections 202(a) and (b) that would have been codified as 9 C.F.R. § 201.3(a). 82 Fed. Reg. at 48,594, App.51. The Department purports to stand by its interpretation that violations can be established without proving competitive injury, and has not explicitly abandoned its view that if growers and producers *are* required to prove competitive injury to bring claims under the Act, they will "continue to be subjected to unfair business practices, and their businesses [will] be at risk." *Id.* at 48,596-97, App.53-54. The Department even admits that "the underlying facts…have not changed to any material extent" since it issued the IFR. *Id.* at 48,600, App.57.

Nonetheless, the Department now professes to have "serious legal and policy concerns related to [the IFR's] promulgation and implementation." *Id.* at 48,596, App.53. Having once sought to *facilitate* farmers' efforts to avail themselves of the Packers and Stockyard Act's protections through litigation, the Department now seeks to *prevent* "increased litigation," concerned that "the IFR would embolden producers and growers to sue for any perceived slight by a packer or integrator." *Id.* at 48,594, App.51; *see id.* at 48,601, App.58. And having once understood that facilitating litigation by farmers would *deter* packers and integrators from treating farmers unfairly and committing violations of the Act, the Department now believes that "[f]ear of litigation" would lead to undesirable consequences. *See id.* at 48,594-95, App.51-52.

The Department further claims that, contrary to its prior analysis, courts would not defer to its interpretation of sections 202(a) and (b) even if that interpretation were enshrined in a regulation. *See id.* at 48,596-98, App.53-55. The Department asserts that in issuing the IFR it "ignor[ed] case law…contrary" to its interpretation, *id.* at 48,601, App.58, notwithstanding that the IFR explicitly addressed those very cases, *see* 81 Fed. Reg. at 92,568, 92,587, App.3, 22.

Finally, the Department argues that it impermissibly issued its interpretation as an interim final rule when, instead, it should have solicited another round of comment. *See* 82 Fed. Reg. at 48,598-99, App.55-56. Although in issuing the IFR the Department never invoked the APA's good cause exception for foregoing notice and comment, and instead explained that it had satisfied the APA's requirements by soliciting comments on the proposed rule in June 2010, *see* 81 Fed. Reg. at 92,570, App.5, the Department now is of the view that it was required to establish good cause in the IFR and failed to do so, *see* 82 Fed. Reg. at 48,599, App.56.

<u>Abandonment of the NPRM.</u> Simultaneous with rescinding the IFR, the Department announced that it "will take no further action" on the NPRM. *Id.* at 48,603, App.60. Notwithstanding that the aim of the NPRM (as of the IFR) was to enhance private enforcement of the protections that Congress has afforded farmers in the Packers and Stockyards Act, the Department now cites approvingly to comments complaining that the NPRM, if it had been finalized, would have "increase[d] litigation industry-wide." *Id.* Although "recogniz[ing] that the livestock and poultry industries have a vested interest in understanding what conduct or actions violate" sections 202(a) and (b) of the Act, the Department dismisses that interest out of concern for the "protracted litigation" that it believes the "proposed rule…would inevitably generate." *Id.* The Department does not mention Congress's dictate in § 11006(1) of the 2008 Farm Bill, and does not acknowledge that it is now almost eight years late in complying.

IV. The Petition for Review

Petitioners challenge the Department's withdrawal of the Farmer Fair Practices Rules and failure to abide Congress's mandate in the 2008 Farm Bill. Petitioners Connie and Jonathan Buttram, in Albertville, Georgia, and Jim Dinklage, in Knox County, Nebraska, are lifelong farmers who have experienced firsthand the kinds of retaliatory and discriminatory treatment that the Rules were designed to protect against. *See* C. Buttram Decl. (Ex. A), Add.14; J. Buttram Decl. (Ex. B), Add.18; Dinklage Decl. (Ex. D), Add.28. Petitioner Organization for Competitive Markets researches the causes of concentration in agricultural markets, educates the public about them, counsels farmers about counteracting their effects, and advocates on its members' behalves. *See* Maxwell Decl. (Ex. E), Add.32. Because the Department has turned its back on Petitioners by defying Congress's mandate and unlawfully withdrawing the Farmer Fair Practices Rules, Petitioners respectfully request that this Court intervene.

SUMMARY OF THE ARGUMENT

In withdrawing the Farmer Fair Practices Rules, the Department violated the APA in two respects. First, it has unlawfully withheld agency action. In the 2008 Farm Bill, Congress—in plain, mandatory terms—directed the Department to promulgate by June 2010 regulations explaining the criteria it uses to determine whether actions are unreasonably prejudicial under section 202(b) of the Packers and Stockyards Act. Because the Department has undeniably failed to do so, the Court must "compel agency action unlawfully withheld." 5 U.S.C. § 706(1).

Second, the Department acted arbitrarily and capriciously in failing to adequately explain its grounds for reversing course and withdrawing the Rules. The Department purports to stand by the Rules' logic, that facilitating increased enforcement of the Act would deter packers and processors from engaging in unfair and unlawful practices—practices that, per the Department's own analysis, are rampant in the livestock and poultry industries. But now, without explaining why, the Department simply asserts that increased enforcement is no longer a good thing. In the absence of reasoned decisionmaking, this Court must hold the Department's withdrawal of the Rules unlawful and set it aside. *Id.* § 706(2)(A).

ARGUMENT

I. The Department's Actions Have Injured Petitioners

Petitioners have standing to challenge the Department's withdrawal of the Rules and failure to comply with Congress's mandate in the 2008 Farm Bill. As the Department itself has acknowledged, the Rules' withdrawal has made it harder for farmers like petitioners Jonathan and Connie Buttram and

Jim Dinklage (the "Individual Petitioners"), and OCM member Mike Callicrate, to avail themselves of the Act's protections. The Buttrams and Mr. Dinklage therefore have standing to sue in their own right, and OCM has associational standing to sue on behalf of its members. Finally, OCM also has organizational standing. The Rules' withdrawal has left farmers to turn to OCM for assistance and required OCM to establish new programs to help them, thereby diverting OCM's resources from its other core initiatives.

A. Petitioners Jonathan Buttram, Connie Buttram, and Jim Dinklage Have Standing

The Individual Petitioners have demonstrated "(1) injury in fact, (2) a causal connection between that injury and" the Department's withdrawal of the Farmer Fair Practices Rules, "and (3) the likelihood that a favorable decision by the court" vacating the Department's withdrawal "will redress the alleged injury." *Iowa League of Cities v. EPA*, 711 F.3d 844, 869 (8th Cir. 2013).

The Individual Petitioners are among the millions of farmers harmed by the Department's withdrawal of the Rules. Accordingly, they have suffered "the type of concrete and actual or imminent harm necessary to establish an injury in fact." *Id.* at 870. The Buttrams and Mr. Dinklage have experienced the very kinds of actions that the NPRM, had it been finalized, would have confirmed constitute violations of the Packers and Stockyards

Act. C. Buttram Decl. ¶ 4, Add.15; J. Buttram Decl. ¶¶ 6-11, Add.19-21; Dinklage Decl. ¶¶ 4-6, Add.29.[4]

For example, in response to Mr. Buttram's advocacy efforts—especially his role with the Alabama Contract Poultry Growers Association—major poultry companies have terminated contracts with his family's farms. J. Buttram Decl. ¶ 8, Add.20; C. Buttram Decl. ¶ 4, Add.15. The NPRM, if finalized, would have clarified that the poultry companies' "retaliatory action[s]…in response to" the Buttrams' "lawful…association" and "assertion of rights" are "violations of section 202(a)." 81 Fed. Reg. at 92,704, App.31 (proposed 9 C.F.R. § 201.210(b)(1)). And both the NPRM and the IFR would have confirmed that the Buttrams could seek redress in court under the Act without having to establish competitive injury. *See id*. at 92,567, 92,704, App.2, 31. Then, the Buttrams would have more readily filed claims against the companies and enjoyed the protections that the Act

[4] *See, e.g.*, *Animal Legal Def. Fund v. Veneman*, 469 F.3d 826, 833 (9th Cir. 2006) (assessing a plaintiff's standing to challenge an agency decision to abandon a proposed policy by considering whether the policy, if finalized as proposed, would have benefited the plaintiff), *opinion vacated on reh'g en banc*, 490 F.3d 725 (9th Cir. 2007) (vacating the panel opinion upon the parties' settlement).

promises. J. Buttram Decl. ¶ 12, Add.21; C. Buttram Decl. ¶ 6, Add.15.[5] Indeed, the Department cited "the increased ability for the enforcement of the…Act" by litigation brought by individual farmers as the Rules' "primary benefit," *see* 81 Fed. Reg. at 92,588, App.23, and, subsequently, as a reason for their withdrawal, *see* 82 Fed. Reg. at 48,594-95, App.51-52.

Moreover, the harm to the Individual Petitioners is ongoing and will continue absent judicial intervention. *See Park v. Forest Service of the United States*, 205 F.3d 1034, 1037 (8th Cir. 2000). Although the retaliatory and discriminatory treatment the Individual Petitioners have experienced has caused them to shift their farming operations, were the Rules in place, and were they therefore more likely to succeed in challenging such treatment in court, they would be more likely to resume their prior work—and more likely to require the Rules' protection. *See* J. Buttram Decl. ¶¶ 12-13,

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[5] Additional examples abound. To take but two: Mr. Buttram experienced discriminatory treatment when a poultry processor manipulated the scales while weighing his birds. J. Buttram Decl. ¶ 10, Add.20; *see* 81 Fed. Reg. at 92,705, App.32 (the proposed 9 C.F.R. § 201.210(b)(8) would have "set[] forth GIPSA's position on [inaccurate weighing] as unfair, unjustly discriminatory or deceptive in violation of section 202(a) of the…Act"). And because Mr. Dinklage was treated less "favorably as compared to others similarly situated" by a meatpacker on account of his "lawful…assertion of [his] rights," *id.* at 92,706, App.33 (citing proposed 9 C.F.R. § 201.211(a)); *see* Dinklage Decl. ¶¶ 5-6, Add.29, under the Rules the Department likely would have determined that he had been subjected to an undue disadvantage under section 202(b).

Add.21; C. Buttram Decl. ¶¶ 5-7, Add.15-16; Dinklage Decl. ¶¶ 6-7, Add.29-30.

The Individual Petitioners also satisfy standing's causation and redressability requirements. *See Iowa League of Cities*, 711 F.3d at 869. Their injuries are caused by the Department's withdrawal of the Rules and would be redressed by a court order vacating that withdrawal and ordering the Department to comply with Congress's command in the 2008 Farm Bill. That the Department would have discretion as to any final rule it might adopt does not alter the analysis. *Cf. Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 n.7 (1992) ("under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered"); *Iowa League of Cities*, 711 F.3d at 871 (where a petitioner asserts a procedural injury, the redressability prong "does not require petitioners to show that the agency would alter its rules upon following the proper procedures").

B. OCM Has Associational Standing

OCM is a membership organization that exists to promote fairness in agricultural markets and to pursue equitable treatment for farmers. Maxwell

Decl. ¶¶ 2, 4-6, Add.32-33. Because the interests at stake here are undoubtedly "germane to [OCM's] purpose," and because, as explained above, the Individual Petitioners have "standing to sue in their own right," OCM has "associational standing" to bring suit on its members' behalves. *Iowa League of Cities*, 711 F.3d at 869 (citation omitted);[6] *see* Maxwell Decl. ¶ 7, Add.33 (confirming the Buttrams' membership in OCM).[7]

In addition, Mike Callicrate is an OCM member, *see* Maxwell Decl. ¶ 8, Add.33, who also would have standing to sue in his own right. Like the Buttrams and Mr. Dinklage, Mr. Callicrate is a farmer who has experienced retaliatory and discriminatory treatment, in his case at the hands of meatpackers—treatment that he could have more easily challenged in court

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[6] The associational standing test also requires that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Iowa League of Cities*, 711 F.3d at 869 (citation omitted). Because OCM claims only that the Department's withdrawal of the rules must be struck down, and that the Department must be ordered to comply with Congress's command in the 2008 Farm Bill, this requirement is satisfied. *See Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 287-88 (1986) (requirement satisfied where a "suit raises a pure question of law"); *see, e.g.*, *AARP v. EEOC*, 226 F. Supp. 3d 7, 20 (D.D.C. 2016) (requirement satisfied where suit challenging agency action seeks only injunctive relief).

[7] The Petition for Review erroneously identified petitioner James Dinklage as a member of OCM. After filing the petition for review, the undersigned learned that while Mr. Dinklage is engaged with OCM's work, he is not presently a member under the terms set forth in OCM's bylaws.

had the Rules not been withdrawn. *See* Callicrate Decl. (Ex. C) ¶¶ 2, 4-6, Add.24-26. Mr. Callicrate's experiences as an OCM member further confirm that OCM has standing to bring this action on its members' behalves.

C. OCM Has Organizational Standing

Having been directly injured by the Department's actions, OCM also has standing in its own right. An entity has organizational standing when it demonstrates "a concrete and demonstrable injury to [its] activities which drains its resources and is more than simply a setback to its abstract social interests." *Nat'l Fed'n of Blind of Mo. v. Cross* ("*NFB*"), 184 F.3d 973, 979 (8th Cir. 1999) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). OCM has set forth "specific facts establishing," first, "distinct and palpable injuries fairly traceable to [the Departments'] conduct," and second, that OCM has been required to "drain[] its resources" to counteract that harm. *Id.* (quoting *Ark. ACORN Fair Hous., Inc. v. Greystone Dev. Co.*, 160 F.3d 433, 435 (8th Cir. 1998)). The Rules' withdrawal, and the Department's failure to comply with the 2008 Farm Bill, have hampered OCM's ability to pursue its mission and disrupted its daily activities in at least three ways. *See* Maxwell Decl. ¶¶ 11-16, Add.33-37.

First, as a result of the Rules' withdrawal, OCM now fields substantially more complaints from farmers regarding packers' and processers' unfair actions. Maxwell Decl. ¶¶ 11-14, Add.33-35. OCM has long counseled individual farmers who face such treatment. *Id.* ¶ 11, Add.33-34. After evaluating an individual farmer's situation, OCM attempts to assist the farmer in finding market alternatives, in understanding his or her options under the Packers and Stockyards Act, and in contacting relevant regulators. *Id.* ¶ 14, Add.35. The Rules' withdrawal has increased the number of requests to OCM for assistance by 50%. *Id.* That has resulted in a substantial increase in the OCM staff time devoted to counseling activities, *id.*, significantly depleting OCM's resources. Were the Rules restored, the burden on OCM would lessen, as farmers would be better able to protect themselves and would lean on OCM less. *See id.*

Second, the Rules' withdrawal has forced OCM to reorient its focus. *Id.* ¶ 15, Add.35-36. Now that farmers' own access to courts is curtailed, OCM—in keeping with its longstanding commitment to fair agricultural markets, but in new and newly urgent ways—must work to ensure that the Department has the resources, capacities, and will to patrol those markets itself. OCM has therefore had to respond to the Rules' withdrawal by establishing a new initiative focused on the Department's enforcement of the

Act. *Id*. Were the Rules restored, OCM could deprioritize this initiative. *See id.*

Third, the resources diverted to providing additional counseling to farmers and establishing a new project oriented around the Department are no longer available for OCM's other key programs. *Id.* ¶ 16, Add.36-37. The consequences for OCM have been stark. Most significantly, OCM has had to suspend its Taking It Back Tour, whereby OCM organizes events in its Board members' states to educate farmers about fairness in the marketplace. *Id.* OCM had planned one event for late 2017 and three events for early 2018, but it has had to cancel all of them in light of the Rules' withdrawal and the corresponding drain on its resources. *Id.* OCM has also had to divert resources away from other programs, including those focused on the upcoming farm bill. *Id.*

These are not mere "setback[s]," and they concern far more than OCM's "abstract social interests." *NFB*, 184 F.3d at 979. Rather, the effects of the Rules' withdrawal on OCM have been drastic and concrete, both in terms of the injuries to OCM and OCM's response. This case, therefore, is not at all like *NFB*, where the putative organizational plaintiff did "not allege[] that the [challenged] policy…impacted *it* in any measurable way," *id.* at 980, or like *Arkansas ACORN Fair Housing*, where the plaintiff "present[ed] no facts to quantify the resources, if any, that [it] expended to counteract the [defendant's challenged conduct]," 160 F.3d at 434.

Rather, OCM faces the same injuries as the organizational plaintiff in *Granville House, Inc. v. Department of Health and Human Services*, where this Court approved organizational standing because the challenged agency action had "perceptibly impaired [the plaintiff's] ability to provide its services" by "caus[ing] it to forego" certain of its traditional activities and by requiring it "to withdraw" somewhat "from its primary mission." 715 F.2d 1292, 1297-98 (8th Cir. 1983). OCM's injuries also resemble those of the plaintiff in *Association of Community Organizations for Reform Now v. Fisher*, where the Fifth Circuit—after a searching analysis—concluded that the organizational plaintiff could proceed where it had put forward evidence to show that it was spending resources to "counteract[]" the defendant's allegedly unlawful activity, observing that such "wasted resources, which [it] could have put to [other] use[s,]…provide[d] [it] with standing." 178 F.3d 350, 361 (5th Cir. 1999).

Likewise, this case resembles *PETA v. U.S. Department of Agriculture*, where the D.C. Circuit recently approved organizational standing because the plaintiff alleged, with sufficient specificity, that the agency's actions had "perceptibly impaired [its] ability to…continue to educate the public," and that it had undertaken "expenditures in response to, and to counteract the effects of the defendants' alleged unlawful acts." 797 F.3d 1087, 1095, 1097 (D.C. Cir. 2015); *see Action Alliance of Senior Citizens of Greater Phila. v. Heckler*, 789 F.2d 931, 938 (D.C. Cir. 1986) (finding organizational standing where the plaintiffs had "alleged inhibition of their daily operations, an injury both concrete and specific to the work in which they are engaged").

As in those cases, OCM has demonstrated in detail the many ways in which the Department's withdrawal of the Rules has hampered its ability to carry out its overall mission, required it to shift and spend its finite resources, and interfered with its day-to-day work. *See* Maxwell Decl. ¶¶ 12-16, Add.34-37. OCM therefore has organizational standing to test the legality of the Department's actions.

II. The Department Is Defying Congress's Mandate in the 2008 Farm Bill, and this Court Must Compel It to Act

The 2008 Farm Bill required the Department, by June 18, 2010, to "promulgate regulations…to establish criteria that the Secretary will consider in determining" whether "an undue or unreasonable preference or advantage has occurred in violation of" section 202(b) of the Packers and Stockyards Act. 122 Stat. at 2120, Add.12. Almost eight years later, the Department still has not complied with Congress's mandate, and it has declared its intention to take "no further action" in response to it. 82 Fed. Reg. at 48,603, App.60. This Court must order the Department to comply with Congress's directive.

A. Under Section 706(1) of the APA, Courts Must Intervene When Agencies Miss Statutory Deadlines to Issue Regulations

Section 706(1) of the Administrative Procedure Act directs that courts "shall compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1); *see also id.* § 551(13) (defining "agency action" reviewable under the APA to include a "failure to act"). As this Court has acknowledged, "[i]t is clear that section 706(1) applies to the situation where a federal agency refuses to act in disregard of its legal duty to act." *EEOC v. Liberty Loan Corp.*, 584 F.2d 853, 856 (8th Cir. 1978). Specifically, as relevant here, when an agency misses a statutory deadline to issue a regulation, the "agency has failed to take a discrete action that it is required to take," *Norton v. S. Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 64 (2004) (emphasis omitted), and section 706(1) requires courts to intervene. Indeed, in *SUWA*, after setting forth the relevant principles, *see id.* at 61-65, the Supreme Court highlighted these very circumstances as the quintessential example of when relief under section 706(1) is warranted:

> For example, 47 U.S.C. § 251(d)(1), which required the Federal Communications Commission "to establish regulations to implement" interconnection requirements "[w]ithin 6 months" of the date of enactment of the Telecommunications Act of 1996, would have supported a judicial decree under the APA requiring the prompt issuance of regulations.

Id. at 65.

Precisely so here. In enacting the 2008 Farm Bill, Congress spoke clearly when it directed the Secretary of Agriculture to "promulgate regulations" establishing "criteria that the Secretary will consider" in determining whether a violation of section 202(b) of the Packers and Stockyards Act has occurred. 122 Stat. at 2120, Add.12. The 2008 Farm Bill required the promulgation of such regulations "[a]s soon as practicable, but not later than 2 years after the date of the enactment of this Act," *id.*, *i.e.*, by June 18, 2010.

The Department is now almost eight years delinquent and has recently declared its intent to take "no further action" to comply. 82 Fed. Reg. at 48,603, App.60. Accordingly, the Department has unlawfully withheld agency action and, under section 706(1) of the APA, this Court must order it to issue the regulations that Congress has required.

Of course, under well-established principles of separation of powers and administrative law, the Court's "judicial decree" cannot "set[] forth the content of those regulations," but neither can the Department continue to ignore Congress's directive. *SUWA*, 542 U.S. at 65. Both in the 2008 Farm Bill and in section 706(1), Congress could not have been more clear. "'Shall' means 'shall.'" *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) (emphasis omitted). As the Tenth Circuit has reasoned:

> [W]hen Congress by organic statute sets a specific deadline for agency action, neither the agency nor any court has discretion. The agency must act by the deadline. If it withholds such timely action, a reviewing court must compel the action unlawfully withheld. To hold otherwise would be an affront to our tradition of legislative supremacy and constitutionally separated powers.

Id. at 1190. Thus, "when an entity governed by the APA fails to comply with a statutorily imposed absolute deadline, it has unlawfully withheld agency action" under section 706(1) of the APA "and courts, upon proper application, must compel the agency to act." *Id.*

To be sure, notwithstanding Congress's mandatory language, certain courts have held that section 706(1) does not mandate intervention when an agency has ignored a statutory deadline. Instead, those courts have fashioned a "rule of reason," considering Congress's deadline as just one of several factors relevant to determining whether relief is warranted. *See, e.g.*, *Telecommunications Research & Action Ctr. v. FCC* ("*TRAC*"), 750 F.2d 70, 80 (D.C. Cir. 1984) (identifying six principles, including whether Congress has provided a deadline, a court should consider in determining whether to grant relief pursuant to section 706(1)); *see also In re Barr Labs.*, *Inc.*, 930 F.2d 72 (D.C. Cir. 1991) (applying the *TRAC* factors in a case where an agency exceeded a statutory deadline).

To Petitioners' knowledge, the question presented here—whether when an agency misses a statutory deadline to issue a regulation, "shall means shall" in section 706(1) or, instead, permits discretion—is one of first impression in this Circuit. For the reasons explained below, Petitioners urge this Court to follow the Tenth Circuit in holding that Congress's clear language means courts cannot deny relief where, as here, an agency has unlawfully withheld agency action by failing to promulgate statutorily mandated regulations within a statutorily mandated period of time.

1. The plain meaning of section 706(1) requires courts to compel agency action unlawfully withheld

"As with any question of statutory interpretation," this Court "turn[s] first to the plain language of the statute." *Stanley v. Cottrell, Inc.*, 784 F.3d 454, 466 (8th Cir. 2015) (citing *Hardt v. Reliance Std. Life Ins. Co.*, 560 U.S. 242, 251 (2010)). In doing so, this Court must "'presume that a legislature says in a statute what it means and means in a statute what it says.'" *Id.* (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). If the words of a statute are unambiguous, this Court's inquiry is "complete." *Id.*

Section 706(1) of the APA states that courts "shall" compel agency action unlawfully withheld. 5 U.S.C. § 706(1). The Supreme Court and this Court have made clear that, when Congress uses mandatory language, it means what it says. *See Murphy v. Smith*, 138 S. Ct. 784, 787 (2018) ("The word 'shall' usually creates a mandate, not a liberty."); *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (holding that by using the word "shall" in the civil forfeiture statute, "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied"); *Pierce v. Underwood*, 487 U.S. 552, 569-70 (1988) (holding that Congress's use of the "word" shall in a housing subsidy statute constituted "mandatory language"); *McLaurin v. Prater*, 30 F.3d 982, 984-85 (8th Cir. 1994) ("The statute's use of the word 'shall'…is a mandatory command. Despite [defendant's] protestations to the contrary, 'shall' does not mean 'may' or 'is permitted to'; 'shall' has been consistently understood to mean that something is required.").

The mandatory nature of the word "shall" applies with no less force when Congress uses it to direct courts to act in certain ways. *See Murphy*, 138 S. Ct. at 787 (observing that Congress's use of the word "shall" "tells us that the district court has some nondiscretionary duty to perform"). Indeed, as the Supreme Court has reaffirmed on several occasions, the word "shall" "normally creates an obligation *impervious to judicial discretion*." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (emphasis added) (citing *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947)).

Take, for example, the Supreme Court's recent decision in *Murphy*, which considered whether a district court has discretion under 42 U.S.C. § 1997e(d)(2). 138 S. Ct. at 786. That statute provides that when a prisoner wins a civil rights suit and the district court awards fees to the prisoner's attorney, "a portion of the [prisoner's] judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." 42 U.S.C. § 1997e(d)(2). The Court held that the use of the phrase "shall be applied" created a "mandate" that the "district court must apply as much of the judgment as necessary to satisfy the fee award, without of course exceeding the 25% cap." *Id.* at 787. "If Congress had wished to afford the judge more discretion in this area, it could have easily substituted 'may' for 'shall.'" *Id.* But, as the Supreme Court observed, "Congress didn't…. And respect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own." *Id.* at 787-88.

That principle applies here with equal force. Congress could have chosen to draft section 706(1) of the APA to state that a court "*may*," or "*is* *authorized to*," compel agency action unlawfully withheld or unreasonably delayed. But it didn't. And this Court must give effect to the statute as written. Accordingly, Congress's use of the word "shall" in section 706(1) means that courts lack discretion to refrain from compelling agency action once it is determined that an agency has "unlawfully withheld" agency action. *See Forest Guardians*, 174 F.3d at 1186-89.

2. Contrary decisions that find room for discretion in the APA's mandatory language are misguided

Despite section 706(1)'s mandatory language, the D.C. Circuit has held that claimants appealing to that provision are effectively seeking a writ of mandamus, which is an equitable form of relief that "does not necessarily follow a finding of a violation." *In re Barr Labs.*, 930 F.2d at 74. Accordingly, in the D.C. Circuit's view, the relevant question in cases involving statutory deadlines is "whether [a court] should exercise [its] equitable powers to enforce the deadline." *Id.* This question is in turn informed by the six "*TRAC* factors" fashioned by the D.C. Circuit to guide courts in determining when to grant section 706(1) mandamus relief. *See* 750 F.2d at 80.

The D.C. Circuit's holding in *TRAC* is based on that court's reading of another provision of the APA—the waiver of sovereign immunity in section 702—which provides, in relevant part, that a claimant

> seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States…. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States[.]

5 U.S.C. § 702. This waiver of sovereign immunity is subject to, as relevant here, one important caveat: "Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." *Id.*

It is the "herein" caveat in section 702 that grounds the D.C. Circuit's belief that a court retains equitable discretion to deny relief under section 706(1), even where an agency has clearly defied a statutory deadline. According to the D.C. Circuit, the "herein" clause in section 702 means that Congress has waived the government's sovereign immunity only as to nonmonetary, discretionary forms of relief—*i.e.*, injunctive, mandamus, or declaratory relief. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207-08 (D.C. Cir. 1985). And, the reasoning goes, courts are empowered to grant such relief not by the APA itself but instead by the All Writs Act, which provides that "[t]he Supreme Court and all courts established by an Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651(a). Thus, the D.C. Circuit has held that section 706(1)'s mandatory language is irrelevant because, under section 702, nothing in the APA limits or precludes legal or equitable defenses, and the power to grant a writ of mandamus to compel agency action comes not from section 706(1) but rather from the All Writs Act. *TRAC*, 750 F.2d at 76-77.

This conclusion misinterprets the meaning of the word "herein" in section 702, renders section 706(1) superfluous in violation of traditional principles of statutory interpretation, and misapplies the All Writs Act.

First, section 702's use of the word "herein" refers *only to section 702 itself*. This interpretation is supported by the provision's statutory and legislative history. Section 702 was expanded in 1976 to include language that waived the government's right to raise a sovereign immunity defense. *See* Pub. L. No. 94-574, 90 Stat. 2721 (1976). Crucially, as the House Report accompanying that amendment makes clear, the "herein" caveat immediately following the sovereign immunity waiver was added to clarify that nothing in the *amendment* itself was "intended to affect or change defenses other than sovereign immunity." *See* H.R. Rep. 94-1656, at 12 (1976). In other words, the "herein" caveat means only that section 702 does not limit or preclude the government's ability to raise any legal or equitable defense except for the defense of sovereign immunity. But section 706(1), by its plain terms, *does* limit the government's ability to raise equitable defenses, specifically when a claimant identifies agency action unlawfully withheld. And "it is a commonplace of statutory construction that the specific governs the general." *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 941 (2017) (citation omitted).

Second, if the D.C. Circuit's reading of section 702 is correct, then section 706(1) is rendered superfluous, in violation of another canon of statutory construction. If the "herein" caveat in section 702 means that claimants challenging agency inaction must invoke the All Writs Act, seek a writ of mandamus, and appeal to courts' equitable discretion to compel agency action, then section 706(1)—where Congress has provided that courts "*shall*…compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1) (emphasis added)—has no meaning. That cannot be. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (citations omitted)).

Third, the D.C. Circuit's reliance on the All Writs Act as a reason to ignore the standard for compelling agency action unlawfully withheld in section 706(1) is misplaced. "The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute." *Pa.*

Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 43 (1985). But "[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Id.* For example, in *Pennsylvania Bureau of Correction v. U.S. Marshals Service*, a district court, relying on the All Writs Act, issued a writ of habeas corpus, directing the Marshals Service to transport prisoners not in their custody. The federal habeas statute, by contrast, would have limited such a directive to the prisoners' custodians. *Id.* The Supreme Court held this directive unlawful: "Although the [All Writs] Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Id.*

Likewise here. Section 706(1) of the APA specifically mandates that a court "shall…compel agency action unlawfully withheld." 5 U.S.C. § 706(1). It is, therefore, this specific statutory mandate that should supply the standard for determining whether to issue an order compelling the agency to act in this case.

B. Even if this Court Determines that Section 706(1) Permits Discretion, this Court Should Still Compel the Department to Adhere to Congress's Directive

Even if this Court finds that it retains equitable discretion to determine whether relief is warranted in the case of a missed statutory deadline under section 706(1) of the APA, it should still grant relief here. As noted above, the D.C. Circuit has identified six factors to guide a court in determining whether to issue orders compelling agency action:

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is "unreasonably delayed."

TRAC, 750 F.2d at 80 (citations omitted). Here, these factors counsel in favor of issuing an order directing the Department to comply with Congress's mandate in the 2008 Farm Bill.

As to the first two factors, the two-year deadline established in the 2008 Farm Bill provides content to the "rule of reason" governing the reasonableness of the Department's ongoing delay in this case. The

Department is now almost eight years late and has expressly stated that it has no intention of moving forward with a rulemaking to comply with the Farm Bill's directive. This Court should therefore issue an order to compel compliance.

The third, fourth, and fifth factors—which require a court to balance the effect of the delay on public health and welfare and on other prejudiced interests against any competing agency priorities—likewise tip in favor of judicial intervention. Congress determined that the mandated regulations would directly benefit the lives and livelihoods of farmers across this country, including the Individual Petitioners. Each Individual Petitioner has been subjected to unfairly discriminatory and predatory practices precisely because he or she chose to exercise rights of speech and association—practices that the Department's proposed regulations would have confirmed as unlawful. *See* 82 Fed. Reg. at 92,706, App.33. The Department's delay in promulgating such regulations thus directly touches the lives and welfare of the Individual Petitioners and severely prejudices their interests in continuing to participate in increasingly concentrated markets, contrary to Congress's directives. The Department has not identified, and cannot identify, an issue that should be given any higher priority.

Finally, as to the sixth factor, while the Court need not find any "impropriety" in the Department's delay under *TRAC*, 750 F.2d at 80, the Department's avowed intent to "take no further action" in response to Congress's mandate, 82 Fed. Reg. at 48,603, App.60, should rightly cause this Court some concern.

For these reasons, even if the Court were to apply the "rule of reason" set forth in *TRAC*, it should compel the Department to comply with Congress's command.

III. The Department's Withdrawal of the Farmer Fair Practices Rules Was Arbitrary and Capricious

The Department has violated the law in an additional way: its reasons for rescinding the IFR and abandoning the NPRM are arbitrary and capricious under the APA. 5 U.S.C. § 706(2)(A). Accordingly, this Court must set aside the Department's withdrawal of the Rules.[8]

[8] The APA's requirement of reasoned decisionmaking applies to the Department's decision to take no further action on the NPRM. "An agency decision" not to act "after a notice and comment period is reviewable agency action." *NRDC v. EPA*, 824 F.2d 1146, 1150 (D.C. Cir. 1987) (en banc); *see, e.g.*, *Int'l Union, United Mine Workers of Am. v. U.S. Dep't of Labor*, 358 F.3d 40, 43-44 (D.C. Cir. 2004) ("Although the [agency's] publication of the proposed…rule certainly did not obligate it to adopt that rule (or, for that matter, any rule), the agency was not free to terminate the rulemaking for no reason whatsoever." (citation omitted)).

It is fundamental that, in order to comply with the APA, "an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). The agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (citation omitted). Where an agency "entirely fail[s] to consider an important aspect of the problem," *id.*, or acts on the basis of "an improper understanding of the law," the agency's action is arbitrary, capricious, and an abuse of discretion under section 706(2)(A) of the APA, *Kazarian v. U.S. Citizenship & Immigration Servs.*, 596 F.3d 1115, 1118 (9th Cir. 2010); *see SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("an order may not stand if the agency has misconceived the law").

Agencies do not get a pass when they attempt to deregulate. *See State Farm*, 463 U.S. at 42 ("[T]he forces of change do not always or necessarily point in the direction of deregulation."). To the extent "Congress established a presumption from which judicial review should start, that presumption…[is] *against* changes in current policy that are not justified by the…record." *Id.* Accordingly, where an agency changes its policy, even if it need not always satisfy a "heightened standard," it must still "provide reasoned explanation for its action," "display awareness that it is changing position," and "show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009) (emphasis omitted); *see, e.g.*, *Friends of Boundary Waters Wilderness v. Bosworth*, 437 F.3d 815, 828 (8th Cir. 2006) (courts provide "considerably less deference to agency reversals of position than to longstanding agency views" (citing *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993))).

The Department has not provided sufficient reasons for changing course and abandoning the Farmer Fair Practices Rules.

A. The Department's Overarching Rationale for Withdrawing the Farmer Fair Practices Rules Runs Directly Counter to Its Reason for Issuing Them in the First Place

In issuing the Rules, the Department trumpeted the benefits, to individuals and the market as a whole, of making it easier for farmers to avail themselves of the protections that the Packers and Stockyards Act provides. In withdrawing the Rules, the Department adopted the exact opposite perspective, saying less litigation is better. But crucially, the Department has failed to explain how it got from point A to point B, from favoring to disfavoring easing farmers' access to courts under the Act. Nowhere does it explain why its new position is good policy when it had previously determined it was not. Because the Department has not set forth adequate, or indeed *any*, "good reasons for [its] new policy," its orders rescinding the Rules are arbitrary and capricious and must be set aside. *Fox*, 556 U.S. at 515.

In issuing the IFR, the Department identified numerous benefits that would flow from increased private enforcement of the Packers and Stockyards Act. Increased enforcement by farmers, the Department said, would "serve to strengthen the protection afforded the nation's livestock producers and poultry growers." 81 Fed. Reg. at 92,571, App.6. It would begin to address various structural issues in certain agricultural markets—discussed at length, *see id.* at 92,574-76, App.9-11—by alleviating hold-up problems, making contracts easier to enforce, incentivizing packers and processors "to avoid exploitation of market power and asymmetric information" and other "behaviors that result in the market failure," and increasing efficiency, *id.* at 92,576, App.11. In sum, the Department concluded that the IFR would permit producers and growers "to have more protections and be treated more fairly." *Id.* at 92,587, App.22. That, in turn, would lead to "more equitable contracts," fewer "instances of unfair, unjustly discriminatory, or deceptive practices," and "increased efficiencies in the marketplace"— "benefit[s]" that would "accrue to all segments of the value chain in the production of livestock and poultry, and ultimately to consumers." *Id.* at 92,587-58, App.22-23.

So, too, in the NPRM: the Department described how additional clarity regarding what conduct violates sections 202(a) and (b) of the Act would "promote fairness and equity," *id.* at 92,712, App.39; "deter violations"; "lower …costs throughout the entire production and marketing complex of all livestock, poultry, and meat"; and "improve efficiencies in the regulated markets…and reduce market failures" by "increas[ing] the amount of relevant information to market participants" and "foster[ing] competition," *id.* at 92,717, App.44. Specifically, the Department explained the benefits of "providing notice to all market participants of specific examples of conduct…that, absent demonstration of a legitimate business justification, [is] unfair, unjustly discriminatory, or deceptive," including "retaliatory conduct" and "failure to ensure accurate scales and weights." *Id.* at 92,717-18, App.44-45. Such benefits, the Department said, include "reduc[ing] the risk of violat[ions of] sections 202(a) and 202(b)" and "establishing parity of negotiating power between packers, swine contractors, and live poultry dealers and livestock producers, swine production contract growers, and poultry growers by reducing the ability to use market power with the resulting deadweight losses." *Id.* at 92,718, App.45.

So why, then, did the Department decide to withdraw the Farmer Fair Practices Rules? What changed? Not "the underlying facts and reasoning," which the Department said had "not changed to any material extent" between the issuance and the rescission of the Rules. 82 Fed. Reg. at 48,600, App.57. Indeed, the Department admitted that by rescinding the IFR, it was foregoing "broader protection and fair treatment" for producers and growers. *Id.*

Rather, what shifted was the Department's desired policy outcome. Where the Department once wanted more private enforcement of the Act, the Department now wants less. The Department states, without further explication, that "an increase in litigation…serves neither the interests of the livestock and poultry industries nor GIPSA." *Id.* at 48,601, App.58 (IFR rescission); *see id.* at 48,603, App.60 (NPRM abandonment) (similar). Without saying why, the Department credits those commenters who opposed the Rules on grounds that they "would embolden producers and growers to sue for any perceived slight by a packer or integrator." *Id.* at 48,594, App.51 (IFR rescission); *see id.* at 48,603, App.60 (NPRM abandonment) (similar). The Department does so even though it initially supported the Rules precisely because they would lower the costs of litigation for farmers, resulting in myriad benefits cataloged by the Department and summarized above. The loss of those benefits is undoubtedly "an important aspect of the problem" associated with withdrawing the Rules, and the Department's utter "fail[ure] to consider" that loss is fatal. *State Farm*, 463 U.S. at 43.

Finally, although the Department pays lip service to the "livestock and poultry industries[']…vested interest in understanding what conduct or actions violate" sections 202(a) and (b) of the Act, 82 Fed. Reg. at 48,603, App.60, the Department has decided not to provide examples of prohibited conduct, or to set forth the criteria it uses to determine when violations of section 202(b) have occurred—criteria that Congress has required it to publish. Rather, without even mentioning Congress's mandate—certainly, a "relevant factor[]" under the APA, *State Farm*, 463 U.S. at 42—the Department has returned to a "case-by-case" approach, 82 Fed. Reg. at 48,604, App.61.

The Department is permitted, of course, to change its mind about the value of robust private enforcement of the Act—at least within the bounds of the discretion that Congress has provided. *See Fox*, 556 U.S. at 514-15. But under the APA, it is not permitted to do so without adequate justification—without "show[ing] that there are good reasons for [its] new policy." *Id.* at 515. Here, the Department has provided none: its orders do not disclose any reason why it now opposes increased private enforcement of the Act, or increased clarity concerning what conduct the Act prohibits. Accordingly, the Department's orders withdrawing the Farmer Fair Practices Rules are arbitrary and capricious, *see id.*; *Friends of Boundary Waters Wilderness*, 437 F.3d at 828, and must be "set aside," 5 U.S.C. § 706(2)(A).

B. The Department's Additional Reasons for Withdrawing the IFR Do Not Withstand Scrutiny

The Department provided two additional reasons for withdrawing the IFR. First, in yet another reversal from its previous position, the Department now believes that courts would not have deferred to the IFR's interpretation of the Packers and Stockyards Act, and second, the Department now claims that its decision to issue the IFR without another round of notice and comment was legal error. Neither explanation satisfies the APA's requirement of reasoned decisionmaking, and neither saves the Department's withdrawal of the IFR. *See Int'l Union*, 358 F.3d at 44-45 (granting petition for review where, although one rationale advanced by the agency was adequate, others were not).

<u>Deference.</u> In issuing the IFR, the Department explained that it was codifying its longstanding interpretation of the Packers and Stockyards Act in regulation because, in the absence of such codification, courts had refused to defer to it. 81 Fed. Reg. at 92,568 & n.15, App.3 (citing *Been v. O.K. Indus.*, 495 F.3d 1217, 1226-27 (10th Cir. 2007)). For example, in *Been*, the

Tenth Circuit discounted the value of amicus briefs that the Department had submitted to defend its interpretation, reasoning that they "do not reflect the deliberate exercise of interpretive authority that regulations…demonstrate." 495 F.3d at 1227 (citation omitted). The court held that absent such a regulation, deference was not warranted. *See id*. Accordingly, the Department explained that it was issuing the IFR to answer such concerns, and that the IFR "[might] constitute a material change in circumstances that [would] warrant[] judicial reexamination of the issue." 81 Fed. Reg. at 92,568, App.3.

In rescinding the IFR, the Department changed its tune, once again without adequate justification. The Department now believes that courts—or at least two courts, the Fifth and the Eleventh circuits—would not have deferred to the IFR. *See* 82 Fed. Reg. at 48,596-97, App.53-54 (discussing *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (en banc); *London v. Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir. 2005)). But the Department's assessment of why the Fifth and Eleventh circuits would refuse deference to an agency rule is flawed.

The Department invokes the Supreme Court's decision in *Brand X*, which held that where an appellate court has found a statute to have a clear, unambiguous meaning, *stare decisis* demands that that court not subsequently defer to an agency's contrary interpretation. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 984 (2005). Contrary to the Department's assessment, however, it is not at all clear that *Wheeler* and *London* in fact found the Packers and Stockyards Act unambiguous. Indeed, in *Wheeler* the Fifth Circuit *emphasized* the elasticity of the statutory text. 591 F.3d at 363 ("'unfair,' 'unjust,' 'undue,' and 'unreasonable'" are statutory terms that have multiple dictionary meanings and "do not" necessarily "extend to the outer limits of their definitional possibilities" (citation omitted, alteration adopted)).

Moreover, in both *Wheeler* and *London* the courts looked well beyond the statutory text in determining its meaning. *See id.* at 362-63 (considering what "motivated Congress to pass the Act," policy concerns favoring "predictab[ility] and consisten[cy]," and other "outside sources," even while acknowledging that doing so "may be inappropriate when determining the meaning of an unambiguous statute"); *London*, 410 F.3d at 1302-04 (considering "the purposes Congress sought to serve," "the backdrop of corruption the Act was intended to prevent," the Act's "antitrust ancestry," legislative history," and "[p]olicy considerations"). Setting aside the permissibility of such methods in general, the Supreme Court has explicitly forbidden them for determining the meaning of unambiguous statutory text.

See Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) ("Extrinsic materials have a role in statutory interpretation *only to the extent* they shed a reliable light on the enacting Legislature's understanding of *otherwise ambiguous terms*." (emphasis added)). Thus, to accept the Department's reasoning—that the Fifth and Eleventh circuits deemed the Act unambiguous—would be to assert that those courts ignored the Supreme Court's directive.

Finally, a prediction that two courts of appeal, out of a dozen, might continue to refuse deference does not justify abandoning an effort that inevitably aimed for the Supreme Court. Nor were *Wheeler* and *London* unknown to the Department when it promulgated the IFR. *See* 81 Fed. Reg. at 92,568 & n.13, App.3. Ultimately, the Department has not adequately explained why it now believes that promulgating the IFR would not buttress its interpretation of the Packers and Stockyards Act.

<u>Notice and comment.</u> The Department's claim that the IFR erred in invoking the APA's "good cause" exception, *see* 82 Fed. Reg. at 48,598-99, App.55-56, makes no sense. Upon establishing good cause, the APA permits an agency to issue a regulation without undergoing notice and comment. 5 U.S.C. § 553(b), (c). But here, the IFR did *not* invoke the APA's good cause exception, and it did not need to. Rather, the IFR

explained that the Department had "fulfilled the [APA's] notice and comment requirement" because, in the Department's June 2010 proposed rule, it solicited comments about promulgating its interpretation as a regulation. 81 Fed. Reg. at 82,570, App.5. That conclusion was legally correct; the Department's new view—that courts would conclude that the rulemaking record was too "stale," 82 Fed. Reg. at 48,599, App.56—is legal error, and therefore cannot support its order withdrawing the IFR, *see Chenery*, 318 U.S. at 94.

The Supreme Court has instructed courts to be "extremely reluctant" to vacate agency action on the basis of staleness challenges. *Miss. Indus. v. FERC*, 808 F.2d 1525, 1567 (D.C. Cir.) (citing *ICC v. Jersey City*, 322 U.S. 503, 514 (1944)), *revised on reh'g en banc*, 822 F.2d 1104 (D.C. Cir. 1987); *see Am. Optometric Ass'n v. FTC*, 626 F.2d 896, 906 (D.C. Cir. 1980) ("Courts are properly reluctant to base a remand of an agency's decision on the ground that the decision relies on evidence which has grown stale."). And where courts do so, it is typically because "a court [had] vacated the agency rule at issue, thus taking the rule off the books and reinstating the prior regulatory regime," and the agency attempted to promulgate a new rule on the basis of its old rulemaking record. *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 84 (D.D.C. 2007).

Here, the Department has provided no valid reason to suggest that courts would have taken the rare step of vacating the IFR on staleness grounds. That is particularly so given the substantial rulemaking record that supported the IFR, consisting of three public meetings, five joint public workshops, and 61,000 comments. *See* 81 Fed. Reg. at 92,566-67, App.1-2. Indeed, it is hard to imagine what gap of time might prompt a court to preclude the Department from promulgating its longstanding interpretation of the Packers and Stockyards Act.

CONCLUSION

The Department's withdrawal of the Farmer Fair Practices Rules cannot withstand scrutiny, and its failure to comply with Congress's mandate in the 2008 Farm Bill is clear. Accordingly, Petitioners respectfully request that the Court vacate the withdrawal of the Rules and order the Department to issue the mandated regulations.

Dated: March 29, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 12,484 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Times New Roman font in a size equivalent to 14 points or larger.

Dated: March 29, 2018

/s/ *Karianne M. Jones*
Karianne M. Jones

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2018, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM-ECF system.

Dated: March 29, 2018

/s/ *Karianne M. Jones*
Karianne M. Jones

No. 17-3723

In the

United States Court of Appeals

for the

Eighth Circuit

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

Petitioners,

– v. –

U.S. DEPARTMENT OF AGRICULTURE; SONNY PURDUE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE; AND THE UNITED STATES OF AMERICA,

Respondents.

PETITIONERS' ADDENDUM

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TABLE OF CONTENTS

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 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 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

[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).

[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]

[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).

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]

[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.

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

[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

[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] S*ee 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)).

[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.

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 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

[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).

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 pre-empt 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]

BILLING CODE 3410–KD–P

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. 92(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.

[FR Doc. 2017–22588 Filed 10–17–17; 8:45 am]

BILLING CODE 3410–KD–P

7 USC 228 note.

SEC. 11006. REGULATIONS.

Deadline.

As soon as practicable, but not later than 2 years after the date of the enactment of this Act, 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—

(1) whether an undue or unreasonable preference or advantage has occurred in violation of such Act;

(2) whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement;

(3) when a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of such Act; and

(4) if a live poultry dealer or swine contractor has provided a reasonable period of time for a poultry grower or a swine production contract grower to remedy a breach of contract that could lead to termination of the poultry growing arrangement or swine production contract.

Exhibit A

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ORGANIZATION FOR COMPETITIVE MARKETS; JONATHAN BUTTRAM; CONNIE BUTTRAM; and JAMES DINKLAGE, *Petitioners*, v. U.S. DEPARTMENT OF AGRICULTURE; SONNY PERDUE, in his official capacity as SECRETARY OF AGRICULTURE; and the UNITED STATES OF AMERICA, *Respondents*.	No. 17-3723

DECLARATION OF CONNIE BUTTRAM

I, Connie Buttram, hereby state, under penalty of perjury, that the following information is true to my knowledge, information, and belief:

1. I was born in 1964 in Marshall County, Alabama. I live with my husband, Jonathan Buttram, at 5662 County Road 3, Albertville, AL, 35951, on our farm, which we purchased in the late 1990s. The farm is in my name, and I have worked on it since we purchased it. I worked on it full-time starting in the mid-2000s.

2. I am a voting member of the Organization for Competitive Markets ("OCM"). I also serve as the Secretary of Alabama Contract Poultry Growers Association ("ACPGA").

3. Given my work with OCM and ACPGA, and as a farmer, I know about the Department of Agriculture's Farmer Fair Practices Rules.

4. As Jonathan detailed in his declaration, Koch Foods has the contract to provide chicks for the broiler houses on our Albertville farm. They breached this contract by refusing to provide, or place, chicks on our farm. In the fall of 2016, after Koch Foods became aware of Jonathan's escalating work to educate the public about abuses in the poultry industry and the poultry marketplace, Koch Foods demanded that I meet with them to tell them about Jonathan's activities. I declined the meeting. I told them that they needed to speak with Jonathan, not me. In response, and in retaliation, Koch Foods stopped placing chicks on our farm.

5. Before Koch Foods stopped placing chicks on our farm, I had planned to operate the broiler houses on the farm for at least five more years.

6. With Jonathan, I considered pursuing claims in court under the Packers and Stockyards Act against Koch Foods for their retaliatory and discriminatory actions against Jonathan and me, but the possibility that we would have to establish competitive injury, and uncertainty regarding whether such actions would be deemed unfair, unjustly discriminatory, or unreasonably prejudicial under the Act, stood as significant obstacles to our doing so. If it was clear that we would not have to demonstrate competitive injury, and that Koch Foods's actions would be deemed unfair, unjustly discriminatory, or unreasonably prejudicial under the Packers and Stockyards Act, we would consider pursuing claims against Koch Foods under the Act.

7. Given the retaliation we faced at the hands of Koch Foods, and the difficulties we would have faced seeking a remedy in court under the Packers and Stockyards Act, Jonathan and I no longer operate broiler houses. If we could hold poultry companies accountable for their unlawful actions, we would attempt to become

growers again, although the costs to resume operations—operations that ceased on account of poultry companies' unfair, retaliatory, and discriminatory actions against us—would be substantial.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 27 day of March 2018,

Connie Buttram

Connie Buttram

Exhibit B

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ORGANIZATION FOR COMPETITIVE MARKETS; JONATHAN BUTTRAM; CONNIE BUTTRAM; and JAMES DINKLAGE, *Petitioners,* v. U.S. DEPARTMENT OF AGRICULTURE; SONNY PERDUE, in his official capacity as SECRETARY OF AGRICULTURE; and the UNITED STATES OF AMERICA, *Respondents.*	No. 17-3723

DECLARATION OF JONATHAN BUTTRAM

I, Jonathan Buttram, hereby state, under penalty of perjury, that the following information is true to my knowledge, information, and belief:

1. I reside with my wife, Connie Buttram, at 5662 County Road 3, Albertville, AL, 35951. We live on our farm, where we have grown chickens under contract for poultry companies, also known as processors or integrators, for twenty years.

2. I was born in 1956 in Dekalb County, Alabama. I have been a farmer all of my life. My father became a chicken farmer in the 1950s, and our family bought and sold many chicken farms over the years. I personally have been growing chickens since around 1978, and I estimate that I have hands-on grown about 56 million chickens. I am also currently a cattle farmer.

3. I am a voting member of the Organization for Competitive Markets ("OCM"), and I also serve on OCM's Board of Directors.

4. In addition, I have been involved with the Alabama Contract Poultry Growers Association ("ACPGA"), which works to improve the social and economic well-being of growers, for many years. I now serve as its President. ACPGA currently has approximately 650 members. Members of ACPGA are permitted to buy propane—necessary for poultry growing operations—at a discounted rate through a contract ACPGA negotiated with United Propane Gas in Paducah, Kentucky.

5. Given my work with OCM and ACPGA, and as a farmer, I know about the Department of Agriculture's Farmer Fair Practices Rules.

6. Most recently, I have operated chicken houses on two farms in Alabama. In the mid-1980s, my father built chicken houses, which ultimately numbered twelve, on a farm near Geraldine, Alabama. I worked those houses with my father and then, when it looked like he was about to lose his contract, took them over from him in the late 1990s. Then, around 1998, Connie and I bought the farm where we currently live, near Albertville, Alabama. The Albertville farm, which is in Connie's name, has two chicken houses on it, and we currently run about 80 cattle on this farm as well. In the course of being involved in the operation of poultry farms, I have experienced retaliation at the hands of poultry companies on account of my efforts to advocate for growers.

7. During the time I worked on the Geraldine farm, I was engaged in efforts to secure better treatment for growers from Gold Kist, the chicken producer with which I contracted (and that was later acquired by Pilgrim's Pride). In particular, among other things, I worked to elect a grower to Gold Kist's board of directors. My efforts included

organizing other growers to support his candidacy, to bring our perspective to the table. I also, in conjunction with ACPGA, worked to facilitate local growers' ability to purchase discounted propane from United Propane Gas, over poultry companies' objections.

8. In response, representatives from Gold Kist and Pilgrim's Pride threatened me repeatedly and warned me to stop my advocacy efforts. Ultimately, Pilgrim's Pride terminated the contract with the Geraldine farm. I believe that the cancellation was in retaliation for my work to improve conditions for growers.

9. I subsequently contracted with Koch Foods for the chicken houses on the Geraldine farm. However they, too, retaliated against me. Specifically, in retaliation for my advocacy, Koch Foods "blackballed" me by ensuring that the chicks delivered to the Geraldine farm were among the worst from the hatchery—from newly laying hens or old hens, or female chickens that had been separated from male chickens. These chicks were often lethargic and exhibited lack of vigor and vitality. Therefore, they were unlikely to grow very fast or get very large, reducing my compensation. Koch Foods also delivered subpar feed to me. Finally, after a Koch Foods representative vandalized two chicken houses on the Geraldine farm, I cancelled that contract with Koch Foods and shut the Geraldine farm down.

10. Koch Foods still had the contract on the Albertville farm. Connie and I experienced discriminatory treatment and retaliation there, too, on account of my advocacy work. For example, when the chickens were brought to the processing plant for weighing, Koch Foods representatives manipulated the scales so that they would record lower weights, reducing what they had to pay. In addition, one or two times, Koch Foods attempted to bill us for feed that they did not actually deliver to the Albertville farm.

11. Koch Foods's most recent, and most severe, act of retaliation is described in Connie's declaration. Koch Foods has also refused to contract with my children, or place chickens with them.

12. I considered pursuing claims in court under the Packers and Stockyards Act against poultry companies for their retaliatory and discriminatory actions against my family and me, but the possibility that we would have to establish competitive injury, and uncertainty regarding whether such actions would be deemed unfair, unjustly discriminatory, or unreasonably prejudicial under the Act, stood as significant obstacles to our doing so. If it was clear that we would not have to demonstrate competitive injury, and that the poultry companies' actions would be deemed unfair, unjustly discriminatory, or unreasonably prejudicial under the Packers and Stockyards Act, we would consider pursuing claims against the poultry companies under the Act.

13. Given the retaliation we faced at the hands of poultry companies, and the difficulties we would have faced seeking a remedy in court under the Packers and Stockyards Act, I no longer operate chicken houses. If we could hold poultry companies accountable for their unlawful actions, we would attempt to become growers again, although the costs to resume operations—operations that ceased on account of poultry companies' unfair, retaliatory and discriminatory actions against us—would be substantial.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 27 day of March 2018,

Jonathan Buttram

Exhibit C

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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

Petitioners,

v.

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

Respondents.

No. 17-3723

DECLARATION OF MIKE CALLICRATE

I, Mike Callicrate, hereby state, under penalty of perjury, that the following information is true to my knowledge, information, and belief:

1. I am a voting member of the Organization for Competitive Markets ("OCM") and currently serve on OCM's Board of Directors. I've been a part of OCM since it was founded in 1998. I served as OCM's Vice President from 1999 to 2000 and again from 2008 to 2011, and as OCM's President from 2012 to 2016.

2. I was born in 1951, and I grew up in rural Colorado. In 1975, I moved to St. Francis, Kansas, where I still reside, to start my own farming, ranching, and cattle feeding business.

3. Given my work with OCM and as a farmer, I know about the Department of Agriculture's Farmer Fair Practices Rules.

4. Beginning around 1990, with consolidation increasing in the cattle industry, I became involved in efforts to advocate on behalf of small farmers, and spoke out repeatedly against the unfair and anticompetitive business practices of big meatpackers. I helped to found two national groups—OCM and R-CALF USA—to provide independent voices for small farmers, and I also helped to found a number of state-based advocacy groups. I speak out to the federal government and to state governments on these issues, I advocate in the press, and I maintain a blog. The meatpackers know my work well. For example, in 1996, I was asked to be on a panel in South Dakota at the governor's beef conference, where I challenged Bob Peterson, then the president of Iowa Beef Processors, which has since become Tyson Fresh Meats. Mr. Peterson was advocating for increased concentration in the agricultural markets, and I pushed back, asserting that big companies are not better, and that denying people a fair price for what they produce is not a good thing. I have also been involved in a number of court cases and other legal actions involving meatpackers.

5. The meatpackers retaliated against me for my advocacy efforts. First, they tried to bid me below the market—to pay less for cattle raised on my feedlot than they were paying for cattle raised on other feedlots. That disadvantaged me: because their lowballing meant that farmers could take their cattle to another feedlot and get a better price, I lost business. Then, eventually, all four of the big meatpackers refused to buy from me. At the end of December 1998, a representative from the only packer I was able to sell to at that point admitted to me directly that he had been instructed not to buy my cattle. In response, in January of 1999, I called the then-Secretary of Agriculture, Dan Glickman, asking why he didn't enforce the Packers and Stockyards Act. I said that if he

would have enforced the Act, I wouldn't be in the position I was in. He responded that we needed big companies to do business in the global market. Secretary Glickman called ConAgra in Greeley, Colorado, and told them to buy all my cattle. I shut down my feedlot, laying off 15 people. Since then, I have used my feedlot at a greatly reduced occupancy for feeding cattle for Ranch Foods Direct, a meat company that I own. I also grow a few calves and stocker cattle for sale in the feeder market. That market, too, is consolidating, and I believe that the big players there, like the big meatpackers, know that I'm a voice for small farmers, and they want my operations to fail.

6. My ability to pursue claims under the Packers and Stockyards Act has been and is hampered by the possibility of having to prove competitive injury, and by uncertainty regarding what kinds of actions qualify as unlawful or unreasonably prejudicial. Without those obstacles, I would more readily seek redress in court for the retaliation and discrimination that I have experienced.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 27th day of March 2018,

____

Mike Callicrate

Exhibit D

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ORGANIZATION FOR COMPETITIVE MARKETS; JONATHAN BUTTRAM; CONNIE BUTTRAM; and JAMES DINKLAGE, *Petitioners*, v. U.S. DEPARTMENT OF AGRICULTURE; SONNY PERDUE, in his official capacity as SECRETARY OF AGRICULTURE; and the UNITED STATES OF AMERICA, *Respondents.*	No. 17-3723

DECLARATION OF JIM DINKLAGE

I, Jim Dinklage, hereby state, under penalty of perjury, that the following information is true to my knowledge, information, and belief:

1. I am 69 years old and was born and raised on a farm/feedlot in eastern Nebraska, near Pender, in Cuming County. I began working our family's farm when I was very young and have been a farmer/feeder/rancher ever since.

2. Given my work as a farmer, I know about the Department of Agriculture's Farmer Fair Practices Rules.

3. I currently reside on my ranch in Knox County, Nebraska. I have lived here since 2001. I run a cattle ranching operation and primarily custom graze cow-calf pairs during the summer. I have also worked as a salesman for various direct fed microbial ("DFM") companies over the years. I currently have my own DFM LLC.

4. I used to feed natural cattle in custom feeding yards to be offered to meatpackers. However, after I raised complaints with a certain meatpacker on three occasions concerning unfair and discriminatory treatment, the meatpacker blackballed me—refusing to buy cattle from me and refusing to certify one of the natural DFM products I was selling at the time, meaning that I couldn't sell the product to others raising cattle for the company.

5. On one occasion, I complained to the meatpacker that, in violation of my contract with them, they had docked my payment on account of ossification, or hard bone. On another occasion, I complained to the meatpacker that they had impermissibly docked what I was owed, claiming that I was short an animal when in fact they had put the animal down unjustifiably. On a third occasion, I complained to the meatpacker about errors and delays associated with a payment due to me.

6. After these three "strikes," the meatpacker cut me out. Because of the complaints I had raised with them, the meatpacker will no longer buy cattle from me, and they told my supervisor at the DFM company that I was selling for at the time that if I was involved, they would not certify the DFM feed additive for their cattle. Had the meatpacker been willing to continue buying from me, I would have continued feeding cattle for them, and had they been willing to certify the DFM additive that I was selling, I would have sold more additive.

7. I considered pursuing claims in court under the Packers and Stockyards Act against the meatpacker for their retaliatory and discriminatory actions against me, but the possibility that I would have to establish injury to competition, and uncertainty regarding whether the meatpacker's actions were unfair or unreasonably prejudicial under

the Act, stood as significant obstacles to my doing so. If I was able to bring such claims now without these obstacles, I would consider doing so. Likewise, if I could more easily hold packers accountable for their illegal actions, I would be more likely to get back in the cattle business, and I might do so regardless.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, information, and belief at this time.

Executed this 27 day of March 2018,

JJ Dinklage

Jim Dinklage

Exhibit E

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ORGANIZATION FOR COMPETITIVE MARKETS; JONATHAN BUTTRAM; CONNIE BUTTRAM; and JAMES DINKLAGE, *Petitioners*, v. U.S. DEPARTMENT OF AGRICULTURE; SONNY PERDUE, in his official capacity as SECRETARY OF AGRICULTURE; and the UNITED STATES OF AMERICA, *Respondents.*	No. 17-3723

DECLARATION OF JOE MAXWELL

I, Joe Maxwell, hereby state, under penalty of perjury, that the following information is true to my knowledge, information, and belief:

1. I serve as the Executive Director of the Organization for Competitive Markets, Inc. ("OCM"). I have been OCM's Executive Director since 2015.

2. OCM is a membership-based research and advocacy organization working for open and competitive markets and fair trade in America's food and agricultural sectors. OCM's mission is to define and advocate the proper role of government in the agricultural economy as a regulator and enforcer of rules necessary for markets that are fair, honest, accessible, and competitive for all citizens.

3. OCM was founded in 1998 in Kansas City, Missouri, and is now headquartered in Lincoln, Nebraska.

4. OCM is organized as a nonpartisan, nonprofit organization under section 501(c)(3) of the Internal Revenue Code.

5. Under OCM's bylaws, all OCM members must work to promote a greater understanding of OCM's work, recruit additional individuals to join OCM, participate in OCM's annual meeting, and provide direction to OCM's Board of Directors. In order to serve on OCM's Board of Directors, an individual must be an OCM member in good standing. All members pay annual dues.

6. OCM's membership consists of non-voting members and voting members. Voting members elect OCM's Board of Directors, President, and Vice President at OCM's annual meeting. Voting members may also vote to remove any member of OCM's Board of Directors or any OCM officer.

7. Jonathan Buttram and Connie Buttram are voting members of OCM.

8. Mike Callicrate is a voting member of OCM and serves on OCM's Board of Directors.

9. I am a voting member of OCM.

10. As OCM's Executive Director, I am responsible for implementing the decisions, policies, and programs as established by OCM's Board of Directors and other OCM members.

11. From its establishment to today, OCM has worked to help farmers protect themselves against abuses by the largest livestock and poultry companies—abuses facilitated by the increasing consolidation, and vastly increased bargaining power, among packers and processors. In addition to advocating for effective regulation and enforcement by the federal government under the Packers and Stockyard Act, OCM also

counsels individual farmers who have experienced treatment at the hands of packers and processors that the Act deems unfair and unreasonably prejudicial, including retaliatory and discriminatory actions. OCM advises such farmers on counteracting such treatment, finding market alternatives, filing complaints with regulators, and pursuing their rights under the Act.

12. The number of inquiries and requests to OCM from concerned and injured farmers, and the amount of OCM staff time spent on such inquiries, increased substantially after October 2017, when the United States Department of Agriculture withdrew interim final rules that would have codified the Department's longstanding interpretation that a violation of the Packers and Stockyards Act can be established without proof of likelihood of competitive injury, *see* 82 Fed. Reg. 48,594 (Oct. 18, 2017), and announced that the Department was taking no further action on proposed rules that would have clarified the actions that that the Department considers unfair, unjustly discriminatory, deceptive, or unreasonably prejudicial in violation of the Act, *see* 82 Fed. Reg. 48,603 (Oct. 18, 2017).

13. As the Department repeatedly acknowledged in withdrawing the interim final rules, *see, e.g.*, 82 Fed. Reg. at 48,594, 48,597, and the proposed rules, *see, e.g.*, *id.* at 48,603, had the rules taken effect they would have significantly enhanced farmers' abilities to pursue claims under the Act against packing and processing companies in court. The rules' withdrawal left farmers to appeal to OCM for advice and assistance, and in certain cases to the U.S. Department of Agriculture, instead of being able to independently and confidently seek redress for retaliatory and otherwise unlawful actions.

14. The effect of the rules' withdrawal on OCM's daily activities has therefore been substantial. First, the withdrawal has caused OCM staff to spend markedly more time counseling farmers on how they can respond to illegal and injurious actions by packing and processing companies. OCM is well known in the industry as an advocate and resource for farmers facing unfair and discriminatory practices, and whether by referral from an OCM member or otherwise, farmers frequently seek OCM's assistance. Many of those seeking OCM's help since the rules' withdrawal have cited the withdrawal among the reasons for their request. In addition, in direct response to the rules' withdrawal, OCM developed and implemented a web-based tool to better enable farmers to request OCM's help. When OCM receives such requests, OCM evaluates the farmer's complaint; attempts to identify market alternatives—for example, a different packer to sell to; educates the farmer as to what options are generally available to her under the Packers and Stockyards Act and any other applicable laws; and assesses whether to recommend that the farmer contact a regulator. Overall, I estimate that the volume of requests for assistance that OCM receives has increased by 50% since the rules' withdrawal in October 2017. Likewise, I estimate that the amount of staff time that OCM has dedicated to providing such assistance has increased by 20% since the rules' withdrawal. Thus, the rules' withdrawal has caused OCM to expend resources on counseling that significantly exceed the organization's typical annual expenditures on such efforts.

15. Second, in addition to requiring OCM to increase its efforts in counseling farmers, the rules' withdrawal has required OCM to develop a new initiative focused on improving enforcement of the Packers and Stockyards Act by the U.S. Department of

Agriculture. Now that the rules' withdrawal has hampered farmers' ability to protect themselves against abuses, they will need to look to the Department for protection, and OCM is in the final stages of developing a new program to assist them in that regard. Specifically, OCM has established program goals, prepared budget documents, and sought funding for an initiative focused on helping farmers seek meaningful assistance from the Department when they confront illegal treatment at the hands of packing and processing companies. OCM has therefore used its resources to counteract the harms caused by the rules' withdrawal.

16. Third, the increased time that OCM now spends counseling farmers and has spent developing its new initiative concerning the Department's enforcement of the Packers and Stockyards Act has prevented OCM from continuing work on other key initiatives. Specifically, OCM has had to divert its resources away from its initiatives on reforming the checkoff program, on country of origin labeling, and on ensuring OCM members' interests are protected in the upcoming farm bill. The rules' withdrawal has also required OCM to suspend its "Taking It Back Tour," whereby members of OCM's Board of Directors host events in their home states to educate attendees, including elected representatives and industry members, about the state of agricultural markets nationally and, as informed by OCM's state-specific research, more locally. OCM sponsored one Taking It Back Tour event in 2016 and two events in 2017. OCM's plan had been to sponsor four more events during late 2017 and early 2018—in Florida, Kentucky, Missouri, and Ohio—but given the effect of the rules' withdrawal on OCM's staff time and other resources, OCM has had to cancel those plans and temporarily shelve its

Taking It Back Tour effort overall. Thus, the rules' withdrawal has substantially hampered OCM's ability to continue providing services that are critical to its mission.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 27th day of March 2018,

Joe Maxwell

Joe Maxwell
Executive Director, Organization for Competitive Markets

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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

Petitioners,

v.

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

Respondents.

No. 17-3723

PETITIONERS' APPENDIX[1]

[1] Per Eighth Circuit Rule 30A(b)(3), Petitioners hereby submit this separate appendix, with consent of Respondents (by counsel).

Dated: December 12, 2016.

Bruce Summers,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2016–30303 Filed 12–19–16; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

9 CFR Part 201

RIN 0580–AB25

Scope of Sections 202(a) and (b) of the Packers and Stockyards Act

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Interim final rule; request for comments.

SUMMARY: The Department of Agriculture's (USDA) Grain Inspection, Packers and Stockyards Administration (GIPSA), Packers and Stockyards Program (P&SP) is amending the regulations issued under the Packers and Stockyards Act, 1921, as amended and supplemented (P&S Act). GIPSA is adding a paragraph addressing the scope of sections 202(a) and (b) of the P&S Act. This interim final rule clarifies that conduct or action may violate sections 202(a) and (b) of the P&S Act without adversely affecting, or having a likelihood of adversely affecting, competition. This interim final rule reiterates USDA's longstanding interpretation that not all violations of the P&S Act require a showing of harm or likely harm to competition. The regulations would specifically provide that the scope of section 202(a) and (b) encompasses conduct or action that, depending on their nature and the circumstances, can be found to violate the P&S Act without a finding of harm or likely harm to competition. This interim final rule finalizes a proposed amendment that GIPSA published on June 22, 2010. GIPSA is now publishing as an interim final rule what was proposed on June 22, 2010, with slight modifications, in order to allow additional comment on these provisions.

DATES: This interim final rule is February 21, 2017. Interested persons are invited to submit written comments on this interim final rule on or before February 21, 2017.

ADDRESSES: We invite you to submit comments on this interim final rule. You may submit comments by any of the following methods:

- *Mail:* M. Irene Omade, GIPSA, USDA, 1400 Independence Avenue SW., Room 2542A–S, Washington, DC 20250–3613.
- *Hand Delivery or Courier:* M. Irene Omade, GIPSA, USDA, 1400 Independence Avenue SW., Room 2530–S, Washington, DC 20250–3613.
- *Internet: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

Instructions: All comments should make reference to the date and page number of this issue of the **Federal Register**. All comments received will be included in the public docket without change, including any personal information provided. Regulatory analyses and other documents relating to this rulemaking will be available for public inspection in Room 2542A–S, 1400 Independence Avenue SW., Washington, DC 20250–3613 during regular business hours. All comments will be available for public inspection in the above office during regular business hours (7 CFR 1.27(b)). Please call the Management and Budget Services staff of GIPSA at (202) 720–8479 to arrange a public inspection of comments or other documents related to this rulemaking.

FOR FURTHER INFORMATION CONTACT: S. Brett Offutt, Director, Litigation and Economic Analysis Division, P&SP, GIPSA, 1400 Independence Ave, SW., Washington, DC 20250, (202) 720–7051, *s.brett.offutt@usda.gov.*

SUPPLEMENTARY INFORMATION: The first section that follows provides background and a summary of the regulatory text for § 201.3(a) and (b) in this interim final rule as compared to the regulatory wording for § 201.3(c) and (d) in the 2010 proposed rule. The second section provides background information about this rule. The third section provides a summary of the public comments received on the proposed rule and at the relevant USDA/Department of Justice Joint Competition Workshops that occurred during the comment period. The fourth section discusses the proposal of new §§ 201.210, 201.211, and 201.214, in this issue of the **Federal Register**. The last section provides the required impact analyses including the Regulatory Flexibility Act, the Paperwork Reduction Act, Civil Rights Analysis, and the relevant Executive Orders.

I. Summary of Changes From the 2010 Proposed Rule

Section 201.3 as Proposed in June 2010

In the proposed rule published in the **Federal Register** on June 22, 2010 [75 FR 35338], GIPSA proposed a new § 201.3, ''Applicability of regulations in this part,'' providing four (4) subsections to describe, in certain respects, the application of the regulations in 9 CFR part 201. These subsections were designated § 201.3(a) through § 201.3(d). Subsection 201.3(c) described the appropriate application of sections 202(a) and (b) of the P&S Act (7 U.S.C. 192(a) and (b)).

In this current rule, GIPSA is re-designating the existing undesignated paragraph in § 201.3 as § 201.3(b), and is adding back the subject heading, ''Effective dates'' to this paragraph.

GIPSA is amending § 201.3 with the addition of proposed § 201.3(c), with slight modifications. Because this provision is of primary importance, GIPSA is designating it as the first of two paragraphs in § 201.3 and changing its designation from (c) to (a). GIPSA has made slight modifications including a grammatical edit and also modified a few words to make the language internally consistent and also consistent with the language in new proposed §§ 201.210, 201.211, and 201.214, published concurrently in this issue of the **Federal Register** as separate proposed rules.

II. Background

A. Development of the Rule

Prior to issuing the initial proposed regulations in 2010, GIPSA held three public meetings in October 2008, in Arkansas, Iowa, and Georgia to gather comments, information, and recommendations from interested parties. Attendees at these meetings were asked to give input on the elements of the 2008 Farm Bill and other issues of concern under the P&S Act. In 2010, USDA and the Department of Justice held five joint public workshops to explore competition issues affecting agricultural industries in the 21st century and the appropriate role for antitrust and regulatory enforcement in those industries. These workshops were held in Ankeny, Iowa (Issues of Concern to Farmers, March 12, 2010); Normal, Alabama (Poultry Industry, May 21, 2010); Madison, Wisconsin (Dairy Industry, June 25, 2010); Fort Collins, Colorado (Livestock Industry, August 27, 2010); and Washington, District of Columbia (Margins, December 8, 2010). The Secretary informed attendees of the workshop in Fort Collins, Colorado that their comments provided that day would be considered in the development of this rulemaking. The Fort Collins workshop addressed issues in the cattle, hog, and other animal sectors. Attendees provided comments on concentration in livestock markets, buyer power, and enforcement of the P&S Act. GIPSA incorporated relevant comments from the Madison, Wisconsin and Fort Collins, Colorado workshops into the text of the wording of the final rule published on December 9, 2011.

The regulations in this current interim final rule also reflect comments, information, and recommendations received in all those meetings.

On June 22, 2010, GIPSA published the proposed rule [75 FR 35338] upon which this interim final rule is based. The background information presented in the proposed rule remains pertinent to this interim final rule. Some of this background information is presented again here.

In that proposed rule, GIPSA proposed a multi-faceted rule and sought public input. During a 5-month comment period, GIPSA received over 61,000 comments from a wide variety of stakeholders. Some commenters addressed issues associated with this interim final rule. GIPSA published a final rule in 2011 that included modifications to address concerns expressed by commenters. The final rule addressed most, but not all, of the requirements of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–246) (2008 Farm Bill); however, for the reasons described in further detail below, GIPSA never implemented a final § 201.3(c) following the 2010 public notice and comment period. The 2010 proposed rule also proposed three other regulations, §§ 201.210, 201.211, and 201.214, that GIPSA has restructured and rewritten and is publishing as two separate proposed rules concurrent with this rule. Proposed § 201.210, ''Unfair, unjustly discriminatory and deceptive practices or devices by packers, swine contractors, or live poultry dealers,'' and § 201.211, ''Undue or unreasonable preferences or advantages'' further clarify and define the provisions of § 201.3(a). Proposed § 201.214, ''Poultry Grower Ranking Systems'' provides criteria which would be used in considering whether a live poultry dealer has used a poultry grower ranking system in an unfair, unjustly discriminatory, or deceptive manner or in a way that gives an undue or unreasonable preference or advantage to any poultry grower or subjects any poultry grower to an undue or unreasonable prejudice or disadvantage.

Beginning with the fiscal year (FY) 2012 appropriations act, USDA was precluded from finalizing some of the regulations as proposed in June 2010. Section 201.3(c), ''Scope of Sections 202(a) and (b) of the Act,'' §§ 201.210, 201.211, and 201.214, published as part of the June 22, 2010, proposed rule, were included in the restrictions in the appropriations acts. Until FY 2016, appropriations acts continued to preclude the finalization of §§ 201.3(c), 201.210, 201.211, and 201.214.

Section 201.3(a), ''Applicability to live poultry dealers,'' and § 201.3(d), ''Effective dates,'' proposed in June 2010, were published on December 9, 2011 [76 FR 76874], as a final rule with some changes. At that time, the designation of proposed paragraph (d) was changed to (b).

Section 731, Division A, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235), required the Secretary to rescind what was then § 201.3(a), ''Applicability to live poultry dealers,'' leaving paragraph (b) as the only paragraph in § 201.3. As a result, GIPSA removed the designation for this paragraph as paragraph (b) and also removed its subject heading, ''Effective dates.'' This was accomplished by a final rule published on February 5, 2015 [80 FR 6430].

Neither the FY 2016 appropriations act nor the FY 2017 continuing appropriations act precludes GIPSA from publishing §§ 201.3(c), 201.210, 201.211, or 201.214 as final rules.

B. Purpose of the Regulatory Action

Section 202 of the P&S Act provides that ''[i]t shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry'' to engage in certain prohibited conduct. Section 202(a) prohibits ''any unfair, unjustly discriminatory, or deceptive practice or device.'' Section 202(b) prohibits ''any undue or unreasonable preference or advantage'' or ''any undue or unreasonable prejudice or disadvantage.'' 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 competitive injury.[1] At the same time, USDA has always understood that an act or practice's effect on competition can be relevant [2] and, in certain circumstances, even dispositive [3] with respect to whether that act or practice violates sections 202(a) and/or (b).

As we explained in the proposed rule, the longstanding agency position that, in some cases, a violation of section 202(a) or (b) can be proven without proof of likelihood of competitive injury is consistent with the language and structure of the P&S Act, as well as its legislative history and purposes. Neither section 202(a) nor section 202(b) contains any language limiting the application of those sections to acts or practices that have an adverse effect on competition, such as acts ''restraining commerce.'' Instead, these provisions use terms including ''deceptive,'' ''unfair,'' ''unjust,'' ''undue,'' and ''unreasonable''—which are commonly understood to encompass more than anticompetitive conduct.[4] This is in direct contrast to subsections (c), (d), and (e), which expressly prohibit only those acts that have the effect of ''restraining commerce,'' ''creating a monopoly,'' or producing another type of antitrust injury. The fact that Congress expressly included these limitations in subsections (c), (d), and (e), but not in subsections (a) and (b), is a strong indication that Congress did not intend subsections (a) and (b) to be limited to instances in which there was harm to competition. And Congress confirmed the agency's position by amending the P&S Act to specify specific instances of conduct prohibited as unfair that do not involve any inherent likelihood of competitive injury.[5]

USDA's interpretation of sections 202(a) and (b) is also consistent with the interpretation of other sections of the P&S Act using similar language—sections 307 and 312 (7 U.S.C. 208 and 213). Courts have recognized that the proper analysis under these provisions

[1] *In re Ozark County Cattle Co.,* 49 Agric. Dec. 336, 365 (1990); 1 John H. Davidson et al., *Agricultural Law* section 3.47, at 244 (1981).

[2] *See, In re Sterling Colo. Beef Co.,* 39 Agric. Dec. 184, 235 (1980) (considering and rejecting respondent packer's business justification for challenged conduct).

[3] *See, Armour & Co.* v. *United States,* 402 F.2d 712, 717 (7th Cir. 1968) (a coupon promotion plan (here coupons for fifty cents off specified packages of bacon) is not per se unfair and violates section 202(a) if it is implemented with some predatory intent or carries some likelihood of competitive injury); *In re IBP, Inc.,* 57 Agric. Dec. 1353, 1356 (1998) (contractual right of first refusal at issue violated section 202 ''because it has the effect or potential of reducing competition'').

[4] When the P&S Act was enacted, *Webster's New International Dictionary* defined ''deceptive'' as ''[t]ending to deceive; having power to mislead, or impress with false opinions''; ''unfair'' as ''[n]ot fair in act or character; disingenuous; using or involving trick or artifice; dishonest; unjust; inequitable'' (2d. definition); and ''unjust'' as ''[c]haracterized by injustice; contrary to justice and right; wrongful.'' *Webster's New International Dictionary* 578, 2237, 2238, 2245, 2248 (1st ed. 1917). This is the same understanding of the terms today.

[5] *See* sections 409(c) and 410(b).

depends on ''the facts of each case,'' [6] and that these sections may apply in the absence of harm to competition or competitors.[7]

The legislative history and purposes of the P&S Act also support USDA's position. The P&S Act ''is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.'' [8] In amending the P&S Act, Congress made clear that its goals for the statute extended beyond the protection of competition. In 1935, for instance, when Congress first subjected live poultry dealers to sections 202(a) and (b), Congress explained in the statute itself that ''[t]he handling of the great volume of live poultry . . . is attendant with various unfair, deceptive, and fraudulent practices and devices, resulting in the producers sustaining sundry losses and receiving prices far below the reasonable value of their live poultry. . . .'' [9] Similarly, the House Committee Report regarding the 1958 amendments stated that ''[t]he primary purpose of [the P&S Act] is to assure fair competition *and fair trade practices*'' and ''to safeguard farmers . . . against receiving less than the true market value of their livestock.'' [10] The Report further observed that protection extends to ''unfair, deceptive, unjustly discriminatory'' practices by ''small'' companies in addition to ''monopolistic practices.'' [11] In accordance with this legislative history, courts and commentators have recognized that the purposes of the P&S Act are not limited to protecting competition.[12]

Four courts of appeals have disagreed with 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 sections 202(a) and/or (b) without proving harm to competition or likely harm to competition.[13] After carefully considering the analyses in these opinions, USDA continues to believe that its longstanding interpretation of the P&S Act is correct. These court of appeals opinions (two of which were issued over vigorous dissents) [14] are inconsistent with the plain language of the statute; they incorrectly assume that harm to competition was the only evil Congress sought to prevent by enacting the P&S Act; and they fail to defer to the Secretary of Agriculture's longstanding and consistent interpretation of a statute administered by the Secretary. To the extent that these courts failed to defer to USDA's interpretation of the statute because that interpretation had not previously been enshrined in a regulation,[15] this new regulation may constitute a material change in circumstances that warrants judicial reexamination of the issue.[16]

Although it is not necessary in every case to demonstrate competitive injury in order to show a violation of sections 202(a) and/or (b), any act that harms competition or is likely to harm competition may violate the statute. How a competitive injury or the likelihood of a competitive injury manifests itself depends critically on whether the target of the act or practice is a competitor (*e.g.,* a packer harms other packers), or whether the target of the act or practice operates at a different level of the livestock or poultry production process (*e.g.,* a packer harms a livestock producer). Competitive injury or the likelihood of competitive injury may occur when an act or practice improperly forecloses competition in a large share of the market through exclusive dealing, restrains competition among packers, live poultry dealers or swine contractors or otherwise represents a use of market power to distort competition.[17] Competitive injury or the likelihood of competitive injury also may occur when a packer, swine contractor, or live poultry dealer wrongfully depresses prices paid to a livestock producer, swine production contract grower, or poultry grower below market value or impairs the livestock producer, swine production contract grower, or poultry grower's ability to compete with other producers or growers.

To establish an actual or likely competitive injury, it is not necessary to show that a challenged act or practice had a likely effect on resale price levels. Even the antitrust laws do not require such a showing. The P&S Act is broader than the antitrust laws and, therefore, such a requirement of showing effect on resale price levels is not necessary to establish competitive injury under section 202 of the P&S Act (though such a showing would suffice).

III. Discussion of Comments

The proposed rule published on June 22, 2010, (75 FR 35338) provided a 60-day comment period to end on August 23, 2010. In response to requests for an extension of time to file comments, on July 28, 2010, GIPSA extended the comment period to end on November 22, 2010 (75 FR 44163). Commenters covered the spectrum of those affected by the rule, including livestock producers and poultry growers, packers and live poultry dealers, trade associations representing both production and processing, plant workers, and consumers. GIPSA considered all comments postmarked or electronically submitted by November 22, 2010. GIPSA received over 61,000 comments, which addressed the rule generally as well as specific provisions. GIPSA considered written comments as well as comments received at two public meetings, on June 25, 2010, and August 27, 2010, conducted jointly by USDA and the Department of Justice. Because these ''Workshops on Competition in Agriculture'' were held during the comment period for the proposed rule, the Secretary announced that any comments made in those forums would be considered comments on the proposed rule.

Comments on proposed § 201.3(c) were sharply divided with respect to

[6] *Capitol Packing Co.* v. *United States,* 350 F.2d 67, 76 (10th Cir. 1965); *see also, Spencer Livestock Comm'n Co.* v. *USDA,* 841 F.2d 1451, 1454 (9th Cir. 1988).

[7] *See, e.g., Spencer,* 841 F.2d at 1455 (Section 312 covers ''a deceptive practice, whether or not it harmed consumers or competitors.'').

[8] H.R. Rep. 67–77, at 2 (1921); *see also, Swift & Co.* v. *United States,* 308 F.2d 849, 853 (7th Cir. 1962) (''The legislative history showed Congress understood the sections of the [P&S Act] under consideration were broader in scope than antecedent legislation such as the Sherman Antitrust Act, sec. 2 of the Clayton Act, 15 U.S.C. 13, sec. 5 of the Federal Trade Commission Act, 15 U.S.C. 45 and sec. 3 of the Interstate Commerce Act, 49 U.S.C. 3.'').

[9] Public Law 74–272, 49 Stat. 648, 648 (1935).

[10] H.R. Rep. No. 85–1048 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5212, 5213 (emphasis added).

[11] *Id.* at 5213.

[12] *See, e.g., Stafford* v. *Wallace,* 258 U.S. 495, 513–14 (1922); *Spencer,* 841 F.2d at 1455: *United States* v. *Perdue Farms, Inc.,* 680 F.2d 277, 280 (2d Cir. 1982); *Bruhn's Freezer Meats of Chicago, Inc.* v. *USDA,* 438 F.2d 1332, 1336 (8th Cir. 1971); *Bowman* v. *USDA,* 363 F.2d 81, 85 (5th Cir. 1966); *United States* v. *Donahue Bros.,* 59 F.2d 1019, 1023 (8th Cir. 1932).

[13] *Terry* v. *Tyson Farms, Inc.* 604 F.3d 272, 280 (6th Cir. 2010) (''[I]n 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.''); *Wheeler* v. *Pilgrim's Pride Corp.,* 591 F.3d 355, 363 (5th Cir. 2009) (*en banc*) (''To support a claim that a practice violates subsection (a) or (b) of § 192 [of the P&S Act] there must be proof of injury, or likelihood of injury, to competition.''); *Been* v. *O.K. Indus., Inc.,* 495 F.3d 1217,1238 (10th Cir. 2007) (An ''unfair practice'' under section 202(a) of the P&S Act is one that injures or is likely to injure competition); *London* v. *Fieldale Farms Corp.,* 410 F.3d 1295, 1303 (11th Cir. 2005) (P&S Act prohibits only those unfair, discriminatory, or deceptive practices that adversely affect or are likely to adversely affect competition).

[14] *Wheeler,* 591 F.3d at 371–85 (Garza, J., dissenting); *Been,* 495 F.3d at 1238–43 (Hartz, J., concurring in part and dissenting in part).

[15] *See Been,* 495 F.3d at 1226–27.

[16] *See Nat'l Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.,* 545 U.S. 967, 982–84 (2005).

[17] *See, e.g.,* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price,* 96 Yale L.J. 209 (1986); 11 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* 1821 (2d ed. 2005).

harm to competition. Those supporting the proposal pointed out it would provide legal relief for farmers and ranchers who suffer because of unfair actions, such as false weighing and retaliatory behavior, without having to show competitive harm to the industry. Opposing comments relied heavily on the fact that several of the United States Courts of Appeals have ruled that harm to competition (or the likelihood of harm to competition) is a required element to find a violation of sections 202(a) and (b) of the P&S Act.

Those supporting proposed § 201.3(c) included numerous livestock producers and poultry growers and organizations representing the interests of farmers and ranchers. Commenters supporting proposed § 201.3(c) pointed out that it would reduce the costs of litigation for poultry growers and livestock producers who suffer because of unfair actions, such as false weighing and retaliation. Proposed § 201.3(c), according to some commenters, corrects the analytical framework of the P&S Act and ensures that the courts grant a higher level of deference to USDA's interpretation of the P&S Act. They believed it was wrong to require a demonstration of harm to competition to the whole industry stemming from an unfair practice targeting an individual grower or producer in order to violate section 202(a) of the P&S Act, and that proposed § 201.3(c) would remove an undue barrier to relief.

Commenters in favor of proposed § 201.3(c) further pointed out the imbalance in power between livestock producers and packers and noted that without this provision, the packers are inoculated against recourse by a livestock producer because the livestock producer is small and overmatched relative to the much larger and more well-resourced packer. A common theme among supporters was that proposed § 201.3(c) allowed farmers and ranchers to seek redress by showing that they were individually harmed in cases such as false weighing or retaliatory behavior, rather than requiring a showing of harm to competition in the industry. Commenters felt that the packers and poultry companies were given a free pass to act unfairly toward livestock producers, swine production contract growers, and poultry growers knowing that proving harm to competition to the industry would be difficult, if not impossible, in many situations.

Many of the supporting comments also addressed the plain language and intent of section 202 of the P&S Act and opined that the recent court decisions were based on incorrect interpretations of the law. Commenters wrote that proposed § 201.3(c) correctly interpreted the plain language of section 202 and the legislative history of the P&S Act.

Commenters opposing proposed § 201.3(c) included many meat packers, live poultry dealers, and organizations representing packers and poultry companies. The opposing comments stated that the P&S Act had always been considered an antitrust statute and therefore, GIPSA should be required to show competitive harm to allege a violation of section 202(a). They also expressed concern that a flood of litigation would ensue if the scope of section 202(a) did not remain closely aligned with case law. Commenters opposed to the rulemaking asserted that allowing allegations of section 202(a) violations without a showing of harm or likely harm to competition would enable swine production contract growers, poultry growers, or livestock producers to sue a swine contractor, live poultry dealer, or packer for aa broad range of adverse circumstances affecting them. The comments went on to say that this would guarantee swine production contract growers, poultry growers, and livestock producers a profit on every transaction, a standard afforded in no other industry. In turn, this would reduce the number of swine production contract growers, poultry growers, and livestock producers with whom companies would do business.

Opposing comments relied heavily on the fact that several United States Courts of Appeals have ruled that harm to competition (or the likelihood of harm to competition) is a required element to find a violation of sections 202(a) and (b) of the P&S Act. These commenters stated that because of the decisions in these circuit courts, GIPSA lacked authority to implement proposed § 201.3(c). Several large packers and poultry companies wrote that the proposed § 201.3(c), if implemented, would be in direct conflict with circuit court decisions in the geographic regions in which they do business. One packer commented that livestock producers would bear the cost of determining the legality of an expanded scope of sections 202(a) and 202(b).

Many opposing commenters felt that proposed § 201.3(c) would lead to a large increase in frivolous litigation and greatly increase operational costs for packers and poultry companies. Commenters felt that an increase in frivolous litigation would lead to a decrease in the use of the value-based pricing. Commenters opposed allowing livestock producers to file lawsuits based on their thoughts of what is unfair. Some commenters believed that proposed § 201.3(c) would eliminate the requirement to show any harm at all. A common concern presented by those in opposition to the proposed change to § 201.3 was that while section 202(a) prohibits unfair, unjustly discriminatory, or deceptive practices, the P&S Act does not define what types of conduct would be classified as such. Of particular concern to these commenters was the prospect that GIPSA may bring actions under section 202(a) without a finding of harm to competition which would encourage livestock producers to sue firms subject to the P&S Act for any conduct having an adverse effect on livestock producer interests. While most of the comments focused on unfair conduct that could violate section 202(a), a few comments mentioned section 202(b) as well. These comments set forth concerns calling for regulatory guidance as to what conduct GIPSA would deem as unfair, unjustly discriminatory, or deceptive, and an undue preference or advantage in violation of the P&S Act, especially when there was no showing of harm to competition.

Agency response: GIPSA did not make the specific changes to proposed § 201.3(c) requested by comments. However, GIPSA is proposing new rule language in proposed rules §§ 201.210, 201.211, and 201.214, that provide the guidance commenters were seeking. GIPSA also modified a few words in § 201.3(c) to make the language internally consistent and to make it consistent with the language in new proposed §§ 201.210, 201.211, and 201.214, published concurrently in this issue of the **Federal Register** as two separate proposed rules. Specifically, proposed §§ 201.210 and 201.211 discuss ''conduct or action'' and GIPSA has modified the references to ''conduct'' in proposed § 201.3(c) to ''conduct or action.'' GIPSA also changed the reference to ''challenged act or practice'' to ''challenged conduct or action,'' again for consistency with proposed §§ 201.210 and 201.211 and to make the language in § 201.3(a) internally consistent. In the proposed rule for § 201.214 in this issue of the **Federal Register**, GIPSA proposes listing the failure to use a poultry grower ranking system in a fair manner after applying the criteria in § 201.214 as a tenth type of ''challenged conduct or action'' under § 201.210(b). GIPSA also made a minor grammatical edit and changed all references to ''section'' to ''sections.'' GIPSA believes the paragraph proposed on June 22, 2010, as § 201.3(c) (''Scope of Sections 202(a) and (b) of the Act.'') is of primary importance. As a result, the paragraph is designated as paragraph (a) and the current text in § 201.3 is designated as paragraph (b).

It is the longstanding position of the Secretary of Agriculture that a violation of section 202(a) or (b) can be proven without evidence of competitive injury or the likelihood of competitive injury. The Secretary's position is consistent with the language and structure of the P&S Act, as well as its legislative history and purposes. Sections 202(c), 202(d), and 202(e) of the P&S Act include ''restraint'' and ''monopoly'' language, some of which resembles language in the Clayton Act, 15 U.S.C. 12–27. Neither section 202(a) nor section 202(b) contains language limiting the application to conduct or action that has an adverse effect, or the likelihood of an adverse effect, on competition, such as acts ''restraining commerce.'' Sections 202(a) and 202(b) are tort-like provisions that are concerned with unfair practices, discrimination, and preferential treatment, but not with restraint of trade or monopolistic activities.

Analysis of the Federal Trade Commission Act, 15 U.S.C. 41–58, as amended, (FTC Act) is helpful in illustrating the Secretary's position on the scope of sections 202(a) and 202(b) of the P&S Act. Congress considered the FTC Act in drafting the P&S Act as it incorporated portions of the FTC Act by reference into the P&S Act. Section 5 of the FTC Act, now codified at 15 U.S.C. 45, states, ''[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.'' Thus, in the FTC Act, Congress makes a distinction between ''unfair methods of competition'' and ''unfair or deceptive acts or practices.'' In drafting the P&S Act, Congress chose to prohibit any ''unfair, unjustly discriminatory, or deceptive practice or device,'' and the making or giving of ''any undue or unreasonable preference or advantage . . .,'' without limiting the unfair practices or devices, discrimination, or preferential treatment to only those involving competition. The Supreme Court of the United States has examined the scope of Section 5 of the FTC Act, noting that unfair practices are not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws, nor are unfair practices in commerce confined to purely competitive behavior.[18] The FTC Act's phrase, '''unfair or deceptive acts or practices' '' makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor.'' [19] The Court also noted, upon consideration of legislative and judicial authorities, that the Federal Trade Commission considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.[20]

Recent circuit court decisions have found that a showing of competitive harm, or a likelihood of competitive harm, is required to substantiate a violation of sections 202(a) and 202(b) of the P&S Act. In one of these cases, *Wheeler* v. *Pilgrim's Pride Corp.,*[21] while the majority opinion required a finding of harm to competition, the dissenting opinion agreed with the district court's ruling that sections (a) and (b) of 202 do not contain language limiting their application to actions which have an adverse effect on competition.[22] The court in another case, *Been* v. *O.K. Indus., Inc.,*[23] declined to defer to USDA's interpretation of ''unfair'' practices under section 202(a) of the P&S Act, in part, because ''the Secretary has not promulgated a regulation applicable to the practices the Growers allege violate § 202(a).'' [24] The court, however, stated that ''[r]egulations promulgated by an agency exercising its congressionally granted rule-making authority'' are entitled to deference,[25] implying that such regulation, once enacted by USDA, would be entitled to deference. Therefore, while decisions of the courts of appeals support comments in opposition to amending § 201.3, these same decisions have also pointed to a need for the very rulemaking the addition of paragraph (a) to § 201.3 provides.

An initial increase in litigation costs is a likely result of this rule, as the industry and the courts are setting precedents for the interpretation of § 201.3. However, the litigation costs and the number of lawsuits are expected to decrease after precedent setting decisions are established. In order to place some parameters on conduct or action that constitutes unfair, unjustly discriminatory, and deceptive practices or devices under section 202(a), and on conduct or action that constitutes undue or unreasonable preferences or advantages under section 202(b), and to address concerns raised by commenters about what those terms mean, GIPSA is publishing concurrently with this interim final rule, proposed rules that will include revised §§ 201.210,201.211, and 201.214, which will help clarify the conduct or action GIPSA considers violations of sections 202(a) and 202(b) of the P&S Act.

Contrary to some comments, § 201.3(a) does not stand for the proposition that GIPSA never has to demonstrate that the challenged conduct or action adversely affects competition. Instead, § 201.3(a) solely reiterates GIPSA's longstanding position that a finding that the challenged conduct or action adversely affects or is likely to adversely affect competition is not necessary in all cases. Certain conduct is prohibited because it is unfair, unjustly discriminatory or deceptive even though there may be no harm, or likelihood of harm, to competition. Likewise, certain conduct is prohibited because it creates an unfair preference or advantage even though there may be no harm, or likelihood of harm, to competition. This rule, combined with the specific examples of prohibited conduct in proposed § 201.210 and the criteria the Secretary will consider as set forth in proposed § 201.211, will assist industry participants in understanding which behaviors violate sections 202(a) and 202(b) of the P&S Act.

IV. Interim Final Rule and Request for Comments

As previously discussed, GIPSA published a notice of proposed rulemaking in June, 2010, that, *inter alia,* proposed regulatory text relating to the scope of the P&S Act. GIPSA solicited comments over a 5 month period and received thousands of comments on this aspect of the proposed rule. Accordingly, the agency has fulfilled the notice and comment requirements of the Administrative Procedure Act. However, given the significant level of stakeholder interest in this regulatory provision, the intervening six years, and in the interests of open and transparent government, the agency has decided to promulgate the rule as an interim final rule and provide an additional opportunity for public comment. The agency will consider all comments received by the date indicated in the **DATES** section of this interim final rule with request for comments. After the comment period closes, the agency intends to publish another document in the **Federal Register**. The document will

[18] *FTC* v. *Sperry & Hutchinson Co.,* 405 U.S. 233 (1972).

[19] *Id.,* at 244. (quoting H.R.Rep.No.1613, 75th Cong., 1st Sess., 3 (1937).

[20] *Id.,* at 244.

[21] 591 F. 3d 355 (5th Cir. 2009).

[22] *Id.* at 377 (Garza, J., dissenting).

[23] 495 F. 3d 1217 (10th Cir. 2007).

[24] *Id.* at 1226–27.

[25] *Id.* at 1226.

include a discussion of any comments received and whether any amendments will be made to the rule.

V. Concurrent Publication of Proposed §§ 201.210, 201.211, and 201.214

While some appellate courts have determined that a showing of competitive injury, or likelihood of competitive injury, is required to allege a violation of sections 202(a) or 202(b), some dissenting opinions agreed with USDA's interpretation of sections 202(a) and 202(b) [26] and at least one dissenting opinion stated that if GIPSA developed regulation explaining whether a showing of competitive injury was required in a given circumstance, that regulation would entitle USDA to deference.[27] Amending § 201.3 with the addition of § 201.3(a) provides a structural foundation for the development of more specific regulations containing examples or criteria GIPSA may then use to determine if given conduct or action requires a showing of competitive injury or the potential for competitive injury to allege a violation of section 202(a) or section 202(b). As mentioned in the summary of comments, implementation of these specific regulations may lower costs to some livestock producers, swine production contract growers and poultry growers should they bring legal action for an alleged violation of section 202(a) or section 202(b). GIPSA acknowledges that § 201.3(a) may initially encourage litigation, temporarily driving up overall costs for stakeholders. While this interim rule is a standalone rulemaking, it is worth noting that GIPSA's current thinking is also expressed in separate proposed rules published concurrently in this edition of the **Federal Register**. GIPSA is proposing § 201.210, which clarifies the conduct or action by packers, swine contractors, or live poultry dealers that GIPSA considers unfair, unjustly discriminatory, or deceptive and a violation of section 202(a), and clarifies whether a showing of harm to competition or likelihood of harm to competition is required. GIPSA is also proposing § 201.211, which identifies criteria the Secretary will consider in determining whether conduct or action by packers, swine contractors, or live poultry dealers constitutes an undue or unreasonable preference or advantage and a violation of section 202(b). Section 201.214, as proposed in this edition of the **Federal Register**, lists criteria the Secretary will consider in determining whether a live poultry dealer has used a poultry grower ranking system to compensate poultry growers in an unfair, unjustly discriminatory, or deceptive manner in violation of section 202(a), or in a way that gives an undue or unreasonable preference or advantage to any poultry grower or subjects any poultry grower to an undue or unreasonable prejudice or disadvantage in violation of section 202(b). GIPSA believes §§ 201.210, 201.211, and 201.214, once published as final rules, will mitigate potential costs associated with § 201.3(a) by clarifying what conduct or action would violate section 202(a) and section 202(b). Listing examples and criteria to explain the boundaries for compliance with section 202 of the P&S Act will promote compliance and reduce the number of disputes associated with section 202. Even while proposed §§ 201.210, 201.211, and 201.214 are being considered through the rulemaking process, amending § 201.3 with the addition of § 201.3(a) provides sufficient clarity to obtain deference from the courts.

VI. Required Impact Analyses

A. Executive Order 12866 and Regulatory Flexibility Act

This rulemaking has been determined to be ''economically significant'' for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget. GIPSA is issuing this interim final rule under the P&S Act, in part, to formalize USDA's position that, in some cases, a violation of section 202(a) or (b) can be proven without proof of competitive injury or likelihood of competitive injury. As a required part of the regulatory process, GIPSA prepared an economic analysis of § 201.3(a). The first section of the analysis is an introduction and a discussion of the prevalence of contracting in the cattle, hog, and poultry industries as well as a discussion of potential market failures. Next, GIPSA discusses three regulatory alternatives it considered and presents a summary cost-benefit analysis of each alternative. GIPSA then discusses the impact on small businesses.

Introduction

GIPSA issued a proposed rule on June 22, 2010, which included §§ 201.3, 201.210, 201.211, 201.214. GIPSA is issuing amendments to § 201.3 as an interim final rule and is proposing new versions of §§ 201.210 and 201.211 in a separate proposed rule published concurrently in this issue of the **Federal Register**. Likewise, 201.214 is being proposed in a separate rulemaking. Section 201.3(a) formalizes GIPSA's longstanding position that conduct or action can be found to violate sections 202(a) and/or 202(b) of the P&S Act without a finding of harm or likely harm to competition. GIPSA believes the interim final § 201.3(a) will serve to strengthen the protection afforded the nation's livestock producers and poultry growers.

Section 201.3(a) states that a finding that the challenged conduct or action adversely affects or is likely to adversely affect competition is not necessary in all cases . . . Some unfair, unjustly discriminatory, or deceptive practices do not result in competitive harm to the industry but still result in significant harm to individual livestock producers, swine production contract growers, and poultry growers. If, for example, a livestock producer, swine production contract grower, or poultry grower filed a complaint related to a matter that does not result in competitive harm, such as retaliatory conduct, use of inaccurate scales, or providing a poultry grower sick birds, the livestock producer, swine production contract grower, or poultry grower will be able to prevail without proof of harm to competition or the likelihood of harm to competition. GIPSA believes the standard articulated in § 201.3(a) is consistent with its mission, which is to ''protect fair trade practices, financial integrity and competitive markets for livestock, meats and poultry.'' [28] By removing the burden to prove harm or likely harm to competition in all cases, this interim final rule promotes fairness and equity in the livestock and poultry industries.

Section 201.3(a) may lower the costs to some livestock producers, swine production contract growers, and poultry growers should they bring legal action for an alleged violation of sections 202(a) and/or 202(b). However, § 201.3(a) may initially increase litigation costs for the livestock and poultry industries while precedent setting decisions are established. While this interim rule is a standalone rulemaking, it is worth noting that GIPSA's current thinking is also expressed in separate proposed rules, which will clarify to the industry the types of conduct and criteria that GIPSA believes violate section 202(a) and section 202(b) of the P&S Act.

Proposed § 201.210(a) specifies that any conduct or action by a packer, swine contractor, or live poultry dealer that is explicitly deemed to be an

[26] *Wheeler* v. *Pilgrim's Pride Corp.,* 591 F.3d 355(5th Cir. 2009) (9–7 decision *en banc*) (Judge Garza dissenting, joined by Judges Jolly, Barksdale, Dennis, Prado, Elrod and Haynes).

[27] *Been* v. *O.K. Indus., Inc.,* 495 F.3d 1217, 1238 (10th Cir. 2007).

[28] *https://www.gipsa.usda.gov/laws/law/PS_act.pdf.* Accessed on September 19, 2016.

''unfair,'' ''unjustly discriminatory,'' or ''deceptive'' practice or device by the P&S Act is a per se violation of section 202(a). Section 201.210(b) provides examples of conduct or action that, absent demonstration of a legitimate business justification, are ''unfair,'' ''unjustly discriminatory,'' or ''deceptive'' and a violation of section 202(a) regardless of whether the conduct or action harms or is likely to harm competition. Section 201.210(c) specifies that any conduct or action that harms or is likely to harm competition is an ''unfair,'' ''unjustly discriminatory,'' or ''deceptive'' practice or device and a violation of section 202(a). Many of the examples provided in § 201.210(b) relate to conduct or action that limits, by contract, the legal rights and remedies afforded by law to poultry growers, swine production contract growers, and livestock producers. Other examples specify conduct or actions that violate section 202(a).

As required by the 2008 Farm Bill, proposed § 201.211 specifies criteria the Secretary will consider when determining whether an undue or unreasonable preference or advantage has occurred in violation of section 202(b). The first four (4) criteria require the Secretary to consider whether one or more livestock producers, swine production contract growers, or poultry growers is treated more favorably as compared to other similarly situated livestock producers, swine production contract growers, or poultry growers. The fifth criterion in § 201.211 requires the Secretary to consider whether the packer, swine contractor, or live poultry dealer has demonstrated a legitimate business justification for conduct or action that may otherwise be an undue or unreasonable preference or advantage.

Proposed §§ 201.210 and 201.211 will thus limit the application of § 201.3(a) by placing some parameters on conduct or action that constitutes unfair, unjustly discriminatory, and deceptive practices or devices under section 202(a), and on conduct or action that constitutes undue or unreasonable preferences or advantages under section 202(b). Proposed §§ 201.210 and 201.211 focus heavily on contracts between livestock producers and packers, swine production contract growers and swine contractors, and poultry growers and live poultry dealers.

While proposed §§ 201.210 and 201.211 focus heavily on contracts, § 201.3(a) is broad in nature. It applies to the use of all types of livestock and poultry procurement and growing arrangements by packers, swine contractors, and live poultry dealers, including packers' use of negotiated cash purchases of livestock. As discussed below, contracting broadly defined, is the primary method by which livestock are procured (especially for hogs) and the almost exclusive arrangement under which poultry are produced. A discussion of contracting in these industries is, therefore, useful in explaining the need for § 201.3(a) and laying the foundation for the economic analysis of 201.3(a).

Prevalence of Contracting in Cattle, Hog, and Poultry Industries

Contracting is an important and prevalent feature in the production and marketing of livestock and poultry. Although § 201.3(a) applies to the livestock and poultry industries in general, proposed §§ 201.210 and 201.211 primarily affect livestock and poultry grown or marketed under contract. For example, under § 201.210(b)(2), absent demonstration of a legitimate business justification, GIPSA considers conduct or action by packers, swine contractors, or live poultry dealers that limit or attempt to limit, by contract, the legal rights and remedies of livestock producers, swine production contract growers, or poultry growers as unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) regardless of whether the conduct or action harms or is likely to harm competition. Section 201.211 defines criteria for section 202(b) violations with respect to providing undue or unreasonable preferences or advantages to one or more livestock producers or contract growers as compared to other livestock producers or contract growers.

The type of contracting varies among cattle, hogs, and poultry. Broilers, the largest segment of poultry, are almost exclusively grown under production contracts, while a small percentage of cattle are custom fed and shipped directly for slaughter this activity is not subject to the jurisdiction of the P&S Act. Hog production falls between these two extremes. As shown in Table 1 below, over 96 percent of all broilers are grown under contractual arrangements and over 40 percent of all hogs are grown under contractual arrangements. Live poultry dealers typically own the broilers and provide the growers with feed and medications. Contract growers provide the housing, labor, water, electricity and fuel to grow the birds. Similarly, swine contractors typically own the slaughter hogs and sell the finished hogs to pork packers. The swine contractors typically provide feed and medication to the contract growers who own the growing facilities and provide growing services. With the exception of turkey production, the use of contract growing arrangements has remained relatively stable over the years that the Census of Agriculture has published data on commodities raised and delivered under production contracts as Table 1 shows.

TABLE 1—PERCENTAGE OF POULTRY AND HOGS RAISED AND DELIVERED UNDER PRODUCTION CONTRACTS [29]

Species	2002	2007	2012
Broilers	98.0	96.5	96.4
Turkeys	41.7	67.7	68.5
Hogs	42.9	43.3	43.5

Another contract category is marketing contracts, where producers market their livestock to a packer for slaughter under a verbal or written agreement. These are commonly referred to as Alternative Marketing Arrangements (AMAs). Pricing mechanisms vary across AMAs. Some AMAs rely on a spot market for at least one aspect of its price, while others involve complicated pricing formulas with premiums and discounts based on carcass merits. The livestock seller and packer agree on a pricing mechanism under AMAs, but usually not on a specific price.

USDA's Agricultural Marketing Service (AMS) reports the number of

[29] Agricultural Census, 2007 and 2012. *https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/* and *https://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_1_US/.*

cattle sold to packers under formula, forward contract, and negotiated pricing mechanisms. The following table illustrates the prevalence of contracting in the marketing of fed cattle.

TABLE 2—PERCENTAGE OF FED CATTLE SOLD BY TYPE OF PURCHASE [30]

Year	Formula	Forward contract	Negotiated
2005	30.4	5.0	64.6
2006	31.5	6.8	61.7
2007	33.2	8.3	58.5
2008	37.4	9.9	52.7
2009	43.7	7.0	49.3
2010	44.9	9.5	45.6
2011	48.4	10.9	40.7
2012	54.7	11.4	33.8
2013	60.0	10.2	29.8
2014	58.1	14.2	27.6
2015	58.2	16.5	25.3

GIPSA considers cattle sold under formula pricing methods as sold under AMA contracts. Thus, the first two columns in the above table are cattle marketed under contract and the third column represents the spot market for fed cattle. The data in the table above show that the contracting of cattle has increased significantly since 2005. Approximately 35 percent of fed cattle were marketed under contracts in 2005. By 2015, the percentage of fed cattle marketed to packers under contracts had increased to almost 75 percent, while negotiated spot market transactions have decreased to about 25 percent of all transactions.

As discussed above, over 40 percent of hogs are grown under production contracts. These hogs are then sold by swine contractors to packers under marketing contracts. The prevalence of marketing contracts in the sale of finished hogs, which includes production contract and non-production contract hogs, to packers is even more prevalent as shown in the table below.

TABLE 3—PERCENTAGE OF HOGS SOLD BY TYPE OF PURCHASE [31]

Year	Other marketing arrangements [32]	Formula [33]	Negotiated
2005	39.3	49.7	11.0
2006	44.0	46.4	9.6
2007	44.8	46.5	8.7
2008	43.9	47.6	8.5
2009	42.8	50.4	6.8
2010	45.4	49.4	5.2
2011	47.6	48.2	4.2
2012	47.7	48.6	3.6
2013	48.3	48.4	3.2
2014	45.9	51.4	2.7
2015	46.0	51.4	2.6

Similar to cattle, the percentage of hogs sold under marketing contracts has increased since 2005 to over 97 percent in 2015. The spot market for hogs has declined to 2.6 percent in 2015. As these data demonstrate, almost all hogs are marketed under some type of marketing contract.

Benefits of Contracting in Cattle, Hog, and Poultry Industries

Contracts have many benefits. They help farmers and livestock producers manage price and production risks, elicit the production of products with specific quality attributes by tying prices to those attributes, and smooth the flows of commodities to processing plants encouraging more efficient use of farm and processing capacities. Agricultural contracts can also lead to improvements in efficiency throughout the supply chain for products by providing farmers with incentives to deliver products consumers desire and produce products in ways that reduce processing costs and, ultimately, retail prices.

In 2007, RTI International conducted a comprehensive study of marketing practices in the livestock and red meat industries from farmers to retailers (the RTI Study).[34] The RTI Study analyzed the extent of use, price relationships, and costs and benefits of contracting, including AMAs. The RTI Study found that AMAs increased the economic efficiency of the livestock markets and yielded economic benefits to consumers, producers and packers.

The RTI Study found that efficiencies come from less volatility in volume and

[30] USDA's Agricultural Marketing Service. *https://mpr.datamart.ams.usda.gov/menu.do?path=Products*\Cattle\Weekly. Accessed on September 9, 2016

[31] USDA's Agricultural Marketing Service.

[32] Includes Packer Owned and Packer Sold, Other Purchase Arrangements.

[33] Includes Swine Pork Market Formula, Other Market Formula.

[34] RTI International, 2007, GIPSA Livestock and Meat Marketing Study, Prepared for GIPSA.

more intensive use of production and processing facilities, meaning less capital, labor, feed, and materials per pound of meat produced. Efficiencies also come from reduced transaction costs and from sending price signals to better match the meat attributes to consumer demand. Consumers benefit from lower meat prices and meat with desired attributes. In turn, the consumer benefits increase livestock demand, which provides benefits to producers.

Structural Issues in the Cattle, Hog, and Poultry Industries

As the above discussion highlights, there are important benefits associated with the use of agriculture contracts in the cattle, hog, and poultry industries. However, if there are large disparities in the bargaining power among contracting parties resulting from size differences between contracting parties or the use of market power by one of the contracting parties, the contracts may have detrimental effects on one of the contracting parties and may result in inefficiencies in the marketplace.

For example, a contract that ties a grower to a single purchaser of a specialized commodity or service, even if the contract provides for fair compensation to the grower, still leaves the grower subject to default risks should the contractor fail. Another example is a contract that covers a shorter term than the life of the capital (a poultry house, for example). The grower may face the hold-up risk that the contractor may require additional capital investments or may impose lower returns at the time of contract renewal. Hold-up risk is a potential market failure and is discussed in detail in the next section. These risks may be heightened when there are no alternative buyers for the grower to switch to, or when the capital investment is specific to the original buyer.[35] Some growers make substantial long-term capital investments as part of livestock or poultry production contracts, including land, poultry or hog houses, and equipment. Those investments may tie the grower to a single contractor or integrator. Costs associated with default risks and hold-up risks are important to many growers in the industry. The table below shows the number of integrators that broiler growers have in their local areas by percent of total farms and by total production.

TABLE 4—INTEGRATOR CHOICE FOR BROILER GROWERS[36]

Integrators in grower's area[37]	Percent of total			Can change to another integrator (percent of farms)
	Farms	Birds	Production	
Number:				
1	21.7	23.4	24.5	7
2	30.2	31.9	31.7	52
3	20.4	20.4	19.7	62
4	16.1	14.9	14.8	71
>4	7.8	6.7	6.6	77
No Response	3.8	2.7	2.7	Na

The data in the table show that 52 percent of broiler growers, accounting for 56 percent of total production, report having only one or two integrators in their local areas. This limited integrator choice may accentuate the contract risks. A 2006 survey indicated that growers facing a single integrator received 7 to 8 percent less compensation, on average, than farmers located in areas with 4 or more integrators.[38] If live poultry dealers already possess some market power to force prices for poultry growing services below competitive levels, some contracts can extend that power by raising the costs of entry for new competitors, or allowing for price discrimination.[39]

Many beef, pork, and poultry processing markets face barriers to entry, including; (1) Economies of scale; (2) high asset-specific capital costs with few alternative uses of the capital; (3) brand loyalty of consumers, customer loyalty to the incumbent processors, and high customer switching costs; and (4) governmental food safety, bio-hazard, and environmental regulations. Consistent with these barriers, there has been limited new entry.

However, an area where entry has been successful is in developing and niche markets, such as organic meat and free-range chicken. Developing and niche markets have a relatively small consumer market that is willing to pay higher prices, which supports smaller plant sizes. Niche processors are generally small, however, and do not offer opportunities to many producers or growers.

Economies of scale have resulted in large processing plants in the beef, pork, and poultry processing industries. The barriers to entry discussed above may have limited the entry of new processors, which limits the expansion of choice of processors to which livestock producers market their livestock. Barriers to entry also limit the expansion of choice for poultry growers who have only one or two integrators in their local areas with no potential entrants on the horizon. The limited expansion of choice of processors by livestock producers, swine production contract growers, and poultry growers may limit contract choices and the bargaining power of producers and growers in negotiating contracts.

One indication of potential market power is industry concentration.[40] The following table shows the level of concentration in the livestock and

[35] See Vukina and Leegomonchai, *Oligopsony Power, Asset Specificity, and Hold-Up: Evidence From The Broiler Industry, American Journal of Agricultural Economics,* 88(3): 589–605 (August 2006).

[36] MacDonald, James M. Technology, Organization, and Financial Performance in U.S. Broiler Production. USDA, Economic Research Service, June 2014.

[37] Percentages were determined from the USDA Agricultural Resource Management Survey (ARMS), 2011. ''Respondents were asked the number of integrators in their area. They were also asked if they could change to another integrator if they stopped raising broilers for their current integrator.'' Ibid. p. 30

[38] MacDonald, J. and N. Key. ''Market Power in Poultry Production Contracting? Evidence from a Farm Survey.'' *Journal of Agricultural and Applied Economics.* 44(4) (November 2012): 477–490.

[39] See, for example, Williamson, Oliver E. *Markets and Hierarchies: Analysis and Antitrust Implications,* New York: The Free Press (1975); Edlin, Aaron S. & Stefan Reichelstein (1996) ''Holdups, Standard Breach Remedies, and Optimal Investment,'' *The American Economic Review* 86(3): 478–501 (June 1996).

[40] For additional discussion see MacDonald, J.M. 2016 ''Concentration, contracting, and competition policy in U.S. agribusiness,'' *Competition Law Review,* No. 1–2016: 3–8.

poultry slaughtering industries for 2005–2015.

TABLE 5—FOUR-FIRM CONCENTRATION IN LIVESTOCK AND POULTRY SLAUGHTER [41]

Year	Steers & heifers (%)	Hogs (%)	Broilers (%)	Turkeys (%)
2005	80	64	n.a.	n.a.
2006	81	61	n.a.	n.a.
2007	80	65	57	52
2008	79	65	57	51
2009	86	63	53	58
2010	85	65	51	56
2011	85	64	52	55
2012	85	64	51	53
2013	85	64	54	53
2014	83	62	51	58
2015	85	66	51	57

The table above shows the concentration of the four largest steer and heifer slaughterers has remained relatively stable between 79 and 86 percent since 2005. Hog and broiler slaughter concentration has also remained relatively steady at over 60 percent and 50 percent, respectively.

The data in Table 5 are estimates of national concentration and the size differences discussed below are also at the national level, but the economic markets for livestock and poultry may be regional or local, and concentration in regional or local areas may be higher than national measures. For example, while poultry markets may appear to be the least concentrated in terms of the four-firm concentration ratios presented above, economic markets for poultry growing services are more localized than markets for fed cattle or hogs, and local concentration in poultry markets is greater than in hog and other livestock markets.[42] The data presented earlier in Table 4 highlight this issue by showing the limited ability a poultry grower has to switch to a different integrator. As a result, national concentration may not demonstrate accurately the options poultry growers in a particular region actually face.

Empirical evidence does not show a strong or simple relationship between increases in concentration and increases in market power. Other factors matter, including the ease of entry by new producers into a concentrated industry and the ease with which retail food buyers or agricultural commodity sellers can change their buying or marketing strategies in response to attempts to exploit market power.

For example, in 2009, the Government Accountability Office (GAO) reviewed 33 studies published since 1990 that were relevant for assessing the effect of concentration on commodity or food prices in the beef, pork, or dairy sectors.[43] Most of the studies found no evidence of market power, or found that the efficiency gains from concentration were larger than the market power effects. Efficiency gains would be larger if increased concentration led to reduced processing costs (likely to occur if there are scale economies [44] in processing), and if the reduced costs led to a larger effect on prices than the opposing impact of fewer firms. For example, with respect to beef processing, the GAO report concluded that concentration in the beef processing sector has been, overall, beneficial because the efficiency effects dominated the market power effects, thereby reducing farm-to-wholesale beef margins.

Several studies reviewed by the GAO did find evidence of market power in the retail sector, in that food prices exceeded competitive levels or that commodity prices fell below competitive levels. However, the GAO study also concluded that it was not clear whether market power was caused by concentration or some other factor. In interviews with experts, the GAO report concluded that increases in concentration may raise greater concerns in the future about the potential for market power and the manipulation of commodity or food prices.

Another factor GIPSA considered in proposing §§ 201.210 and 201.211 is the contrast in size and scale between livestock producers, swine production contract growers, and poultry growers and the packers, swine contractors, and live poultry dealers they supply. The disparity in size between large oligopsonistic buyers and atomistic sellers may lead to market power and asymmetric information. The 2012 Census of Agriculture reported 740,978 cattle and calf farms with 69.76 million head of cattle for an average of 94 head per operation. Ninety-one percent of these were family or individually-owned operations.[45] The largest one percent of cattle farms sold about 51 percent of the cattle sold by all cattle farms.

There were 33,880 cattle feeding operations in 2012 that sold 25.47 million head of fed cattle for an average of 752 head per feedlot. The 607 largest feedlots sold about 75 percent of the fed cattle, and averaged 32,111 head sold. About 80 percent of feedlots were family or individually owned.[46] As Table 5 shows, the four largest cattle packers processed about 85 percent, 25.47 million head, for an average of 5.41 million head per cattle packer. This means the average top four cattle packers had 57,574 times the volume of the average cattle farm, and 1,054 times the volume of the largest one percent of cattle farms. It also means the average top four cattle packers had 7,197 times the volume of the average feedlot, and

[41] The data on cattle and hogs were compiled from USDA's NASS data of federally inspected slaughter plants. Data on broilers and turkeys were compiled from Packers and Stockyards industry annual reports. Both data sources are proprietary.

[42] MacDonald and Key (2012) Op. Cit. and Vukina and Leegomonchai (2006) Op. Cit.

[43] United States Government Accountability Office. Concentration in Agriculture. GAO–09–746R. Enclosure II: Potential Effects of Concentration on Agricultural Commodity and Retail Food Prices.

[44] Scale economies are present when average production costs decrease as output increases.

[45] Census of Agriculture, 2012.

[46] Ibid.

169 times the volume of the very largest feedlots.

The USDA, National Agricultural Statistics Service 2012 livestock slaughter summary reported that in 2012, 113.16 million head of hogs were commercially slaughtered in the United States.[47] Table 5 shows that the top four hog packers processed about 64 percent of those hogs, which comes to an average of about 18.1 million head of hogs per top four packer. The 2012 Census of Agriculture reported 55,882 farms with hog and pig sales.[48] About 83 percent of the farms were family or individually owned. Of the 55,882 farms with hog and pig sales, 47,336 farms were independent growers raising hogs and pigs for themselves (sold an average of 1,931 head), 8,031 were swine production contract growers raising hogs and pigs for someone else (an average of 10,970 head per swine production contract grower), and 515 were swine contractors (sold an average of 38,058 head per swine contractor).[49]

The National Chicken Council states that in 2016, approximately 35 companies were involved in the business of raising, processing, and marketing chicken on a vertically integrated basis, while about 25,000 family farmers had production contracts with those companies.[50] That comes to about 714 family-growers per company. Collectively, the family-growers produced about 95 percent of the nearly 9 billion broilers produced in the United States in 2015. The other 5 percent were grown on company-owned farms. That means the average family-grower produced about 342,000 broilers. As Table 5 shows, the four largest poultry companies in the United States accounted for 51 percent of the broilers processed. That means the average volume processed by the four largest poultry companies was about 1.15 billion head, which was 3,357 times the average family grower's volume.

As the above discussion highlights, there are large size differences between livestock producers and meat packers. There are also large size differences between poultry growers and the live poultry dealers which they supply. These size differences may contribute to unequal bargaining power due to monopsony market power or oligopsony market power, or asymmetric information. The result is that the contracts bargained between the parties may have detrimental effects on livestock producers, swine production contract growers, and poultry growers due to the structural issues discussed above and may result in inefficiencies in the marketplace.

Hold-Up as a Potential Market Failure

Integrators demand investment in fixed assets from the growers. One example is specific types of poultry houses and equipment the integrator may require the grower to utilize in their growing operations. These investments may improve efficiency by more than the cost of installation. Typically, the improved efficiency would accrue to both the integrator and the grower. The integrator has lower feed costs, and the grower performs better relative to other poultry growers in a settlement group. If the grower bears the entire cost of installation, then the grower should be further compensated for the feed conversion gains that accrue to the integrator. The risk is that after the assets are installed, the cost to the grower is ''sunk.'' This means that if the integrator reneges on paying compensation for the additional capital investments, and insists on maintaining the lower price, the grower will accept that lower price rather than receive nothing. This allows the integrator to get the benefit of the efficiency gains, at no expense to them, with the grower bearing all of the cost. This reneging is termed ''hold-up'' in the economic literature.[51]

Hold-up can have two consequences that result in a misallocation of resources. If the growers do not anticipate hold-up, then growers will spend too much on investments because the integrator who demands them is not incurring any cost. That is inefficient. If the grower does anticipate hold-up, they will act as if the integrator were going to renege even when they were not, resulting in too little investment and a loss of potential efficiency gains.

Hold-up can be resolved with increased competition. If an integrator developed a reputation for reneging, and growers could go elsewhere, the initial integrator would be punished and disincentivized from reneging in the future. Unfortunately, in practice, many growers do not have the option of going elsewhere.

Data shown above in Table 4 indicate that there are few integrators in these markets, and that growers have limited choice. Table 5, above, indicates the level of concentration in the livestock and poultry slaughtering industries and shows that integrators and livestock packers operate in concentrated markets.

This rule would allow growers to file complaints against integrators that renege, giving some of the incentive benefit of competition, without compromising the efficiency of having a few large processors.

Contracting, Industry Structure, and Market Failure: Summary of the Need for Regulation

There are benefits of contracting in the livestock and poultry industries, as well as structural issues that may result in unequal bargaining power and market failures. These structural issues and market failures will be mitigated by relieving plaintiffs from the requirement to demonstrate competitive injury. For instance, contracting parties can alleviate hold-up problems if they are able to write complete contracts, and are able to litigate to enforce the terms of those contracts when there is an attempt to engage in ex-post hold-up. Because proving competitive injury is difficult and costly, removing that burden will facilitate the use of litigation by producers and growers to address violations of the Packers and Stockyards Act. If growers are able to seek legal remedies, then their contracts are easier to enforce. This will incentivize packers, swine contractors, and integrators to avoid exploitation of market power and asymmetric information, as well as behaviors that result in the market failure of hold-up. The result will be improved efficiency in the livestock and poultry markets.

GIPSA has a clear role to ensure that market failures are mitigated so that livestock and poultry markets remain fair and competitive. Section 201.3(a) seeks to fulfill that role by promoting fairness and equity for livestock producers, swine production contract growers, and poultry growers.

Costs of the Regulations Proposed on June 22, 2010

GIPSA issued a proposed rule on June 22, 2010, which included §§ 201.3, 201.210, and 201.211. GIPSA received and considered thousands of comments before finalizing § 201.3(a) and before proposing the current versions of §§ 201.210, and 201.211. The following provisions were proposed in 2010 but are not in § 201.3 or currently proposed §§ 201.210 and 201.211.

- Applicability to all stages of a live poultry dealer's poultry production, including pullets, laying hens, breeders, and broilers (§ 201.3(a)).

[47] Ibid.

[48] A pig is a generic term for a young hog.

[49] Agricultural Census, 2012.

[50] *http://www.nationalchickencouncil.org/about-the-industry/statistics/broiler-chicken-industry-key-facts/.*

[51] See for example, Benjamin Klein, Robert G. Crawford, and Armen A. Alchian, ''Vertical Integration, Appropriable Rents, and the Competitive Contracting Process,'' *The Journal of Law and Economics* 21, no. 2 (Oct., 1978): 297–326.

• Applicability to all swine production contracts, poultry growing arrangements and livestock production and marketing contracts, including formula and forward contracts (§ 201.3(b)).

• Requirement that packers, live poultry dealers, and swine contractors maintain records justifying differences in prices (§ 201.210(a)(5)).

• Provision prohibiting packers from purchasing livestock from other packers (§ 201.212(c)).

• Requirement that packers offer the same terms to groups of small producers as offered to large producers when the group can collectively meet the same quantity commitments (§ 201.211(a)).

• Requirement that packers refrain from entering into exclusive agreements with livestock dealers (§ 201.212(b)).

• Requirements that packers and live poultry dealers submit sample contracts to GIPSA for posting to the public (§ 201.213).

Although many thousands of the comments submitted contained general qualitative assessments of either the costs or benefits of the proposed rule, only two comments systematically described quantitative costs across the rule provisions. Comments from the National Meat Association (NMA) included cost estimates by Informa Economics (the Informa Study). The Informa Study projected costs of $880 million, $401 million, and $362 million for U.S. cattle and beef, hogs and pork, and poultry industries respectively.[52] However, these cost estimates were for all of the 2010 proposed changes, many of which do not apply. The Informa Study estimated $133.3 million to be one-time direct costs resulting from rewriting contracts, additional record keeping, etc.[53] The majority of the costs would be indirect costs. The Informa Study estimated $880.9 million in costs due to efficiency losses and $459.9 million in costs due to reduced demand caused by a reduction in meat quality resulting from fewer AMAs.

Comments from the National Chicken Council (NCC) included cost estimates prepared by Dr. Thomas E. Elam, President, FarmEcon LLC (the Elam Study).[54] The Elam Study estimated that the entire 2010 proposed rule would cost the chicken industry $84 million in the first year increasing to $337 million in the fifth year, with a total cost of $1.03 billion over the first five years.[55] The Elam Study identified $6 million as one-time administrative costs. Most of the costs would be indirect costs resulting from efficiency losses.[56] More than half of the costs would be due to a reduced rate of improvement in feed efficiency. Again, these cost estimates were for all of the 2010 proposed changes, many of which do not apply.

The Informa Study estimated that the proposed provision requiring packers to refrain from entering into exclusive agreements with livestock dealers would cost livestock auctions as much as $85.5 million.[57] Because GIPSA has no current plans to propose the ''exclusive agreements'' rule, those costs no longer apply. The Informa Study did not directly specify how much the estimates in the study attributed to each of the other provisions, but GIPSA expects that their omission will substantially reduce the cost of § 201.3(a).

Estimates of the costs in the Informa Study and the Elam Study were largely due to projections that packers, swine contractors, and live poultry dealers, would alter business practices in reaction to the proposed rule. For example, the Informa Study projected that packers would reduce the number and types of AMAs to avoid potential litigation,[58] and the Elam Study expected live poultry dealers to evaluate each load of feed delivered to growers to avoid litigation.[59]

The estimates from the Informa Study and the Elam Study may overstate costs because the studies relied on interviews of packers, swine contractors, live poultry dealers, and other stakeholders for much of the basis for the estimates of the willingness of packers, swine contractors, and live poultry dealers to alter their business practices. Moreover, neither study considered benefits from the proposed rule.

The Informa Study projected that the regulations proposed in 2010 would cause beef and pork packers to limit their involvement in vertical arrangements, and without those arrangements, they would not be able to produce the branded products they currently offer. The Informa Study projected that, as a result, beef and pork markets would lose $460 million, which is about half of the value added from branded products.[60]

GIPSA does not expect that the current § 201.3(a) would cause beef and pork markets to abandon half of the value added from branded products. Current § 201.3(a) does not prevent packers from offering quality incentives to hog or cattle feeders, and any vertical coordination among feeders and producers would be outside of GIPSA's jurisdiction.

Given the differences from the rule proposed in 2010, the estimates from the Elam Study likely overstated the costs of compliance to the poultry industry with current § 201.3(a) by at least $115 million over five years. The Informa Study estimates would overstate costs of compliance to the cattle, hog, and poultry industries with current § 201.3(a) by at least $500 million. If packers, swine contractors, and live poultry dealers overstated their willingness to alter their business practices, then the estimates could be overstated that much more.

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 regulation and an explanation of why the planned regulatory action is preferable to the potential alternatives.[61] GIPSA considered three regulatory alternatives. The first alternative that GIPSA considered is the baseline to maintain the status quo and not finalize § 201.3(a). The second alternative that GIPSA considered is to issue § 201.3(a) as an interim final regulation. This is GIPSA's preferred alternative as will be explained below. The third alternative that GIPSA considered is issuing § 201.3(a) as an interim final regulation, but exempting small businesses, as defined by the Small Business Administration, from having to comply with the regulation.

Regulatory Option 1: Status Quo

If § 201.3(a) is never finalized, there are no marginal costs and marginal benefits as industry participants will not alter their conduct. From a cost standpoint, this is the least cost alternative compared to the other two alternatives. This alternative also has no marginal benefits. Since there are no changes from the status quo under this regulatory alternative, it will serve as the baseline against which to measure the other two alternatives.

[52] Informa Economics, Inc. ''An Estimate of the Economic Impact of GIPSA's Proposed Rules,'' prepared for the National Meat Association, 2010, Table 10, Page 53.

[53] Ibid. Page 53.

[54] See Elam, Dr. Thomas E. ''Proposed GIPSA Rules Relating to the Chicken Industry: Economic Impact.'' FarmEcon LLC, 2010.

[55] Ibid. Page 24

[56] Ibid. Page 24.

[57] Ibid. Page 49.

[58] Informa, page 30.

[59] Elam, page 18.

[60] Informa, pages 51 and 52.

[61] See Section 6(a)(3)(C) of Executive Order 12866.

Regulatory Alternative 2: The Preferred Alternative

Section 201.3(a) states that conduct or action can be found to violate sections 202(a) and/or 202(b) of the P&S Act without a finding of harm or likely harm to competition. Given the applicability of the regulation to the entire livestock and poultry industries, it is difficult to predict how the industries will respond. Therefore, GIPSA believes that assigning a range to the expected costs of the regulation is appropriate.

At the lower boundary of the cost spectrum, GIPSA considers the scenario where the only costs are increased litigation costs and there are no adjustments by the livestock and poultry industries to reduce their use of AMAs or incentive pay systems, such as poultry grower ranking systems, and there are no changes to existing marketing or production contracts. For the upper boundary of the cost spectrum, GIPSA considers the scenario in which the livestock and poultry industries adjust their use of AMAs and incentive pay systems and makes systematic changes in its marketing and production contracts to reduce the threat of litigation.

A. Regulatory Alternative 2: Lower Boundary of Cost Spectrum—Litigation Costs of Preferred Alternative

GIPSA modeled the litigation costs by estimating the total cost of litigating a case filed under the jurisdiction of the P&S Act. The main costs are attorney fees to litigate a case in a court of law. Limited empirical data on actual historical litigation costs required GIPSA to use a cost engineering approach to estimate litigation costs. In considering the costs of the 2010 proposed rule, GIPSA, based on its expertise, assumed a cost of $3.5 million to litigate a case. GIPSA uses the same starting point here. The cost of litigating a case includes the costs to all parties including the respondent and the USDA in a case brought by the USDA and the costs of the plaintiff and the defendant in the case of private litigation.

GIPSA then examined the actual number of cases decided under the P&S Act from 1926 to 2014. The listing of court decisions and the court in which the decision was reached came from the National Agricultural Law Center at the University of Arkansas.[62] GIPSA then reviewed each case and classified it as either competition, financial, or trade practice cases. This is an internal classification system corresponding to the types of violations GIPSA investigates.

All of the cases were assigned a specific attorney fee based on a random sample from a normal distribution ranging between $250 thousand and $3.5 million for trade practice cases, $250 thousand to $3 million for financial cases, and $1.5 million to $5 million for competition cases. These ranges are based on GIPSA's expertise and the complexity of each type of case, with competition being the most complex and therefore the most costly to litigate. This expertise comes from GIPSA's experience litigating each type of case and monitoring private litigation under the P&S Act. GIPSA estimated the cost of litigating each case from 1926 to 2014 using the cost ranges outlined above.

GIPSA scaled the initial cost up or down based on the court making the decision and based on GIPSA's assumption that Supreme Court cases are more expensive than District court cases, which are more expensive than state court cases. For Supreme Court cases, GIPSA scaled up the cost by a factor of three. For District court cases, GIPSA left the costs unchanged except for the sole case litigated in the United States District Court for the District of Columbia, which GIPSA scaled up by a factor of 1.1. GIPSA scaled state courts down by a factor of 0.7.

After estimating the cost of each case, by case type, GIPSA averaged all cases decided each year to obtain an estimated annual average cost of litigation. GIPSA then conducted a Monte Carlo simulation by sampling from a normal distribution of estimated average annual litigation costs for each type of case to arrive at the final estimated annual average cost of litigating cases filed under the P&S Act.[63]

GIPSA recognizes the uncertainty in estimating litigation costs and conducted sensitivity analysis using a Monte Carlo simulation on the estimated average annual litigation costs. GIPSA used a normal distribution of estimated litigation costs and calculated estimated litigation costs at the 2.5th percentile (lower percentile) of the distribution, the mean (average), and the 97.5th percentile (upper percentile).

GIPSA then estimated a linear trend line through the data using the Ordinary Least Squares (OLS) linear regression technique and used the trend line to project the litigation costs for 2015–2017.[64] These are baseline litigation costs that GIPSA expects to occur without the regulation. The table below shows the estimated and projected baseline litigation costs for 2007–2017.[65]

TABLE 6—ESTIMATED AND PROJECTED BASELINE LITIGATION COSTS FOR 2007–2017 [66]

Year	Lower percentile ($ millions)	Average ($ millions)	Upper percentile ($ millions)
2007	4.98	8.88	12.77
2008	2.16	5.12	8.08
2009	8.45	13.00	17.46
2010	6.82	11.25	15.60
2011	10.52	15.28	20.02
2012	6.49	10.10	13.81
2013	1.94	4.14	6.42
2014	3.56	6.74	10.03
2015	4.32	8.13	12.10
2016	4.45	8.28	12.31
2017	4.58	8.42	12.52

[62] *http://nationalaglawcenter.org/aglaw-reporter/case-law-index/packers-and-stockyards.* We note that this list is not exhaustive, but it is extensive.

[63] Monte Carlo simulation is a statistical technique that relies on repeated random sampling from a distribution to obtain numerical results.

[64] Ordinary least squares regression technique is a method for estimating the unknown parameters using an established statistical model based on existing data observations.

[65] The baseline litigation costs are those costs GIPSA expects to occur without implementation of § 201.3(a).

GIPSA then reviewed the complete history of all investigations conducted by its Packers and Stockyards Program since 2009 and separated out the investigations involving alleged violations of sections 202(a) and 202(b) of the P&S Act for cattle, hogs, and poultry because § 201.3(a) only applies to alleged violations of sections 202(a) and 202(b). The GIPSA investigation data are more robust, with more observations than the case data. There were never many cases in any given year. In addition, the data since 2009 are better predictors of the next ten years than cases that took place as far back as 1926.

Based on the history of investigations, GIPSA then allocated all of the projected baseline litigation costs for 2017 into section 202(a) and 202(b) violations for each species at the lower percentile, the average, and the upper percentile. These allocations appear in the tables below.

TABLE 7—ALLOCATION OF § 201.3(a) BASELINE LITIGATION COSTS FOR 2017 AT THE LOWER PERCENTILE

P&S Act section	Cattle ($ millions)	Hog ($ millions)	Poultry ($ millions)	Total ($ millions)
202(a)	1.00	0.65	2.01	3.66
202(b)	0.10	0.11	0.71	0.92
Total	1.10	0.76	2.72	4.58

TABLE 8—ALLOCATION OF § 201.3(a) BASELINE LITIGATION COSTS FOR 2017 AT THE AVERAGE

P&S Act section	Cattle ($ millions)	Hog ($ millions)	Poultry ($ millions)	Total ($ millions)
202(a)	1.84	1.20	3.70	6.73
202(b)	0.19	0.21	1.30	1.69
Total	2.02	1.41	4.99	8.42

TABLE 9—ALLOCATION OF § 201.3(a) BASELINE LITIGATION COSTS FOR 2017 AT THE UPPER PERCENTILE

P&S Act section	Cattle ($ millions)	Hog ($ millions)	Poultry ($ millions)	Total ($ millions)
202(a)	2.73	1.78	5.50	10.00
202(b)	0.28	0.31	1.93	2.52
Total	3.00	2.09	7.42	12.52

These allocations assume that all projected baseline litigation costs for 2017 will come only from section 202(a) and 202(b) violations. GIPSA then estimated the additional litigation costs the first full year the regulation is in place.

In order to estimate the additional expected litigation costs in 2017 assuming § 201.3(a) becomes effective in early 2017, GIPSA again utilized the complete history of all investigations conducted by its Packers and Stockyards Program since 2009. GIPSA based the additional litigation costs on the difference between the number of complaints received in 2015 on alleged conduct that may violate sections 202(a) and 202(b), by species, and the highest number of complaints GIPSA received in any year since 2009. By 2015, court decisions had established the requirement to demonstrate harm to competition, which likely resulted in fewer complaints of Section 202(a) and 202(b) violations, particularly in the poultry industry, than in previous years when this requirement was not fully realized by industry participants. GIPSA expects § 201.3(a) will result in additional new complaints filed with GIPSA that will be at the levels experienced between 2009 and 2015 before the requirement of harm to competition was fully realized. GIPSA tracks the number of complaints received through a complaint tracking system initiated in 2009. Thus, this difference, by species, is the increase in complaints GIPSA expects when the regulations are finalized. GIPSA then used these differences as scaling factors to estimate the litigation that GIPSA expects to occur in 2017, the first full year that § 201.3(a) becomes effective. The scaling factors appear in the table below:

TABLE 10—SCALING FACTORS FOR LITIGATION FROM § 201.3(a)

P&S Act section	Cattle	Hog	Poultry
202(a)	2.30	1.40	2.15
202(b)	2.30	1.20	2.15

[66] The litigation costs for 2007–2014 are estimated using Monte Carlo simulation at the lower percentile, the average, and the upper percentile and 2015–2017 are projected using the estimated trend lines using OLS and historical estimates. The cost of each case is measured using 2016 dollars.

The scaling factors run from 1.20 for hogs to 2.30 for cattle.

To finalize the estimated increase in litigation costs, GIPSA multiplied the scaling factors in the above table by the projected 2017 baseline litigation costs at the lower percentile, the average, and the upper percentile to arrive at the expected litigation costs in 2017. GIPSA then subtracted out the projected baseline litigation costs to arrive at the estimated additional litigation costs that GIPSA expects to occur assuming § 201.3(a) become effective in early 2017. These estimated litigation costs appear in the following tables.

TABLE 11—PROJECTED § 201.3(a) LITIGATION COSTS FOR 2017 AT THE LOWER PERCENTILE

P&S Act section	Cattle ($ millions)	Hog ($ millions)	Poultry ($ millions)	Total ($ millions)
202(a)	1.30	0.26	2.31	3.87
202(b)	0.13	0.02	0.81	0.97
Total	1.43	0.28	3.12	4.84

TABLE 12—PROJECTED § 201.3(a) LITIGATION COSTS FOR 2017 AT THE AVERAGE

P&S Act section	Cattle ($ millions)	Hog ($ millions)	Poultry ($ millions)	Total ($ millions)
202(a)	2.39	0.48	4.25	7.12
202(b)	0.24	0.04	1.49	1.77
Total	2.63	0.52	5.74	8.89

TABLE 13—PROJECTED § 201.3(a) LITIGATION COSTS FOR 2017 AT THE UPPER PERCENTILE

P&S Act section	Cattle ($ millions)	Hog ($ millions)	Poultry ($ millions)	Total ($ millions)
202(a)	3.55	0.71	6.32	10.58
202(b)	0.36	0.06	2.22	2.64
Total	3.91	0.77	8.54	13.22

GIPSA expects § 201.3(a) to result in an additional $4.84 million in litigation in 2017 at the lower percentile, $8.89 million in litigation in 2017 at the average, and $13.22 million in litigation in 2017 at the upper percentile. GIPSA also expects the majority of additional litigation to come from the poultry industry based on investigations GIPSA conducted from 2009 to 2015, many of which were based on industry complaints.

As discussed above, GIPSA considers the lower boundary of costs from § 201.3(a) to be increased litigation costs with no adjustments by the livestock and poultry industries to reduce their use of AMAs or incentive pay systems and no changes to existing marketing or production contracts. GIPSA also recognizes the uncertainty in estimating litigation costs and conducted a sensitivity analysis of litigation costs at the lower percentile, the average percentile, and the upper percentile. The sensitivity analysis shows that litigation may vary by as much as $8.38 million (upper percentile minus lower percentile). GIPSA believes the average litigation costs is the best available estimate of litigation costs and uses it as the lower boundary for the estimated litigation costs of § 201.3(a). The lower boundary cost estimates appear in the table below.

TABLE 14—LOWER BOUNDARY PROJECTED § 201.3(a) COSTS—PREFERRED ALTERNATIVE

P&S Act section	Cattle ($ millions)	Hog ($ millions)	Poultry ($ millions)	Total ($ millions)
202(a)	2.39	0.48	4.25	7.12
202(b)	0.24	0.04	1.49	1.77
Total	2.63	0.52	5.74	8.89

GIPSA estimates that § 201.3(a) will result in an additional $8.89 million in additional litigation in the livestock and poultry industries with $2.63 million in litigation in the cattle industry, $0.52 million in the hog industry, and $5.74 million in the poultry industry in the first full year § 201.3(a) would be in place.

B. Regulatory Alternative 2: Lower Boundary—Ten-Year Total Costs of the Preferred Alternative

To arrive at the estimated ten-year costs of § 201.3(a), GIPSA expects the litigation costs to be constant for the first five years while courts are setting precedents for the interpretation of § 201.3(a). GIPSA expects that case law with respect to the regulation will be settled after five years and by then, industry participants will know how GIPSA will enforce the regulation and how courts will interpret the regulation.

The effect of courts establishing precedents is that litigation costs will decline after five years as the livestock and poultry industries understand how the courts interpret the regulation.

To arrive at the estimated ten-year costs of § 201.3(a), GIPSA estimates that litigation costs for the first five years will occur at the same rate and at the same cost as in 2017. In the second five years, GIPSA estimates that litigation costs will decrease each year and return to the baseline in the sixth year after the courts have established precedents. GIPSA estimates this decrease in litigation costs to the baseline to be linear with the same decrease in costs each year. The total ten-year costs of § 201.3(a) at the lower boundary appears in the table below.

TABLE 15—LOWER BOUNDARY OF TEN-YEAR TOTAL COSTS OF § 201.3(a)

Year	Cattle ($ millions)	Hog ($ millions)	Poultry ($ millions)	Total ($ millions)
2017	2.63	0.52	5.74	8.89
2018	2.63	0.52	5.74	8.89
2019	2.63	0.52	5.74	8.89
2020	2.63	0.52	5.74	8.89
2021	2.63	0.52	5.74	8.89
2022	2.19	0.43	4.79	7.41
2023	1.75	0.35	3.83	5.93
2024	1.31	0.26	2.87	4.44
2025	0.88	0.17	1.91	2.96
2026	0.44	0.09	0.96	1.48
Totals	19.70	3.90	43.07	66.67

Based on the analysis, GIPSA expects the lower boundary of the ten-year total costs of § 201.3(a) to be $66.67 million.

C. Regulatory Alternative 2: Lower Boundary—Net Present Value of Ten-Year Total Costs of the Preferred Alternative

The lower boundary ten-year total costs of § 201.3(a) in the table above show that the costs are constant in the first five years and then gradually decrease over the next five years. Costs to be incurred in the future are less expensive than the same costs to be incurred today. This is because the money that will be used to pay the costs in the future can be invested today and earn interest until the time period in which the cost is incurred. After the cost has been incurred, the interest earned will still be available.

To account for the time value of money, the costs of the regulation to be incurred in the future is discounted back to today's dollars using a discount rate. The sum of all costs discounted back to the present is called the net present value (NPV) of total costs. GIPSA relied on both a three percent and seven percent discount rate as discussed in Circular A–4.[67] GIPSA measured all costs using constant 2016 dollars.

GIPSA calculated the NPV of the ten-year total costs of the regulation using both a three percent and seven percent discount rate and the NPVs appear in the following table.

TABLE 16—NPV OF LOWER BOUNDARY OF TEN-YEAR TOTAL COST OF § 201.3(a)—PREFERRED ALTERNATIVE

Discount rate	Preferred alternative ($ millions)
3 Percent	58.62
7 Percent	50.03

GIPSA expects the NPV of the lower boundary of the ten-year total costs of § 201.3(a) to be $58.62 million at a three percent discount rate and $50.03 million at a seven percent discount rate.

D. Regulatory Alternative 2: Lower Boundary—Annualized NPV of Ten-Year Total Costs of the Preferred Alternative

GIPSA then annualized the NPV of the ten-year total costs (referred to as annualized costs) of § 201.3(a) at the lower boundary using both a three percent and seven percent discount rate as required by Circular A–4 and the results appear in the following table.[68]

TABLE 17—ANNUALIZED COSTS OF § 201.3(a)—PREFERRED OPTION

Discount rate	Preferred alternative ($ millions)
3 Percent	6.87
7 Percent	7.12

GIPSA expects the annualized costs of § 201.3(a) at the lower boundary to be $6.87 million at a three percent discount rate and $7.12 million at a seven percent discount rate.

E. Regulatory Alternative 2: Upper Boundary of Cost Spectrum—Preferred Alternative

As discussed above, the upper boundary of the cost spectrum occurs if the cattle, hog, and poultry industries adjust their use of AMAs and incentive pay systems and make systematic changes in their marketing and production contracts to reduce the threat of litigation. For the upper boundary cost estimate, GIPSA relied on the Informa Study and Elam Study. The Informa Study was prepared for the NMA and the Elam Study was prepared for the NCC. Both of these groups were opposed to the rule proposed on June 22, 2010 and GIPSA considers their studies to be upper boundary scenarios for meat and livestock industries and poultry industry costs.

GIPSA reviewed the Informa Study and the Elam Study and compared the provisions in the multiple proposed regulations in the June 22, 2010 rule against § 201.3(a). The Informa Study estimated both direct and indirect costs of the 2010 proposed rule. The Informa Study direct costs are estimates of actual costs of complying with all of the regulations proposed in 2010, such as new computer software and additional staff. The Informa Study estimated both direct one-time costs and on-going direct costs that would be incurred by the livestock industry each year. The Informa Study also estimated indirect costs to capture livestock and poultry industry adjustments to the 2010

[67] *https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf.* Accessed on September 19, 2016.

[68] Ibid.

regulations. The Informa Study also included litigation costs.

The sources of indirect costs that the Informa Study estimated for the cattle industry are a reduction in production efficiencies due to a reduction in the use of AMAs and the corresponding reduction in premiums paid in branded beef programs and a reduction in beef quality. The RTI Study also found that hypothetical reductions in AMAs would reduce beef and cattle supplies, reduce the quality of beef, and increase retail and wholesale beef prices.[69]

For the hog industry, the Informa Study estimated the indirect costs as the reduction in operational efficiency from operating slaughter plants at less than full optimal utilization as well as revenue losses due to reductions in quality from reductions in premiums paid for higher quality hogs procured under AMAs.

For the poultry industry, the Informa Study estimated indirect costs resulting from a slowdown in the adoption of new technology that increases efficiency as integrators are unwilling to provide monetary incentives for growers to invest in new technology due to the threat of litigation for unfair, unjustly discriminatory, or deceptive payment practices.

The Informa Study recognized that the economic costs of the 2010 rule would take time to materialize. The Informa Study estimated that only the direct, one-time costs would occur shortly after implementation of the regulations in the 2010 rule and the more significant impacts, such as declining efficiency and quality degradation, would happen more slowly and might not reach the full impact until three or four years after the rule became effective.[70] The Informa Study further recognized that companies would find ways to adapt to the provisions of the regulation in the rule and the impact of the rule would be lessened over time.[71] The following table summarizes the full-impact of the Informa Study cost estimates on the impact of the June 22, 2010 proposed rule.

TABLE 18—TOTAL INFORMA STUDY COSTS FOR THE FULL-IMPACT YEAR [72]

	Cattle ($ millions)	Hogs ($ millions)	Poultry ($ millions)	Total ($ millions)
One-Time Direct Costs	38.7	68.7	26.0	133.4
Ongoing Direct Costs	61.5	73.8	33.4	168.7
Cost Increase Due to Efficiency Loss	401.9	176.7	302.2	880.8
Revenue Lost Due to Quality/Demand Impact	377.7	82.2	0.0	459.9
Total Informa Costs	879.8	401.4	361.6	1,642.8

At the full impact level, the Informa Study estimated the highest cost to be borne by the cattle industry at almost $880 million, followed by the hog and poultry industries. The Informa Study estimated that the total costs of the regulations proposed in 2010 could be as high as $1.64 billion and that this cost would not be fully borne until three or four years after implementation of the regulations.

The Elam Study estimated a similar impact on the poultry industry as the Informa Study. The Elam Study estimated that the costs of the 2010 proposed rule would increase over time and would cost the chicken industry $200.64 million in the third year after implementation, $266.94 in the fourth year, and $336.67 million in the fifth year, with a total cost of $1.03 billion over the first five years.[73] The Elam Study estimated $6 million as one-time administrative costs from re-drafting poultry grower contracts, additional record keeping, and submission of contracts to GIPSA.[74] The remainder of the costs estimated in the Elam Study were indirect costs resulting from efficiency losses and costs of testing and evaluating feed.

GIPSA expects the livestock and poultry industries to adapt to § 201.3(a) after a period of five years when the courts have presumably settled the case law and the livestock and poultry industries know how courts will interpret the regulation. This will cause the costs of § 201.3(a) to decline after a period of five years. GIPSA expects the livestock and poultry industries to adjust their business practices in a way to maximize profits and lessen the impact of the regulation over time.

GIPSA also compared the estimated impact on the poultry industry in the first five years as estimated in the Informa Study and the Elam Study. In the first four years, the poultry costs estimated in the Informa Study are higher than those estimated in the Elam Study. The Elam study has higher cost estimates in year five. Because the Informa Study cost estimates are higher than the Elam Study cost estimates and the Informa Study cost estimates decline in the later years as GIPSA expects, GIPSA relies on the Informa Study cost estimates to estimate the upper boundary of the costs of § 201.3(a).

1. Regulatory Alternative 2: Upper Boundary-Informa Study Estimates—Adjustment 1

In order to arrive at the upper boundary estimate of the costs of § 201.3(a), GIPSA made several downward adjustments to the Informa Study estimates presented in Table 18 above. The first adjustment is to reduce the Informa Study cost estimates by 25 percent. The Informa Study implicitly asserted that 75 percent of the total costs of the 2010 rule were caused by relieving the plaintiff of the burden of proving competitive injury.[75] Thus, the Informa Study implicitly asserted that provisions in regulations in the 2010 proposed rule other than § 201.3(a) are responsible for 25 percent of the total costs. Because GIPSA is only concerned with costs attributable to § 201.3(a), GIPSA is reducing the Informa Study cost estimates by 25 percent.

[69] RTI International, 2007, GIPSA Livestock and Meat Marketing Study. Prepared for Grain Inspection, Packers and Stockyard Administration.

[70] Informa Economics, Inc. ''An Estimate of the Economic Impact of GIPSA's Proposed Rules,'' prepared for the National Meat Association, 2010, Page 66.

[71] Ibid, Page 67.

[72] Ibid, Tables 7, 8, and 9.

[73] Elam, Dr. Thomas E. ''Proposed GIPSA Rules Relating to the Chicken Industry: Economic Impact.'' FarmEcon LLC, 2010, Table on Page 25.

[74] Ibid. Page 21.

[75] Informa Economics, Inc. ''An Estimate of the Economic Impact of GIPSA's Proposed Rules,'' prepared for the National Meat Association, 2010, Page 71.

2. Regulatory Alternative 2: Upper Boundary-Informa Study Estimates—Adjustment 2

The second downward adjustment that GIPSA made is to scale the Informa Study's estimates according to the timing of the economic impact the Informa Study estimated. The Informa Study expected the costs to increase in the first three years, peak in years three or four, and then decline through year ten. In order to simulate the costs that the Informa Study assigned to each year, GIPSA adjusted the costs in the full impact year in Table 18 above by the percentages listed in Table 19.

TABLE 19—IMPACT LEVEL OF INFORMA STUDY COSTS [76]

Year	Cattle (%)	Hog (%)	Poultry (%)
2017	40	29	49
2018	69	59	79
2019	100	79	100
2020	100	100	100
2021	100	96	81
2022	91	75	60
2023	75	54	30
2024	51	53	9
2025	38	29	9
2026	38	29	9

GIPSA then weighted the Informa Study's full-impact cost estimate for each year and each industry by the impact level from the table above.

3. Regulatory Alternative 2: Upper Boundary-Informa Study Estimates—Adjustment 3

The final downward adjustment GIPSA made is based on two factors. The first factor is that GIPSA expects the language in § 201.3(a) to result in limited industry adjustments and a continued role for the courts to interpret when a showing of harm or likelihood of harm to competition is necessary in order to prove a violation of section 202(a) or (b) of the P&S Act. The second factor is the fact that the courts have historically not required a showing of harm or likelihood of harm to competition in all livestock and poultry cases and GIPSA expects that trend to continue. GIPSA discusses the factors in turn and then estimates the third and final adjustment to the Informa Study estimates.

The first factor is that § 201.3(a) states that a finding that the challenged conduct or action adversely affects or is likely to adversely affect competition is not necessary in all cases. However, § 201.3(a) does not provide any guidance regarding the types of conduct or action where a finding of harm or likelihood of harm would or would not be necessary to prove a violation of section 202(a) or (b) of the P&S Act.[77] It is possible that without the guidance in the proposed regulations, courts will continue to exercise judicial discretion in determining when a finding of harm or likelihood of harm to competition is necessary in order to prove a violation of sections 202(a) and/or (b). However, this rule will provide the longstanding position of the Department of Agriculture for the courts to consider. Because some of the U.S. Courts of Appeals in areas of heavy agricultural production have ruled that GIPSA must demonstrate competitive injury or the likelihood of competitive injury in order to prove that certain conduct or action violates section 202(a) and (b), GIPSA anticipates that the federal district courts in those circuits will continue to apply this binding case law.

GIPSA acknowledges that final § 201.3(a) may motivate some private plaintiffs to file new lawsuits under sections 202(a) and/or 202(b) to test its parameters in an attempt to move courts to find in selected cases that harm or likely harm to competition need not be proven. If a U.S. Court of Appeals upholds a district court ruling that competitive harm or likelihood of competitive harm must be demonstrated in order to prove a violation of section 202(a) or (b), that result would not involve any change from the status quo of section 202(a) and 202(b) litigation. Packers, swine contractors, and live poultry dealers would have no reason to adjust their contracts or business practices with the result of few additional indirect costs being borne by the livestock and poultry industries. Similarly, plaintiffs would then need to consider the high costs (in terms of discovery of large amounts of data and the hiring of economic and statistical experts) to proceed to trial and may opt not to proceed with additional litigation.[78]

GIPSA expects the effects of § 201.3(a) on livestock and poultry industry participants to be mixed. A small number of livestock producers, swine production contract growers, and poultry growers may seek judicial enforcement of their rights under the P&S Act without showing harm or likely harm to competition. However, due to the uncertain outcome of litigation under sections 202(a) and/or 202 (b), GIPSA expects packers, swine contractors, and live poultry dealers will likely take a ''wait and see'' approach prior to making any significant changes in their business models, marketing arrangements, or other practices. Concerned with net profit and reports to stockholders or owners, such firms will rationally forego any large changes in their operations until it is clear that such changes are legally required. If such changes are not required, due to status quo rulings by courts requiring proof of competitive

[76] The Informa Study estimates are for years one through ten beginning with the first year of the implementation of the rule and are not specific to any one year. GIPSA uses 2017 as year one and 2026 as year ten. The Informa Study stated that in particular, the decline in beef and pork quality and subsequent damage to consumer demand will take time to materialize, while the efficiency losses in poultry would likely happen sooner, but will still be delayed. This is presumably because the breeding cycle for hogs and especially for cattle is longer than that for poultry.

[77] Proposed regulations 201.210 and 201.211 provide conduct and criteria for 202(a) and 202(b) violations.

[78] In the *Been* v. *O.K. Indus., Inc.* litigation, the plaintiffs' economic expert billed for more than 3,000 hours spent on economic analysis of data, building a monopsony case in accordance with the Tenth Circuit's 2007 opinion, writing reports, consulting with attorneys, and testifying at depositions and during the jury trial. The defendant's two economic experts presumably billed for a similarly significant amount of time.

injury or the likelihood of competitive injury, as GIPSA anticipates, then GIPSA expects that few changes will be made as a result of § 201.3(a).

GIPSA expects the status quo enforcement outcome of § 201.3(a) discussed above to be most likely in the cattle and hog industries. GIPSA has enforced the P&S Act and regulations against packers without proving harm or likelihood of harm to competition for decades, and the courts have upheld successful enforcement actions. It is primarily in the poultry industry that, the courts have declined to enforce, sections 202(a) and (b) of the P&S Act and regulations without a finding of harm or likelihood of harm to competition.

Therefore, due to the likelihood of status quo rulings, GIPSA estimates that the upper boundary cost estimate of the overall impact of § 201.3(a) on the cattle and hog industries will be considerably less than the Informa Study estimates after applying the first two adjustments.

The second factor is the recent outcome of cases decided under the P&S Act since 2000 and whether courts have required demonstration of harm or likely harm to competition. GIPSA examined the actual number of cases decided under the P&S Act from 2000 to 2014. This is the same listing of cases as in the estimation of litigation costs presented earlier, except that GIPSA only considered cases decided after 2000 to reflect the most current decisions reached by the courts. The listing of court decisions and the court in which the decision was reached came from the National Agricultural Law Center at the University of Arkansas.[79] GIPSA then reviewed each case since 2000 and classified it as either a competition, financial, or trade practice case. GIPSA then examined each case to determine which cases involved alleged violations of sections 202(a) and 202(b) and which of those cases the court required demonstration of harm or likelihood of harm to competition.

GIPSA found 22 cases which involved alleged violations of sections 202(a) and 202(b) and addressed the issue of demonstrating harm or likelihood of harm to competition. Of those 22 cases, GIPSA found that the courts required demonstration of harm or likelihood of harm to competition in eight cases and did not require demonstration of a harm or likelihood of harm to competition in 14 cases. However, these 14 cases where demonstration of harm or likelihood of harm to competition was not required were not evenly distributed among the cattle, hog, and poultry industries. Courts have only required a demonstration of harm or likelihood of harm to competition in 20 percent of the cases alleging violations of sections 202(a) and 202(b) in the cattle and hog industries since 2000. GIPSA found that the courts have required a demonstration of harm or likelihood of harm to competition in 50 percent of the cases alleging violations of sections 202(a) and 202(b) in the poultry industry since 2000. The fact that demonstration of harm or likelihood of harm to competition was not required in every case is consistent with § 201.3(a), which states that demonstration of harm or likelihood of harm to competition is not required in all cases. As these cases have all involved livestock packers, swine contractors, and live poultry dealers and are a matter of public record, GIPSA believes that packers, swine contractors, and live poultry dealers are already aware that courts have not required demonstration of a harm or likelihood of harm to competition in all cases. This is another reason why GIPSA expects packers, swine contractors, and live poultry dealers to likely take a ''wait and see'' approach.

Therefore, due to the likelihood of status quo rulings by courts and the rationality of livestock packers, swine contractors, and live poultry dealers to tend toward a ''wait and see'' approach, GIPSA estimates the upper boundary estimate to be between 20 percent of the Informa Study cattle and hog industry estimates, 50 percent of the Informa Study poultry industry estimate and zero percent of the Informa Study estimates after applying the first two adjustments. Zero percent would mean that there are no industry adjustments from § 201.3(a).

Given the uncertainty in how the industry will respond to § 201.3(a), GIPSA selected one half of 20 percent of the Informa Study estimates for cattle and hogs, one half of 50 percent of the poultry industry estimate from the Informa Study estimates as its point estimate. Thus, GIPSA applied ten percent of the cattle and hog Informa Study estimates and 25 percent of the poultry Informa Study estimates as its point estimate after applying the first two adjustments. The following table shows the estimated upper boundary costs for § 201.3(a) on an annual and ten-year cost basis based on the adjusted Informa Study cost estimates.

TABLE 20—UPPER BOUNDARY ANNUAL COSTS OF § 201.3(a)—PREFERRED ALTERNATIVE

Year	Cattle ($ millions)	Hog ($ millions)	Poultry ($ millions)	Total ($ millions)
2017	28.14	12.49	35.87	76.49
2018	43.67	14.68	49.78	108.13
2019	63.08	19.82	62.93	145.82
2020	63.08	24.95	62.93	150.96
2021	63.08	23.85	50.72	137.65
2022	57.26	18.71	37.57	113.54
2023	47.55	13.58	18.78	79.92
2024	32.03	13.21	5.64	50.87
2025	24.26	7.34	5.64	37.24
2026	24.26	7.34	5.64	37.24
Totals	446.42	155.97	335.47	937.86

At the upper boundary in the first full year after implementation, GIPSA estimates that § 201.3(a) will result in an additional $76.49 million in direct and indirect costs in the livestock and poultry industries, with $28.14 million in the cattle industry, $12.49 million in the hog industry, and $35.87 million in the poultry industry. GIPSA expects the

[79] *http://nationalaglawcenter.org/aglaw-reporter/case-law-index/packers-and-stockyards.*

upper boundary of the ten-year total cost of § 201.3(a) to be $937.86 million.

F. Regulatory Alternative 2: Upper Boundary—NPV of Ten-Year Total Costs of the Preferred Alternative

GIPSA calculated the NPV of the ten-year total costs of the regulation using both a three percent and seven percent discount rate and the NPVs appear in the following table.

TABLE 21—NPV OF UPPER BOUNDARY OF TEN-YEAR TOTAL COST OF § 201.3(a)—PREFERRED ALTERNATIVE

Discount rate	Preferred option ($ millions)
3 Percent	818.97
7 Percent	692.49

GIPSA expects the NPV of the upper boundary of the ten-year total costs of § 201.3(a) to be $818.97 million at a three percent discount rate and $692.49 million at a seven percent discount rate.

G. Regulatory Alternative 2: Upper Boundary—Annualized Costs of the Preferred Alternative

GIPSA then annualized the costs of § 201.3(a) at the upper boundary using both a three percent and seven percent discount rate and the results appear in the following table.

TABLE 22—ANNUALIZED COSTS OF § 201.3(a)—PREFERRED OPTION

Discount rate	Preferred option ($ millions)
3 Percent	96.01
7 Percent	98.60

GIPSA expects the annualized costs of § 201.3(a) at the upper boundary to be $96.01 million at a three percent discount rate and $98.60 million at a seven percent discount rate.

H. Sensitivity Analysis of the Upper Boundary

In the section above, GIPSA explained that it chose 10 percent of the cattle and hog estimates from the Informa Study and 25 percent of the poultry estimate from the Informa Study as its point estimate for the upper boundary costs. Because of the uncertainty over the eventual impacts of this rule on industry behavior, GIPSA evaluates the sensitivity of its upper bound estimate to an alternative set of assumptions. GIPSA presents three alternative sets of assumptions for calculating the upper bound estimate.

For the first scenario, GIPSA applies the full adjustment to the Informa Study cost estimates, specifically, 20 percent for cattle and hogs and 50 percent for poultry. In that case, GIPSA's estimate of the upper bound would be twice as high as presented in the previous section. For the second scenario, § 201.3(a) is assumed to impact industry behavior for the poultry industry only, (that is, zero percent of the Informa Study estimate for cattle and hogs, and 25 percent of the estimate for poultry). In that scenario, the upper bound estimate would be the same as presented in Table 20, above, for poultry, and would be the lower boundary estimate for cattle and hogs as shown in Table 15. For a third scenario, all the Informa Study estimates are adjusted to zero assuming that there are no indirect costs of adjustment to the rule. In that case, the lower boundary estimate, only reflecting litigation costs, as shown in Tables 15 through 17 would be the result.

GIPSA calculated the NPV of the ten-year total costs of the regulation using both a three percent and seven percent discount rate for each of the three scenarios described above and the NPVs appear in the following table.

TABLE 23—SENSITIVITY ANALYSIS OF THE UPPER BOUNDARY ESTIMATE OF THE TEN-YEAR TOTAL COST OF § 201.3(a)—PREFERRED ALTERNATIVE—EXPRESSED IN NPV

Discount rate	Point estimate ($ millions)	Scenario 1 ($ millions)	Scenario 2 ($ millions)	Scenario 3 ($ millions)
3 Percent	818.97	1,637.94	319.43	58.62
7 Percent	692.49	1,384.98	276.18	50.03

Scenario 1: Adjustment to Informa of 20% for cattle and hogs, 50% for poultry.
Scenario 2: Adjustment to Informa of 0% for cattle and hogs, 25% for poultry.
Scenario 3: Adjustment to Informa of 0% for cattle and hogs, and poultry.

GIPSA then annualized the estimated costs of § 201.3(a) at the upper boundary for the three sensitivity scenarios using both a three percent and seven percent discount rate and the results appear in the following table.

TABLE 24—SENSITIVITY ANALYSIS OF THE UPPER BOUNDARY ESTIMATE OF THE TEN-YEAR TOTAL COST OF § 201.3(a)—PREFERRED ALTERNATIVE—ANNUALIZED

Discount rate	Point estimate ($ millions)	Scenario 1 ($ millions)	Scenario 2 ($ millions)	Scenario 3 ($ millions)
3 Percent	96.01	192.02	37.45	6.87
7 Percent	98.60	197.19	39.32	7.12

Scenario 1: Adjustment to Informa of 20% for cattle and hogs, 50% for poultry.
Scenario 2: Adjustment to Informa of 0% for cattle and hogs, 25% for poultry.
Scenario 3: Adjustment to Informa of 0% for cattle and hogs, and poultry.

I. Regulatory Alternative 2: Range of Annualized Costs of the Preferred Alternative

The following table shows the full range of the annualized costs of § 201.3(a) at both a three percent and seven percent discount rate.

TABLE 25—RANGE OF ANNUALIZED COSTS—PREFERRED OPTION

Discount rate	Lower boundary ($ millions)	Upper boundary ($ millions)
3 Percent	6.87	96.01
7 Percent	7.12	98.60

GIPSA estimates the annualized costs of § 201.3(a) will range from $6.87 million to $96.01 million at a three percent discount rate and from $7.12 million to $98.60 million at a seven percent discount rate.

J. Regulatory Alternative 2: Point Estimate of Annualized Costs of the Preferred Alternative

The range of potential costs is broad. The reason there is a broad range of potential costs is because § 201.3(a) has applicability to the livestock and poultry industries and it is difficult to predict how the industries will respond. If the industries do not change any of their current business practices, GIPSA expects additional litigation to be the only costs and the costs of the regulation will be closer to the lower boundary. If, however, the industries respond by reducing the use of AMAs and restricting their use of incentive pay, GIPSA expects the costs of the regulation to be closer to the upper boundary. Based on the uncertainty over how the industries will respond, GIPSA believes that the mid-point in the range of estimated annualized costs is the best available point estimate of the costs of § 201.3(a). The point estimate along with the lower and upper boundary estimates appear in the table below.

TABLE 26—POINT ESTIMATE OF ANNUALIZED COSTS—PREFERRED ALTERNATIVE

Discount rate	Lower boundary ($ millions)	Point estimate ($ millions)	Upper boundary ($ millions)
3 Percent	6.87	51.44	96.01
7 Percent	7.12	52.86	98.60

GIPSA expects the annualized costs of § 201.3(a) at the point estimate to be $51.44 million at a three percent discount rate and $52.86 million at a seven percent discount rate. Based on the discussion of GIPSA's expectation that the cattle, hog, and poultry industries will likely take a ''wait and see'' approach to how the courts will interpret § 201.3(a) and for courts to take a status quo approach, GIPSA believes the point estimates of the preferred alternative to be the best available estimates of the costs of § 201.3(a).

K. Regulatory Alternative 2: Sensitivity Analysis of Point Estimates of Annualized Costs

In its estimate of litigation costs presented above, GIPSA recognized the uncertainty in estimating litigation costs and conducted a sensitivity analysis. GIPSA estimated that the lower boundary of the first-year costs of § 201.3(a) were $4.84 million at the lower percentile, $8.89 million at the average percentile, and $13.22 million at the upper percentile.[80] GIPSA relied on the average estimate of litigation costs as the lower boundary of the litigation costs of § 201.3(a).

To consider the effects of the uncertainty in its estimation of litigation costs, GIPSA annualized its litigation costs estimates at the lower percentile, the average percentile, and the upper percentile and the results appear in the following table.

TABLE 27—ANNUALIZED RANGE OF ESTIMATED LITIGATION COSTS—PREFERRED ALTERNATIVE

Discount rate	Lower percentile ($ millions)	Average ($ millions)	Upper percentile ($ millions)
3 Percent	3.74	6.87	10.22
7 Percent	4.54	7.12	12.41

GIPSA then applied this uncertainty to its point estimates of the annualized costs of § 201.3(a) by subtracting the difference of the lower percentile of estimated litigation costs and the point estimate at both the three and seven percent discount rates and added the difference of the upper percentile of estimated litigation costs and the point estimate at both the three and seven percent discount rates. The results of the sensitivity analysis appear in the following table.

[80] See Tables 11–13 above.

TABLE 28—ANNUALIZED RANGE OF POINT ESTIMATES OF § 201.3(a)—PREFERRED ALTERNATIVE

Discount rate	Lower percentile ($ millions)	Point estimate ($ millions)	Upper percentile ($ millions)
3 Percent	49.87	51.44	53.11
7 Percent	51.57	52.86	55.50

GIPSA estimates that the point estimates of the annualized costs of § 201.3(a) will range from $49.87 million at the lower percentile to $53.11 million at the upper percentile using a three percent discount rate. At the seven percent discount rate, GIPSA estimates that the point estimate of the annualized costs will range from $51.57 million at the lower percentile to $55.50 million at the upper percentile. Given the size of the range between the upper and lower boundary of the estimated annualized costs, GIPSA's point estimate is not overly sensitive to the uncertainty in the estimated litigation costs. Thus, GIPSA believes the point estimates of the preferred alternative to be the best available estimate of the costs of § 201.3(a).

L. Regulatory Alternative 2: Benefits of the Preferred Alternative

GIPSA was unable to quantify the benefits of § 201.3(a). However, there are qualitative benefits of § 201.3(a) that merit discussion. The primary qualitative benefit of § 201.3(a) is ability of livestock producers, swine production contract growers, and poultry growers to have more protections and be treated more fairly, which may lead to more equitable contracts. A simple example is the inaccurate weighing of slaughter-ready poultry grown by a poultry grower for a live poultry dealer. The poultry grower is harmed if the true weight is above the inaccurate weight because the poultry grower's payment is typically tied to the poultry grower's efficiency in growing poultry, which in this case is artificially low due to the inaccurate weight of the live birds. The impact of this harm to the poultry grower is very small when compared to the entire industry and there is no discernable or provable harm to competition from this one instance. However because there is no discernible or provable harm or likely harm to competition, courts have been reluctant to find a violation of section 202(a) of the P&S Act in such a situation, despite the harm suffered by the individual poultry grower.

However, if similar, though unrelated, harm is experienced by a large number of poultry growers, the cumulative effect does result in a discernible and provable harm to competition. The individual harm is inconsequential to the poultry industry, but the sum total of all individual harm has the potential to be quite significant when compared to the poultry industry and therefore, courts have found harm or likely harm to competition in such a situation. Under proposed § 201.210(b)(8), failing to ensure accurate weights of live poultry, absent a legitimate business justification, will constitute an unfair, unjustly discriminatory, or deceptive practice or device and a violation of section 202(a) of the P&S Act. Whether or not the conduct harms or is likely to harm competition becomes irrelevant.

GIPSA expects § 201.3(a) to increase enforcement actions against live poultry dealers for violations of sections 202(a) and/or 202(b) when the conduct or action does not harm or is not likely to harm competition. Several appellate courts have disagreed with USDA's interpretation of the P&S Act that harm or likely harm to competition is not necessary in all cases to prove a violation of sections 202(a) and/or 202(b). In some cases in which the United States was not a party, these courts have concluded that plaintiffs could not prove their claims under sections 202(a) and/or (b) without proving harm to competition or likely harm to competition. One reason the courts gave for declining to defer to USDA's interpretation of the statute is that USDA had not previously enshrined its interpretation in a regulation. Interim final § 201.3(a) corrects the issue and courts may now give deference to USDA's interpretation.

GIPSA expects the result will be additional enforcement actions that will be successfully litigated and serve as a deterrent to violating sections 202(a) and/or 202(b). Benefits to the industries and the markets from additional enforcement will also arise from establishing parity of negotiating power between livestock producers, swine production contract growers, and poultry growers and packers, swine contractors, and live poultry dealers by reducing the ability to use market power with the resulting dead weight losses.[81]

Section 201.3(a) also provides additional protections for livestock producers, swine production contract growers, and poultry growers against unfair, unjustly discriminatory, and deceptive practices or devices and undue or unreasonable preferences, advantages, prejudices, or disadvantages since demonstration of harm to competition is required in all cases. GIPSA believes the standard articulated in § 201.3(a) is consistent with its mission ''[T]o protect fair trade practices, financial integrity, and competitive markets for livestock, meats, and poultry.'' [82] By making it clear that demonstration of harm or likely harm to competition is not necessary in all cases, this interim final rule promotes fairness and equity for livestock producers, swine production contract growers, and poultry growers.[83]

M. Regulatory Alternative 2: Cost-Benefit Summary of the Preferred Alternative

GIPSA estimates 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 expects that the cattle, hog, and poultry industries will primarily take a ''wait and see'' approach to how courts will interpret § 201.3(a) and courts to take a status quo approach and only slightly adjust their use of AMAs and performance-based payment systems. GIPSA estimates that the annualized costs of § 201.3(a) will 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 industry adjustments.

[81] Nigel Key and Jim M. MacDonald discuss evidence for the effect of concentration on grower compensation in ''Local Monopsony Power in the Market for Broilers? Evidence from a Farm Survey'' selected paper American Agri. Economics Assn. meeting Orlando, FL, July 27–29, 2008.

[82] *https://www.gipsa.usda.gov/laws/law/PS_act.pdf.* Accessed on September 19, 2016.

[83] See additional discussion in Steven Y. Wu and James MacDonald (2015) ''Economics of Agricultural Contract Grower Protection Legislation,'' *Choices* 30(3): 1–6.

The primary benefit of § 201.3(a) is the increased ability for the enforcement of the P&S Act for violations of sections 202(a) and/or 202(b), which do not result in harm or likely harm to competition. This, in turn, will reduce instances of unfair, unjustly discriminatory, or deceptive practices or devices and undue or unreasonable preferences, advantages, prejudices, or disadvantages and increased efficiencies in the marketplace. The benefit of additional enforcement of the P&S Act will accrue to all segments of the value chain in the production of livestock and poultry, and ultimately to consumers.

N. Regulatory Alternative 3: Small Business Exemption

The third regulatory alternative that GIPSA considered is issuing § 201.3(a) as an interim final regulation, but exempting small businesses, as defined by the Small Business Administration, from having to comply with it.[84] To estimate the expected costs of exempting small business, GIPSA relied on the percentage of small businesses in the cattle, hog, and poultry industries that are developed and presented in the Regulatory Flexibility Analysis section below.

To arrive at the estimated costs of § 201.3(a) based on exempting small businesses, GIPSA weighted the point estimates, lower boundary, and upper boundary of cost estimates by the percentage of cattle and hogs processed by packers that are large businesses and the percentage of contracts held by swine contractors and live poultry dealers that are large businesses. GIPSA estimates that small businesses account for 19.3 percent of the cattle slaughtered. For the hog industry, GIPSA estimates that small businesses slaughter 17.8 percent of hogs and that 65 percent of swine contractors are small businesses. GIPSA estimates that 10.27 percent of live poultry dealers are classified as small businesses.

O. Regulatory Alternative 3: Lower Boundary of Cost Spectrum—Litigation Costs of the Small Business Exemption

As discussed above, GIPSA considers the lower boundary of costs from § 201.3(a) to be increased litigation with no adjustments by the cattle, hog, and poultry industries to reduce their use of AMAs or incentive pay systems and there are no changes to existing marketing or production contracts. GIPSA used the average of the litigation cost estimates as the lower boundary for the estimated costs of § 201.3(a). GIPSA then weighted the lower boundary cost estimate under the preferred alternative by the percentage of large businesses in the cattle, hog, and poultry industries. The estimates appear in the table below. The preferred alternative is also shown for convenience.

TABLE 29—LOWER BOUNDARY ANNUAL TOTAL COSTS—SMALL BUSINESS EXEMPTION

Year	Preferred alternative ($ millions)	Small business exemption ($ millions)
2017	8.89	7.49
2018	8.89	7.49
2019	8.89	7.49
2020	8.89	7.49
2021	8.89	7.49
2022	7.41	6.24
2023	5.93	4.99
2024	4.44	3.74
2025	2.96	2.50
2026	1.48	1.25
Totals	66.67	56.16

At the lower boundary with a small business exemption, GIPSA estimates that § 201.3(a) will result in an additional $7.49 million in litigation costs in the cattle, hog, and poultry industries in the first full year following implementation. GIPSA expects the lower boundary of the ten-year total costs of § 201.3(a) with a small business exemption to be $56.16 million.

P. Regulatory Alternative 3: Lower Boundary—NPV of Total Costs of the Small Business Exemption

GIPSA calculated the lower boundary of the NPV of the ten-year total costs of the regulation under the small business exemption using both a three percent and seven percent discount and the NPVs appear in the following table. The preferred alternative is also shown for convenience.

TABLE 30—LOWER BOUNDARY NPV OF TEN-YEAR TOTAL COST—SMALL BUSINESS EXEMPTION

Discount rate	Preferred alternative ($ millions)	Small business exemption ($ millions)
3 Percent	58.62	49.38
7 Percent	50.03	42.14

[84] See: *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

GIPSA expects the NPV of the lower boundary of the ten-year total costs of § 201.3(a) under a small business exemption to be $49.38 million at a three percent discount rate and $42.14 million at a seven percent discount rate.

Q. Regulatory Alternative 3: Lower Boundary—Annualized Costs of the Small Business Exemption

GIPSA then annualized the NPV of the ten-year total costs of § 201.3(a) at the lower boundary using both a three percent and seven percent discount rate and the results appear in the following table. The preferred alternative is also shown for convenience.

TABLE 31—LOWER BOUNDARY OF ANNUALIZED COSTS—SMALL BUSINESS EXEMPTION

Discount rate	Preferred alternative ($ millions)	Small business exemption ($ millions)
3 Percent	6.87	5.79
7 Percent	7.12	6.00

GIPSA expects the annualized costs of § 201.3(a) at the lower boundary with a small business exemption to be $5.79 million at a three percent discount rate and $6.00 million at a seven percent discount rate.

R. Regulatory Alternative 3: Upper Boundary of Cost Spectrum—Small Business Exemption

As discussed above, the upper boundary of the cost spectrum occurs if the cattle, hog, and poultry industries adjust their use of AMAs and incentive pay systems and make systematic changes in their marketing and production contracts to reduce the threat of litigation.

For the upper boundary cost estimates under the small business exemption, GIPSA weighted the upper boundary cost estimates under the preferred alternative by the percentage of large businesses in the cattle, hog, and poultry industries and the estimates appear in the table below. For convenience, the estimated costs of the preferred alternative are shown in addition to the costs of the small business exemption.

TABLE 32—UPPER BOUNDARY ANNUAL TOTAL COSTS—SMALL BUSINESS EXEMPTION

Year	Preferred alternative ($ millions)	Small business exemption ($ millions)
2017	76.49	60.08
2018	108.13	86.00
2019	145.82	115.60
2020	150.96	117.73
2021	137.65	106.32
2022	113.54	87.69
2023	79.92	60.87
2024	50.87	36.39
2025	37.24	27.68
2026	37.24	27.68
Totals	937.86	726.05

At the upper boundary with a small business exemption, GIPSA estimates that § 201.3(a) will result in an additional $60.08 million in direct and indirect costs in the cattle, hog, and poultry industries in the first full year following implementation. GIPSA expects the upper boundary of the ten-year total costs of § 201.3(a) with a small business exemption to be $726.05 million.

S. Regulatory Alternative 3: Upper Boundary—NPV of Ten-Year Total Costs of the Small Business Exemption

GIPSA calculated the upper boundary of the NPV of the ten-year total costs of the regulation under the small business exemption using both a three percent and seven percent discount and the NPVs appear in the following table. The preferred alternative is also shown for convenience.

TABLE 33—UPPER BOUNDARY NPV OF TEN-YEAR TOTAL COSTS—SMALL BUSINESS EXEMPTION

Discount rate	Preferred alternative ($ millions)	Small business exemption ($ millions)
3 Percent	818.97	634.97
7 Percent	692.49	537.90

GIPSA expects the NPV of the upper boundary of the NPV of the ten-year total costs of § 201.3(a) under a small business exemption to be $634.97 million at a three percent discount rate and $537.90 million at a seven percent discount rate.

T. Regulatory Alternative 3: Upper Boundary—Annualized Costs of the Preferred Alternative

GIPSA then annualized the costs of § 201.3(a) at the upper boundary using both a three percent and seven percent discount rate and the results appear in the following table. The preferred alternative is also shown for convenience.

TABLE 34—UPPER BOUNDARY OF ANNUALIZED COSTS—SMALL BUSINESS EXEMPTION

Discount rate	Preferred alternative ($ millions)	Small business exemption ($ millions)
3 Percent	96.01	74.44
7 Percent	98.60	76.58

GIPSA expects the annualized costs of § 201.3(a) at the upper boundary with a small business exemption to be $74.44 million at a three percent discount rate and $76.58 million at a seven percent discount rate.

U. Regulatory Alternative 3: Point Estimates—Annualized Costs of the Small Business Exemption

Using the same methodology, GIPSA also estimated the point estimates of the annualized costs of § 201.3(a) with a small business exemption using both a three percent and seven percent discount rate and the results appear in the following table. The preferred alternative is also shown for convenience.

TABLE 35—POINT ESTIMATE OF ANNUALIZED COSTS—SMALL BUSINESS EXEMPTION

Discount rate	Preferred alternative ($ millions)	Small business exemption ($ millions)
3 Percent	51.44	40.11
7 Percent	52.86	41.29

GIPSA expects the annualized costs of § 201.3(a) at the point estimates with a small business exemption to be $40.11 million at a three percent discount rate and $41.29 million at a seven percent discount rate.

V. Regulatory Alternative 3: Range of Annualized Costs of the Small Business Exemption

The following table shows the range of the annualized costs of § 201.3(a) at both a three percent and seven percent discount rate under the small business exemption.

TABLE 36—RANGE OF ANNUALIZED COSTS—SMALL BUSINESS EXEMPTION

Discount rate	Lower boundary ($ millions)	Point estimate ($ millions)	Upper boundary ($ millions)
3 Percent	5.79	40.11	74.44
7 Percent	6.00	41.29	76.58

GIPSA estimates the annualized costs of § 201.3(a) to range from $5.79 million to $74.44 million at the three percent discount rate and from $6.00 million to $76.58 million at the seven percent discount rate. The range of potential costs is broad and GIPSA relied on its expertise and the methodology discussed above to arrive at point estimates of the costs within the range that GIPSA expects to occur. GIPSA expects the most likely point estimates of annualized costs to be $40.11 million at a three percent discount rate and $41.29 million at a seven percent discount rate.

W. Regulatory Alternative 3: Benefits of the Small Business Exemption

The benefits of § 201.3(a) with a small business exemption are the same as in the preferred alternative except that the benefits for livestock producers, swine production contract growers, and poultry growers will only be captured by those livestock producers, swine production contract growers, and poultry growers selling or growing livestock and poultry for packers, swine contractors, and poultry dealers classified as large businesses.

X. Regulatory Alternative 3: Cost-Benefit Summary of the Small Business Exemption

GIPSA estimates the annualized costs of § 201.3(a) under a small business exemption to range from $5.79 million to $74.44 million at the three percent discount rate and from $6.00 million to $76.58 million at the seven percent discount rate. GIPSA expects the point estimates of the annualized costs to be $40.11 million at a three percent discount rate and $41.29 million at a seven percent discount rate.

Cost-Benefit Comparison of Regulatory Alternatives

The status quo option has zero marginal costs and benefits as GIPSA does not expect any changes in the cattle, hog, or poultry industries. GIPSA compared the annualized costs of the preferred alternative to the annualized costs of the small business exemption alternative by subtracting the annualized costs of the small business exemption alternative from the preferred alternative and the results appear in the following table.

TABLE 37—COSTS SAVINGS OF THE SMALL BUSINESS EXEMPTION ALTERNATIVE COMPARED TO THE PREFERRED ALTERNATIVE

Discount rate	Lower boundary ($ millions)	Point estimate ($ millions)	Upper boundary ($ millions)
3 Percent	1.08	11.33	21.57
7 Percent	1.12	11.57	22.01

The annualized cost savings of the small business exemption alternative is between $1.08 million and $21.57 million using a three percent discount rate and between $1.12 million and $22.01 million using a seven percent discount rate. At GIPSA's point estimates, the annualized costs of the small business exemption alternative is $11.33 million less than the preferred alternative using a three percent discount rate and $11.57 million less expensive using a seven percent discount rate.

The data presented in Table 4 above show that over 50 percent of broiler growers have only one or two integrators in their local area. This limited integrator choice may accentuate the risks of contracting. Poultry growers with contract growing arrangements with both small and large live poultry dealers face these risks.

Similarly, the potential market failures or unequal bargaining power among contracting parties due to monopsony or oligopsony market power or asymmetric information likely applies to both production and marketing contracts regardless of whether the packer, swine contractor, or live poultry dealer is large or small due to the regional nature of concentration. The result is that the contracts may have detrimental effects on one of the contracting parties and may result in inefficiencies in the marketplace.

One purpose of § 201.3(a) is to mitigate the risks of potential market failures or unequal bargaining power to all livestock producers, swine production contract growers, and poultry growers, not just the livestock producers, swine production contract growers, and poultry growers selling or growing livestock and poultry for large packers, swine contractors, and poultry dealers. The small business exemption would continue to subject the livestock producers, swine production contract growers, and poultry growers with contractual arrangements with small packers, swine contractors, and live poultry dealers to the contracting risks and potential market failures discussed above. GIPSA believes that the benefits of § 201.3(a) should be captured by all livestock producers, swine production contract growers, and poultry growers.

GIPSA considered three regulatory alternatives and believes the preferred alternative is the best option. All livestock producers, swine production contract growers, and poultry growers, regardless of the size of the firm with which they contract, will capture the benefits of § 201.3(a).

Regulatory Flexibility Analysis of the Preferred Option

The Small Business Administration (SBA) defines small businesses by their North American Industry Classification System Codes (NAICS).[85] 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 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. The Census provides the number of head sold from their own operations by size classes for swine contractors, but not the value of sales nor number of head sold from the farms of the contracted production. Thus, to estimate the entity size and average per-entity revenue by the SBA classification, the average value per head for sales of all swine operations is multiplied by production values for firms in the Census size classes for swine contractors. The estimates reveal that although 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.

Currently, there are 133 live poultry dealers that would be subject to § 201.3(a). According to U.S. Census data on County Business Patterns, there were 74 live poultry dealers that had more than 1,250 employees in 2013. The difference yields approximately 59 live poultry dealers that have fewer than 1,250 employees and would be considered as small businesses that would be subject to the interim final regulation.

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.

Poultry dealers classified as large businesses are responsible for about 89.7 percent of the poultry contracts. Assuming that small businesses will bear 10.3 percent of the costs in the first full year § 201.3(a) is effective, between $590,000[86] at the lower boundary and $3.7 million[87] at the upper boundary in additional costs would fall on live poultry dealers classified as small businesses. This amounts to average

[85] See: *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.* Accessed on September 19, 2016.

[86] Lower bound cost estimate of $5.74 million (Table 12) × 10.27 percent of firms that are small businesses = $589 thousand.

[87] Upper bound cost estimate of $35.87 million (Table 20) × 10.27 percent of firms that are small businesses = $3.7 million.

estimated costs for each live poultry dealer classified as a small business of between $10,000 and $62,400.

As of June 2016, GIPSA records identified 359 beef and pork packers actively purchasing cattle or hogs for slaughter. Many firms slaughtered more than one species of livestock. Of the 359 beef and pork packers, 161 processed both cattle and hogs, 132 processed cattle but not hogs, and 66 processed hogs but not cattle. GIPSA records had a total of 293 cattle slaughterers and 227 hog slaughterers. Two hundred eighty-seven of the cattle slaughterers and 219 of the hog slaughterers would be classified as small businesses.

GIPSA estimates that small businesses accounted for 19.3 percent of the cattle and 17.8 percent of the hogs slaughtered in 2015. If the costs of implementing § 201.3(a) are proportional to the number of head processed, then in 2017, the first full year the regulation would be effective, GIPSA expects between $507,000 [88] and $5.4 million [89] in additional costs would fall on beef packers classified as small businesses. This amounts to a range of $1,800 to $18,900 for each beef packer classified as a small business. GIPSA expects, between $13,000 [90] and $308,000 [91] would fall on pork packers classified as small businesses, and between $12,500 [92] and $301,000 [93] would fall on swine contractors classified as small businesses. This amounts to average estimated costs for each pork packer classified as a small business of between $60 and $1,400, and for each swine contractor classified as a small business of between $35 and $831 in the first full year the regulation would be effective.

Annualized ten-year costs discounted at a three percent interest rate would fall between $392,000 and $8.7 million for the cattle industry, between $20,000 and $772,000 for the hog industry, and between $456,000 and $3.6 million for the poultry industry. This amounts to average estimated costs ranging from $1,400 to $30,400 for each beef packer, $45 to $1,800 for each pork packer, $27 to $1,053 for each swine contractor, and $7,700 to $61,000 for each live poultry dealer that is a small business. The total annualized ten-year costs for small businesses would be between $870,000 and $13.1 million.

Annualized ten-year costs discounted at a seven percent interest rate would fall between $406,000 and $8.8 million for the cattle industry, $20,000 and $785,000 for the hog industry, and $473,000 and $3.8 million for the poultry industry. This amounts to average estimate costs ranging from $1,400 to $30,700 for each beef packer, $40 to $1,800 for each pork packer, $23 to $1,100 for each swine contractor, and $8,000 to $64,100 for each live poultry dealer that is a small business. The total annualized ten-year costs for small businesses would be between $900,000 and $13.4 million.

The table below lists the expected additional costs associated with the proposed regulation and upper and lower bound estimates of the costs. It also lists the point estimate, upper bound, and lower bound annualized costs at three percent and seven percent interest rates.

TABLE 38—UPPER AND LOWER BOUND COSTS TO SMALL BUSINESSES OF § 201.3(a)

Estimate type	Cattle ($ millions)	Hogs ($ millions)	Poultry ($ millions)	Total ($ millions)
First Year Costs:				
Lower Bound	0.507	0.025	0.590	1.122
Point Estimate	2.969	0.317	2.137	5.423
Upper Bound	5.430	0.609	3.684	9.723
10 years annualized at 3%:				
Lower Bound	0.392	0.020	0.456	0.867
Point Estimate	4.554	0.396	2.026	6.976
Upper Bound	8.716	0.772	3.596	13.084
10 years annualized at 7%:				
Lower Bound	0.406	0.020	0.473	0.899
Point Estimate	4.613	0.403	2.126	7.142
Upper Bound	8.820	0.785	3.780	13.385

In considering the impact on small businesses, GIPSA considered the average costs and revenues of each small business impacted by § 201.3(a). The number of small businesses impacted by § 201.3(a), by NAICS code, as well as the per entity, first-year and annualized costs at both the three percent and seven percent discount rates appear in the following table.

[88] Lower bound cost estimate of $2.63 million × 19.3 percent of slaughter in small businesses = $507 thousand.

[89] Upper bound cost estimate of $28.14 million × 19.3 percent of slaughter in small businesses = $5.4 million.

[90] Lower bound cost estimate of $520 thousand × 17.8 percent of slaughter in small business × 13.8 percent of costs attributed to packers = $13,000.

[91] Upper bound cost estimate of $12.49 million × 17.8 percent of slaughter in small business × 13.8 percent of costs attributed to packers = $308 thousand.

[92] Lower bound cost estimate of $520 thousand × 2.8 percent of contracted hogs produced by swine contractors that are small businesses × 86.2 percent of costs attributed to swine contractors = $12,500.

[93] Upper bound cost estimate of $12.49 million × 2.8 percent of contracted hogs produced by swine contractors that are small businesses × 86.2 percent of costs attributed to swine contractors = $301 thousand.

TABLE 39—PER ENTITY UPPER AND LOWER BOUND COSTS TO SMALL BUSINESSES OF § 201.3(a)

NAICS	Number of small business	Average cost per entity					
		First-year		Annualized costs 3%		Annualized costs 7%	
		Low ($)	High ($)	Low ($)	High ($)	Low ($)	High ($)
112210—Swine Contractor	363	35	831	27	1,053	23	1,071
311615—Poultry	59	9,996	62,443	7,727	60,957	8,010	64,066
311611—Cattle	287	1,767	18,920	1,366	30,369	1,416	30,732
311611—Hogs	219	59	1,405	45	1,781	47	1,811

The following table compares the average per entity first-year cost of § 201.3(a) to the average revenue per establishment for all firms in the same NAICS code.

TABLE 40—COMPARISON OF PER ENTITY FIRST-YEAR COST TO SMALL BUSINESSES OF § 201.3(a) TO REVENUES

NAICS	Number of small business	Average first-year cost per entity		Average revenue per establishment ($)	Cost as percent of revenue	
		Low ($)	High ($)		Low	High
112210—Swine Contractor	363	35	831	485,860	0.01	0.17
311615—Poultry	59	9,996	62,443	13,842,548	0.07	0.45
311611—Cattle	287	1,767	18,920	6,882,205	0.03	0.27
311611—Hogs	219	59	1,405	6,882,205	0.00	0.02

The following table compares the average per entity annualized cost at a seven percent discount rate of § 201.3(a) to the average revenue per establishment for all firms in the same NAICS code. The annualized costs are slightly higher at the seven percent rate than at the three percent rate, so only the seven percent rate is shown as it is the higher annualized cost.

TABLE 41—COMPARISON OF PER ENTITY ANNUALIZED COST TO SMALL BUSINESSES OF § 201.3(a) TO REVENUES

NAICS	Number of small business	Average annualized cost per entity		Average revenue per establishment ($)	Cost as percent of revenue	
		Low ($)	High ($)		Low (%)	High (%)
112210—Swine Contractor	363	23	1,071	485,860	0.00	0.22
311615—Poultry	59	8,010	64,066	13,842,548	0.06	0.46
311611—Cattle	287	1,416	30,732	6,882,205	0.02	0.45
311611—Hogs	219	39	1,811	6,882,205	0.00	0.03

The revenue figures in the above table come from Census data for live poultry dealers and cattle and hog slaughterers, NAICS codes 311615 and 311611, respectively.[94] As discussed above, the Census provides the number of head sold by size classes for farms that sold their own hogs and pigs in 2012 and that that identified themselves as contractors or integrators, but not the value of sales nor the number of head sold from the farms of the contracted production. Thus, to estimate average revenue per establishment, GIPSA used the estimated average value per head for sales of all swine operations and the production values for firms in the Census size classes for swine contractors

As the results in Tables 40 and 41 demonstrate, the costs of § 201.3(a) as a percent of revenue are small as they are less than one percent, with the exception of the upper boundary for swine contractors.[95]

Annualized costs savings of exempting small businesses would be between $870,000 and $13.1 million using a three percent discount rate and between $900,000 and $13.4 million using a seven percent discount rate. At GIPSA's point estimates, the annualized costs of the small business exemption alternative is $7.0 million less than the preferred alternative using a three percent discount rate and $7.1 million less expensive using a seven percent discount rate.

Exempting small businesses would continue to subject the livestock producers, swine production contract growers, and poultry growers with contractual arrangements with small packers, swine contractors, and live poultry dealers to the contracting risks and potential market failures discussed above. GIPSA believes that the benefits

[94] Source: *http://www.census.gov/data/tables/2012/econ/susb/2012-susb-annual.html.* Accessed on November 29, 2016.

[95] There are significant differences in average revenues between swine contractors and cattle, hog, and poultry processors, resulting from the difference in SBA thresholds.

of § 201.3(a) should be captured by all livestock producers, swine production contract growers, and poultry growers.

Based on the above analyses regarding § 201.3(a), GIPSA certifies that this rule 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.*). While confident in this certification, GIPSA acknowledges that individual businesses may have relevant data to supplement our analysis. We would encourage small stakeholders to submit any relevant data during the comment period.

B. Executive Order 12988

This interim final rule has been reviewed under Executive Order 12988, Civil Justice Reform. These actions are not intended to have retroactive effect, although in some instances they merely reiterate GIPSA's previous interpretation of the P&S Act. This interim final rule will not pre-empt 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 prior to any judicial challenge to the provisions of this rule. Nothing in this interim 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.

C. Executive Order 13175

This rule has been reviewed 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 the distribution of power and responsibilities between the Federal Government and Indian tribes.

Although GIPSA has assessed the impact of this rule on Indian tribes and determined that this rule does not, to our knowledge, have tribal implications that require tribal consultation under Executive Order 13175, GIPSA offered opportunities to meet with representatives from Tribal Governments during the comment period for the proposed rule (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. All tribal headquarters were invited to participate in these venues for consultation. GIPSA has received no specific indication that the 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.

D. Paperwork Reduction Act

This interim 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.

E. 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.

For the reasons set forth in the preamble, we amend 9 CFR part 201 as follows:

PART 201—REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 7 U.S.C. 181–229c.

■ 2. Section 201.3 is amended by redesignating the existing text as paragraph (b), adding new paragraph (a), and adding a heading to paragraph (b) to read as follows:

§ 201.3 Applicability of regulations in this part.

(a) *Scope of sections 202(a) and (b) of the Act.* The appropriate application of sections 202(a) and (b) of the Act depends on the nature and circumstances of the challenged conduct or action. A finding that the challenged conduct or action adversely affects or is likely to adversely affect competition is not necessary in all cases. Certain conduct or action can be found to violate sections 202(a) and/or (b) of the Act without a finding of harm or likely harm to competition.

(b) *Effective dates.* * * *

Larry Mitchell,

Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. 2016–30424 Filed 12–19–16; 8:45 am]

BILLING CODE 3410–KD–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 51

[Docket ID OCC–2016–0017]

RIN 1557–AE07

Receiverships for Uninsured National Banks

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is adopting a final rule addressing the conduct of receiverships for national banks that are not insured by the Federal Deposit Insurance Corporation (FDIC) (uninsured banks) and for which the FDIC would not be appointed as receiver. The final rule implements the provisions of the National Bank Act (NBA) that provide the legal framework for receiverships of such institutions. The final rule adopts the rule as proposed without change.

DATES: This final rule is effective on January 19, 2017.

FOR FURTHER INFORMATION CONTACT: Mitchell Plave, Special Counsel, Legislative and Regulatory Activities Division, (202) 649–5490, or for persons who are deaf or hard of hearing, TTY, (202) 649–5597, or Richard Cleva, Senior Counsel, Bank Activities and Structure Division, (202) 649–5500, Office of the Comptroller of the Currency, 400 7th Street SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

I. Introduction

On September 13, 2016, the OCC published a proposed rule to implement the provisions of the NBA that provide the legal framework for receiverships for uninsured banks,[1] 12 U.S.C. 191—200,

[1] All Federal savings associations (FSAs), including trust-only FSAs, are required to be insured. For this reason, this final rule does not apply to FSAs, given that receiverships for FSAs would be conducted by the FDIC.

Proposed Rules

Federal Register
Vol. 81, No. 244
Tuesday, December 20, 2016

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

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.

SUMMARY: The Department of Agriculture's (USDA) Grain Inspection, Packers and Stockyards Administration (GIPSA), Packers and Stockyards Program (P&SP) is proposing to amend the regulations issued under the Packers and Stockyards Act, 1921, as amended and supplemented (P&S Act). The proposed amendments will clarify the conduct or action by packers, swine contractors, or live poultry dealers that GIPSA considers unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the P&S Act. The proposed amendments will also identify criteria that the Secretary will consider in determining whether conduct or action by packers, swine contractors, or live poultry dealers constitutes an undue or unreasonable preference or advantage and a violation of section 202(b) of the P&S Act.

This proposed rule identifies the conduct or action that is a per se violation of section 202(a) of the P&S Act, includes an illustrative list of conduct or action, absent demonstration of a legitimate business justification, GIPSA believes is unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the P&S Act regardless of harm to competition, and clarifies that any conduct or action that harms or is likely to harm competition is a violation of section 202(a) of the P&S Act. The proposed rule also includes criteria the Secretary will consider in determining whether conduct or action constitutes an undue or unreasonable preference or advantage and a violation of section 202(b) of the P&S Act.

DATES: We will consider comments we receive by February 21, 2017.

ADDRESSES: We invite you to submit comments on this proposed rule. You may submit comments by any of the following methods:

- *Mail:* M. Irene Omade, GIPSA, USDA, 1400 Independence Avenue SW., Room 2542A–S, Washington, DC 20250–3613.
- *Hand Delivery or Courier:* M. Irene Omade, GIPSA, USDA, 1400 Independence Avenue SW., Room 2542A–S, Washington, DC 20250–3613.
- *Internet: http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

Instructions: All comments should make reference to the date and page number of this issue of the **Federal Register**. Regulatory analyses and other documents relating to this rulemaking will be available for public inspection in Room 2542A–S, 1400 Independence Avenue SW., Washington, DC 20250–3613 during regular business hours. All comments received will be included in the public docket without change, including any personal information provided. All comments will be available for public inspection in the above office during regular business hours (7 CFR 1.27(b)). Please call the Management and Budget Services staff of GIPSA at (202) 720–8479 to arrange a public inspection of comments or other documents related to this rulemaking.

FOR FURTHER INFORMATION CONTACT: S. Brett Offutt, Director, Litigation and Economic Analysis Division, P&SP, GIPSA, 1400 Independence Ave. SW., Washington, DC 20250, (202) 720–7051, *s.brett.offutt@usda.gov*.

SUPPLEMENTARY INFORMATION:

Background on Prior Proposed Rule

In June 2010, GIPSA proposed a new regulation designated as § 201.210. Paragraph (a) in that regulation introduced a list of examples of conduct that GIPSA considered unfair, unjustly discriminatory, or deceptive under section 202(a) of the P&S Act. GIPSA intended the first seven examples in the list to exemplify conduct that would violate section 202(a) regardless of proof of harm or likely harm to competition. The seven (7) examples proposed were as follows: (1) An unjustified material breach of a contractual duty or an action or omission that a reasonable person would consider unscrupulous, deceitful, or in bad faith in connection with any transaction in or contract involving the production, maintenance, marketing or sale of livestock or poultry; (2) a retaliatory action or omission, such as coercion, intimidation, or disadvantage, by a packer, swine contractor, or live poultry dealer in response to the lawful expression, association, or action of a poultry grower, livestock producer, or swine production contract grower; (3) a refusal to provide to a poultry grower or swine production contract grower statistical information and data (*e.g.,* feed conversion rates, feed analysis, and origin and breeder history) used to determine compensation paid under a production contract; (4) an action or attempt to limit by contract a poultry grower, swine production contract grower, or livestock producer's legal rights and remedies afforded by law; (5) paying premiums or applying discounts on a swine production contract grower's payment or the purchase price received by the livestock producer from the sale of livestock without documenting the reason and substantiating the revenue and cost justification associated with the premium or discount; (6) terminating a poultry growing arrangement or a swine production contract based only on allegations that the poultry grower or swine production contract grower failed to comply with an applicable law, rule or regulation; and (7) a representation, omission or practice that is fraudulent or likely to mislead a reasonable poultry grower, swine production contract grower, or livestock producer regarding a material condition or term in a contract or business transaction. These seven (7) examples of conduct were followed by one last example, number eight (8), that read, ''Any act that causes competitive injury or creates a likelihood of competitive injury.''

Comments in opposition to proposed § 201.210 argued that the regulation was unclear, vague, and ambiguous. Some questioned whether the lack of clarity would make it impossible to determine whether a company was behaving in compliance with § 201.210. Other comments questioned whether it allowed for a balancing of interests. As a result of the comments, GIPSA has restructured and revised proposed § 201.210.

Summary of Changes From the 2010 Proposed Rule

In this new proposed rule, GIPSA restructured § 201.210 into three paragraphs designated by letters (a) through (c). Paragraph (a) addresses ''per se'' violations of section 202(a), which are those behaviors specifically identified with the P&S Act as unfair, unjustly discriminatory, or deceptive practices or devices. A delay in payment or attempt to delay payment for livestock purchases by a market agency, dealer, or packer is specifically identified as an ''unfair practice'' in Section 409(c) of the P&S Act. When a packer violates section 409(c) of the P&S Act (7 U.S.C. 228b), the conduct is also a ''per se'' violation of section 202(a) of the P&S Act. Likewise, delays in payment or attempts to delay payment by a live poultry dealer are ''per se'' violations because such conduct is identified as an ''unfair practice'' in section 410(b) of the P&S Act (7 U.S.C. 228b–1). Paragraph (b) provides a list of examples of conduct or action that absent demonstration of a legitimate business justification, GIPSA considers as unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the P&S Act whether or not the conduct harms or is likely to harm competition. Paragraph (c) states that any conduct or action that harms or is likely to harm competition is unfair, unjustly discriminatory, or deceptive and is a violation of section 202(a).

Proposed § 201.210 is consistent with USDA's long held position that a showing of harm or likely harm to competition is not required for all violations of section 202(a) of the P&S Act and with the scope of section 202(a) as set forth in the aforementioned interim final rule, § 201.3(a), which also appears in this edition of the **Federal Register**.

GIPSA is proposing § 201.210(a) to affirmatively assert that any conduct or action by a packer, swine contractor, or live poultry dealer that the P&S Act explicitly deems to be unfair, unjustly discriminatory, or deceptive is a violation of section 202(a) without a showing of harm or likely harm to competition. Examples of such conduct or action that would fall under this section are in sections 409(c) and 410(b) of the P&S Act, which state that a packer and live poultry dealer, respectively, have engaged in an ''unfair practice'' when they fail to pay timely for livestock or poultry.

GIPSA is proposing § 201.210(b) as a non-exhaustive list of the types of conduct or action that GIPSA believes is unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the P&S Act regardless of whether the conduct harms or is likely to harm competition. Neither the P&S Act nor the regulations have ever specifically defined the terms ''unfair,'' ''unjustly discriminatory,'' or ''deceptive.'' This list is intended to reduce confusion regarding conduct that is unfair, unjustly discriminatory, or deceptive, without harming or the likelihood of harming competition. This list provides a sufficient number of examples to convey an understanding of this category of conduct and is not intended to list all conduct that would fit this category. These examples are violations if there is no legitimate business justification for the conduct. Legitimate business justifications would allow certain conduct that otherwise would be deemed a violation of section 202(a).

Proposed § 201.210(b)(1) identifies retaliatory action or threat of retaliatory action by a packer, swine contractor or live poultry dealer as violations of section 202(a) when done in response to lawful communication, association, or assertion of rights by a livestock producer, swine production contract grower, or poultry grower. The threat of terminating a contract in retaliation for some action may be sufficient unfair conduct to violate the P&S Act. These retaliatory acts or threats of retaliatory action may be directed toward a single grower or small group of growers, causing them harm, but not having significant effects on competition. For this reason, we propose to include both ''retaliatory action'' and the ''threat of retaliatory action'' in proposed § 201.210(b)(1), as an example of conduct or action that is unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the P&S Act regardless of whether the conduct harms or is likely to harm competition.

Proposed § 201.210(b)(2) identifies conduct or action that attempts to contractually limit the legal rights or remedies afforded by law to a livestock producer, swine production contract grower, or poultry grower as unfair, unjustly discriminatory or deceptive in violation of section 202(a) of the P&S Act. This proposed paragraph only contains an illustrative list of examples of such conduct or action limiting the legal contractual rights and remedies afforded to livestock producers, swine production contract growers, or poultry growers. This list is intended to provide a sufficient number of examples of the types of legal rights and remedies intended to be protected under this section. It is an illustrative list and is not intended to list all applicable legal rights and remedies.

Under proposed § 201.210(b)(2)(i), GIPSA considers conduct or action that contractually limits a livestock producer, swine production contract grower, or poultry grower's right to a trial by jury as unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the P&S Act. Proposed § 201.210(b)(2)(i) provides for an exception when the livestock producer, swine production contract grower, or poultry grower has agreed to be bound by arbitration provisions in a contract that complies with § 201.218(a) and that provides a meaningful opportunity to participate fully in the arbitration process after applying the criteria outlined in § 201.218(b).

The 2008 Farm Bill added section 209, *Choice of Law and Venue,* to the P&S Act. Section 209(a) provides that the forum to resolve any dispute among the parties to a poultry growing arrangement or swine production or marketing contract that arises out of that arrangement or contact must be located in the Federal judicial district where the principal part of the performance took place. GIPSA is proposing to add § 201.210(b)(2)(ii), which makes clear that requiring a trial, arbitration, or other means of dispute resolution to be held in a location other than the Federal judicial district where a grower or producer performs their contractual obligations is unfair and a violation of § 202(a) of the P&S Act. Due to differences in resources between the live poultry dealer, swine contractor or packer and the poultry grower, swine production contract grower or livestock producer, the growers and producers are at a disadvantage if required to travel great distances to resolve disputes. This conduct has the potential to impact a single grower or producer or a small group of growers or producers without harming competition. This proposed regulation interprets and implements a statutory requirement that does not include a harm to competition component.

Under proposed §§ 201.210(b)(2)(iii) and (iv), GIPSA considers any conduct or action that contractually limits a livestock producer's, swine production contract grower's, or poultry grower's right to pursue all damages available under applicable law, or right to seek an award of attorney fees, if such an award is available, under applicable law, respectively, as unfair, unjustly discriminatory, or deceptive in violation of section 202(a) of the P&S Act. Livestock producers, swine production contract growers, and poultry growers commonly have little or no opportunity to negotiate the terms of their contracts with packers, swine contractors, and live poultry dealers. The livestock producers, swine production contract growers, and poultry growers are offered a contract and are typically expected to accept the terms as offered. If the livestock producer, swine production contract grower, or poultry grower has assumed considerable debt to finance their farming operation, the producer or grower may feel they have no choice but to accept the terms as offered. GIPSA believes that it is unfair, unjustly discriminatory or deceptive to limit a producer or grower from recovering damages that would otherwise be available, but for the limitations in the contract.

Proposed §§ 201.210(b)(3) through (7) identify the failure to act in compliance or in accordance with other specified regulations as conduct or action that is unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the P&S Act. Section 201.210(b)(3) clarifies that failing to comply with the requirements of § 201.100 is unfair, unjustly discriminatory or deceptive in violation of section 202(a) of the P&S Act. Regulation § 201.100 specifies certain information and notices that must be provided to poultry growers. The live poultry dealer has control over most, if not all, of the information relevant to the grower's operations. This information is critical to the grower in operating his or her business and places the grower at a great disadvantage without this information. The 2008 Farm Bill directed GIPSA to, among other things, promulgate regulations establishing criteria the Secretary will consider in determining: (1) 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; (2) when a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of the P&S Act; (3) whether a live poultry dealer or swine production contractor has provided a reasonable period of time for a poultry grower or a swine production contract grower to remedy a breach of their arrangement or contract that could lead to the termination of the poultry growing arrangement or swine production contact; and (4) whether the arbitration process provided in a contract provides a grower or producer a meaningful opportunity to participate fully in the arbitration process. As directed by the 2008 Farm Bill, GIPSA published the regulations establishing the criteria in a final rule on December 9, 2011 [76 FR 76874]. The regulations are codified in 9 CFR part 201 as 9 CFR 201.215,[1] 201.216, 201.217 and 201.218, respectively. These criteria, when applied, allow the Secretary to determine whether certain conduct has occurred, specifically whether reasonable notice of suspension of delivery of birds has been given (201.215), whether requiring additional capital investments violates the Act (201.216), whether a reasonable period of time has been given to remedy a breach of contract (201.217), and whether the grower or producer is given the option to decline arbitration and provided a meaningful opportunity to participate in the arbitration process if they so choose (201.218). After applying the criteria in each of these four (4) regulations, the Secretary could determine that a violation of the P&S Act has occurred. This proposed regulation makes clear that such violations are considered unfair, unjustly discriminatory or deceptive in violation of section 202(a) of the P&S Act.

Existing regulations under the P&S Act govern the weighing of livestock, poultry, and feed (§§ 201.55, 201.71, 201.72, 201.73, 201.73–1, 201.76, 201.82, 201.99, 201.108–1). The regulations at § 201.71 also address the proper use of carcass merit evaluation systems and devices. Packers, swine contractors, and live poultry dealers use sophisticated scales and electronic devices to determine weight and quality characteristics of live animals and carcasses. The weights and quality measurements are used in formulas that determine payment to livestock producers and poultry growers. Failure to properly use these devices can affect producer and grower payment. GIPSA has always considered inaccurate weighing and the use of inaccurate scales to be unfair conduct. This proposed rule sets forth GIPSA's position on these practices as unfair, unjustly discriminatory or deceptive in violation of section 202(a) of the P&S Act.

The regulations regarding the weighing of livestock, poultry, and feed require that packers, swine contractors, and live poultry dealers properly install, maintain, inspect, and operate scales to ensure livestock producers, swine production contract growers, and poultry growers are paid on accurate weights. Inaccurate weighing and inaccurate scales can have a significant impact on a poultry grower or livestock producer. Even slight inaccuracies can result in large financial losses when applied over an entire flock or large number of livestock. GIPSA considers, and now proposes for clarification, the failure to accurately weigh poultry and livestock to be a violation of section 202(a) of the P&S Act.

In 2014, GIPSA incorporated by reference applicable requirements of the 2013 edition of the National Institute of Standards and Technology (NIST) Handbook 44. The referenced requirements include standards for livestock, meat, and poultry evaluation systems and/or devices. These standards reference specifications established by the American Society for Testing Materials (ASTM) International. By incorporating the standards in Handbook 44, GIPSA requires regulated entities to comply with the standards. Misuse of these systems and devices or use of inaccurate devices can cause significant harm to a single producer or group of producers without necessarily harming competition. GIPSA considers such harm to producers unfair, unjustly discriminatory or deceptive in violation of section 202(a) of the P&S Act. GIPSA is therefore proposing to add, as a final example of an unfair practice that violates section 202(a) of the P&S Act that does not require a showing of harm or likely harm to competition, a failure to ensure accurate evaluation systems or devices at § 201.210(b)(9).

The specific conduct listed in this proposed rule violates section 202(a) of the P&S Act regardless of whether the conduct or action harms or is likely to harm competition. This list does not imply that conduct that harms competition or is likely to harm competition would not also violate the P&S Act. To make this clear, GIPSA is proposing to add § 201.210(c), which clarifies that, absent demonstration of a legitimate business justification, any conduct or action that harms or is likely to harm competition is an ''unfair,'' ''unjustly discriminatory,'' or ''deceptive'' practice or device and a violation of section 202(a) of the P&S Act. However, nothing in this provision would apply to mergers and acquisitions by packers, swine contractors, or live poultry dealers.

Section 11006(1) of the 2008 Farm Bill directed GIPSA to amend the

[1] The criteria regarding suspension of delivery of birds § 201.215 included ''(a) Whether a live poultry dealer provides a grower written notice at least 90 days prior to the date it intends to suspend the delivery of birds under a poultry growing arrangement''. This criterion was rescinded effective February 5, 2015 [80 FR 6430].

regulations under the P&S Act to establish criteria that the Secretary will consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of the P&S Act. In June 2010, GIPSA published a proposed rule, which included a new regulation addressing this Congressional mandate, § 201.211.

Throughout the history of the P&S Act, an ''undue or unreasonable preference or advantage'' has been determined according to the facts of each case within the purposes of the P&S Act. In proposed § 201.211, GIPSA proposed the following three (3) criteria the Secretary could consider to determine if an undue or unreasonable preference or advantage, or an undue or unreasonable prejudice or disadvantage, had occurred in violation of the P&S Act: (1) 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; (2) 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; and (3) whether information regarding acquiring, handling, processing, and quality of livestock is disclosed to all producers when it is disclosed to one or more producers.

Many commenters supported proposed § 201.211 and specifically the criterion related to contract terms based on number, volume or other conditions. These commenters saw this section as a way to address potential disadvantages to small and medium-scale producers.

GIPSA received several comments expressing concerns regarding the practicality of the proposed criteria on contract distribution by the packer, swine contractor, or live poultry dealer to all livestock producers, swine production contract growers, or live poultry dealers. Some commenters also expressed a concern with the ambiguity and lack of clarity in certain criteria.

Many commenters expressed concerns that the proposed criterion related to price premiums and related types of contracts would have the unintended consequence of either directly or indirectly eliminating alternative marketing arrangements (AMA) Livestock producers use AMAs to market their livestock to a packer at least 14 days prior to slaughter under a verbal or written agreement. Many commenters opined that the proposed regulations would increase the potential for litigation thereby jeopardizing the continued use of these arrangements. The rapid growth of value-added segments of the livestock industry (*e.g.,* breed certifications, source verification, and production method certification) has benefitted many producers and supported consumer demand. GIPSA did not intend to limit the use of AMAs. Commenters also expressed concern about privacy issues in disclosing information regarding acquiring, handling, processing, and quality of livestock to all producers as discussed in proposed § 201.211(c). In response to the comments, GIPSA has revised proposed § 201.211. We do not intend for the current proposed provisions to affect value-added production and premiums, but commenters are encouraged to explain any concerns about how the proposed text will affect value-added production and how we might alter our rule to correct that.

In this new proposed rule, GIPSA would add new § 201.211, ''*Undue or unreasonable preferences or advantages,*'' which is consistent with Congress' instruction to the Secretary in the 2008 Farm Bill. The proposed regulation identifies five criteria the Secretary will consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of the P&S Act. This list is not exhaustive and other criteria may be considered depending on the circumstances of a particular situation.

In response to concerns raised in comments received in 2010 about ambiguity and clarity, GIPSA deleted the criterion regarding contract terms based on number, volume, or other conditions. The originally proposed criteria related to price premiums and disclosing information have also been deleted. Additionally, we propose to add criteria addressing types of conduct considered to be favorable toward some producers and growers as compared to others.

Under proposed § 201.211(a), the Secretary will consider whether a packer, swine contractor, or live poultry dealer treats one or more livestock producers, swine production contract growers, or poultry growers more favorably as compared to others similarly situated who have engaged in lawful communication, association, or assertion of their rights. Producers and growers are entitled to exercise their rights of speech and association, such as forming or joining a contract growers' union, without fear of experiencing disparate treatment. Packers, swine contractors or live poultry dealers who treat some producers and growers more favorably than producers or growers who choose to exercise their rights are giving an undue preference or advantage to a group of producers or growers to the detriment of others. GIPSA believes this conduct violates section 202(b) of the P&S Act and is proposing this regulation to clarify its position.

Under proposed § 201.211(b), the Secretary will consider whether a packer, swine contractor, or live poultry dealer treats one or more livestock producers, swine production contract growers, or poultry growers more favorably as compared to others similarly situated who the packer, swine contractor, or live poultry dealer contend have taken an action or engaged in conduct that violates any applicable law, rule or regulation related to the livestock or poultry operation without a reasonable basis to determine that the livestock producer, swine production contract grower, or poultry grower committed the violation. GIPSA has become aware of situations in which a packer, swine contractor, or live poultry dealer has terminated a contract with a producer or grower based on an allegation that some law or regulation was violated. For example, a live poultry dealer might terminate a poultry grower's contract on the basis that the live poultry dealer believes the poultry grower violated some aspect of the Clean Water Act. Unless there is some reasonable basis for such a determination, such as a finding by a government agency charged with enforcing the Clean Water Act, GIPSA believes treating growers differently under these circumstances would violate the prohibition of section 202(b) against giving undue preferences or advantages to some producers and growers as compared to other producers and growers.

Under proposed § 201.211(c), the Secretary will consider whether a packer, swine contractor, or live poultry dealer treats one or more livestock producers, swine production contract growers, or poultry growers more favorably as compared to others similarly situated for an arbitrary reason unrelated to the livestock or poultry operation. This is necessary to prevent disparate treatment for any reason unrelated to the sale or production of livestock or poultry. If the packer, swine contractor, or live poultry dealer demonstrates a legitimate business reason for the action, the action would not violate section 202(b) of the P&S Act.

Under proposed § 201.211(d), the Secretary will consider whether a packer, swine contractor, or live poultry dealer treats one or more livestock producers, swine production contract growers, or poultry growers more favorably as compared to others similarly situated on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, sexual orientation, or marital or family status. Disparate treatment due to any of these bases could constitute a violation of one or more person's civil rights. GIPSA considers conduct that treats some producers or growers more favorably than others or to the detriment of a producer or grower because of the producer's or grower's status as a member of a class to be prohibited conduct in violation of section 202(b) of the P&S Act.

Finally under proposed § 201.211(e), the Secretary will consider whether the packer, swine contractor, or live poultry dealer has demonstrated a legitimate business justification for conduct or action that may otherwise constitute an undue or unreasonable preference or advantage. A packer, swine contractor, or live poultry dealer may have a legitimate business reason for treating some livestock producers, swine production contract growers, or poultry growers more favorably. In evaluating the criteria proposed above, the Secretary will also consider the proffered justification for the conduct in determining whether the packer swine contractor, or live poultry dealer has violated section 202(b) of the P&S Act.

Required Impact Analyses

Executive Order 12866 and Regulatory Flexibility Act

This rulemaking 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. GIPSA is proposing to make two changes to the regulations. The first will help to clarify the types of conduct considered unfair, unjustly discriminatory, or deceptive in violation of § 202(a) of the P&S Act. The second provides criteria, in response to requirements of the 2008 Farm Bill, to consider in determining whether a packer, swine contractor, or live poultry dealer has engaged in conduct resulting in an undue preference or advantage to one or more livestock producers or poultry growers in violation of § 202(b) of the P&S Act. As a required part of the regulatory process, GIPSA prepared an economic analysis of proposed §§ 201.210 and 201.211. The first section of the analysis is an introduction and a discussion of the prevalence of contracting in the cattle, hog, and poultry industries as well as a discussion of potential market failures. Next, GIPSA discusses three regulatory alternatives it considered and presents a summary cost-benefit analysis of each alternative. GIPSA then discusses the impact on small businesses.

Introduction

GIPSA issued a proposed rule on June 22, 2010, which included §§ 201.3, 201.210, and 201.211. GIPSA has revised the 2010 versions of §§ 201.210 and 201.211 and is now proposing new §§ 201.210 and 201.211 and issuing § 201.3(a) as an interim final rule. Section 201.3(a) states that certain conduct or action can be found to violate sections 202(a) and/or 202(b) of the P&S Act without a finding of harm or likely harm to competition. Section 201.3(a) formalizes GIPSA's longstanding position that, in some cases, violations of sections 202(a) and 202(b) can be proven without demonstrating harm or likely harm to competition. Section 201.210, among other things, provides clarity to the industry regarding the conduct or action, absent demonstration of a legitimate business justification, that constitutes an unfair, unjustly discriminatory, or deceptive practice or device and a violation of section 202(a) regardless of harm to competition. Section 201.211 provides clarity to the industry regarding the conduct or action that constitutes an undue or unreasonable preference or advantage and a violation of section 202(b) by establishing criteria that the Secretary will consider in making such a determination. GIPSA believes the proposed regulations will serve to strengthen the protection afforded the nation's livestock producers and growers while promoting fairness and equity among industry segments.

Proposed § 201.210(a) specifies that any conduct or action by a packer, swine contractor, or live poultry dealer that is explicitly deemed to be an ''unfair,'' ''unjustly discriminatory,'' or ''deceptive'' practice or device by the P&S Act is a per se violation of section 202(a). Section 201.210(b) provides examples of conduct or action that, absent demonstration of a legitimate business justification, are ''unfair,'' ''unjustly discriminatory,'' or ''deceptive'' and a violation of section 202(a) regardless of whether the conduct or action harms or is likely to harm competition. Section 201.210(c) specifies that any conduct or action that harms or is likely to harm competition is an ''unfair,'' ''unjustly discriminatory,'' or ''deceptive'' practice or device and a violation of section 202(a). Many of the examples provided in § 201.210(b) relate to conduct or action that limits, by contract, the legal rights and remedies afforded by law to poultry growers, swine production contract growers, and livestock producers. Other examples include conduct or action that could be violations of section 202(a) of the P&S Act upon application and consideration of criteria contained within other specified regulations.

As required by the 2008 Farm Bill, proposed § 201.211 specifies criteria the Secretary will consider when determining whether an undue or unreasonable preference or advantage has occurred in violation of section 202(b). The first four (4) criteria require the Secretary to consider whether one or more livestock producers, swine production contract growers, or poultry growers is treated more favorably as compared to other similarly situated livestock producers, swine contract growers, or poultry growers. The fifth criterion in § 201.211 requires the Secretary to consider whether the packer, swine contractor, or live poultry dealer has demonstrated a legitimate business justification for conduct or action that may otherwise be an undue or unreasonable preference or advantage.

Sections 201.210 and 201.211 focus heavily on contracts between livestock producers and packers, swine production contract growers and swine contractors, and poultry growers and live poultry dealers. A discussion of contracting in these industries is, therefore, useful in explaining the need for these additional regulations.

Prevalence of Contracting in Cattle, Hog, and Poultry Industries

Contracting is an important and prevalent feature in the production and marketing of livestock and poultry. Several provisions in §§ 201.210 and 201.211 affect livestock and poultry grown or marketed under contract. For example, under § 201.210(b)(2), absent demonstration of a legitimate business justification, GIPSA considers conduct or action by packers, swine contractors, or live poultry dealers that limit or attempt to limit, by contract, the legal rights and remedies of livestock producers, swine production contract growers, or poultry growers as unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) regardless of whether the conduct or action harms or is likely to harm competition. Section 201.211 establishes criteria the Secretary will consider in determining whether conduct or action by a packer, swine contractor, or live poultry dealer constitutes an undue or unreasonable preference or advantage and a violation of section 202(b).

The type of contracting varies among cattle, hogs, and poultry. Broilers, the largest segment of poultry, are almost exclusively grown under production contracts, in which the live poultry dealers own the birds and provide poultry growers with feed and medication to raise and care for the birds until they reach the desired market size. Poultry growers provide the housing, labor, water, electricity, fuel, and provide for waste removal. Cattle production contracts are not subject to the jurisdiction of the P&S Act. Hog production falls between these two extremes. As shown in Table 1 below, over 96 percent of all broilers and over 40 percent of all hogs are grown under contractual arrangements. Similarly, swine contractors typically own the slaughter hogs and sell the finished hogs to pork packers. The swine contractors typically provide feed and medication to the swine production contract growers who own the growing facilities and provide growing services. With the exception of turkey production, the use of contract growing arrangements has remained relatively stable over the last years that the Census of Agriculture has published data on commodities raised and delivered under production contracts as Table 1 shows.

TABLE 1—PERCENTAGE OF POULTRY AND HOG RAISED AND DELIVERED UNDER PRODUCTION CONTRACTS [2]

Species	2002	2007	2012
Broilers	98.0	96.5	96.4
Turkeys	41.7	67.7	68.5
Hogs	42.9	43.3	43.5

Another contract category is marketing contracts, where livestock producers market their livestock to a packer for slaughter under a verbal or written agreement. These are commonly referred to as Alternative Marketing Arrangements (AMA). Pricing mechanisms vary across AMAs. Some AMAs rely on a spot market for at least one aspect of its price, while others involve complicated pricing formulas with premiums and discounts based on carcass merits. The livestock producer and packer agree on a pricing mechanism under AMAs, but usually not on a specific price.

USDA's Agricultural Marketing Service (AMS) reports the number of cattle sold to packers under formula, forward contract, and negotiated pricing mechanisms. The following table illustrates the prevalence of contracting in the marketing of fed cattle. Formula pricing methods and forward contracts are two forms of AMA contracts. Thus, the first two columns in Table 2 are cattle marketed under contract and the third column represents the spot market for fed cattle. The data in Table 2 show that the contracting of cattle has increased since 2005. Approximately 35 percent of fed cattle were marketed under contracts in 2005. By 2015, the percentage of fed cattle marketed to packers under contracts had increased to almost 75 percent.

TABLE 2—PERCENTAGE OF FED CATTLE SOLD BY TYPE OF PURCHASE [3]

Year	Formula	Forward contract	Negotiated
2005	30.4	5.0	64.6
2006	31.5	6.8	61.7
2007	33.2	8.3	58.5
2008	37.4	9.9	52.7
2009	43.7	7.0	49.3
2010	44.9	9.5	45.6
2011	48.4	10.9	40.7
2012	54.7	11.4	33.8
2013	60.0	10.2	29.8
2014	58.1	14.2	27.6
2015	58.2	16.5	25.3

As previously discussed and illustrated in Table 1 above, over 40 percent of hogs are grown under production contracts. These hogs are then sold by swine contractors to packers under marketing contracts. The prevalence of marketing contracts in the sale of finished hogs, which includes production contract and non-production contract hogs, to packers is even more prevalent as shown in the table below.

TABLE 3—PERCENTAGE OF HOGS SOLD BY TYPE OF PURCHASE [4]

Year	Other marketing arrange-ments [5]	Formula [6]	Negotiated
2005	39.3	49.7	11.0

[2] Agricultural Census, 2007 and 2012. *https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/* and *https://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_1_US/*.

[3] USDA's Agricultural Marketing Service. *https://mpr.datamart.ams.usda.gov/menu.do?path=Products/Cattle/Weekly*. Accessed on September 9, 2016.

[4] USDA's Agricultural Marketing Service.

[5] Includes Packer Owned and Packer Sold, and Other Purchase Arrangements.

[6] Includes Swine Pork Market Formula, and Other Market Formula.

TABLE 3—PERCENTAGE OF HOGS SOLD BY TYPE OF PURCHASE [4]—Continued

Year	Other marketing arrangements [5]	Formula [6]	Negotiated
2006	44.0	46.4	9.6
2007	44.8	46.5	8.7
2008	43.9	47.6	8.5
2009	42.8	50.4	6.8
2010	45.4	49.4	5.2
2011	47.6	48.2	4.2
2012	47.7	48.6	3.6
2013	48.3	48.4	3.2
2014	45.9	51.4	2.7
2015	46.0	51.4	2.6

Similar to cattle, the percentage of hogs sold under marketing contracts has increased since 2005 to over 97 percent in 2015. The spot market for hogs has declined to 2.6 percent in 2015. As these data demonstrate, almost all hogs are marketed under some type of marketing contract.

Benefits of Contracting in Cattle, Hog, and Poultry Industries

Contracts have many benefits. They help farmers and livestock producers manage price and production risks, elicit the production of products with specific quality attributes by tying prices to those attributes, and facilitate the smooth the flow of commodities to processing plants encouraging more efficient use of farm and processing capacities. Agricultural contracts can also lead to improvements in efficiency throughout the supply chain for products by providing farmers with incentives to deliver products consumers desire and produce products in ways that reduce processing costs and, ultimately, retail prices.

In 2007, RTI International conducted a comprehensive study of marketing practices in the livestock and red meat industries from farmers to retailers (the RTI Study).[7] The RTI Study analyzed the extent of use, price relationships, and costs and benefits of contracting, including AMAs. The RTI Study found that AMAs increased the economic efficiency of the cattle and hog markets and yielded economic benefits to consumers, livestock producers and packers.

The RTI Study found that increased economic efficiencies came from less volatility in volume and more intensive use of production and processing facilities, meaning less capital, labor, and feed per pound of meat produced. Increased economic efficiencies also came from reduced transaction costs and from sending price signals to better match the meat attributes to consumer demand. Consumers benefit from lower meat prices and from getting meat with desired attributes. In turn, the consumer benefits increase livestock demand, which provides benefits to livestock producers.

Structural Issues in the Cattle, Hog, and Poultry Industries

As the above discussion highlights, there are important benefits associated with the use of agriculture contracts in the cattle, hog, and poultry industries. However, if there are large disparities in the bargaining power among contracting parties resulting from size differences between contracting parties or the use of market power by one of the contracting parties, the contracts may have detrimental effects on one of the contracting parties and may result in inefficiencies in the marketplace.

For example, a contract that ties a grower to a single purchaser of a specialized commodity, even if the contract provides for fair compensation to the grower, still leaves the grower subject to default risks should the contractor fail. Another example is a contract that covers a shorter term than the life of the capital (a poultry house, for example). The grower may face the hold-up risk that the contractor may require additional capital investments or may impose lower returns at the time of contract renewal. Hold-up risk is a potential market failure and is discussed in detail in the next section. These risks may be heightened when there are no alternative buyers for the grower to switch to, or when the capital investment is specific to the original buyer.[8] Some growers make substantial long-term capital investments as part of livestock or poultry production contracts, including land, poultry or hog houses, and equipment. Those investments may tie the grower to a single contractor or integrator. Costs associated with default risks and hold-up risks are important to many growers in the industry. The table below shows the number of integrators that broiler growers have in their local areas by percent of total farms and by total production.

TABLE 4—INTEGRATOR CHOICE FOR BROILER GROWERS [9]

Integrators in grower's area [10] (number)	Farms (% of total)	Birds (% of total)	Production (% of total)	Can change to another integrator (% of farms)
1	21.7	23.4	24.5	7

[7] RTI International, 2007, GIPSA Livestock and Meat Marketing Study, Prepared for GIPSA.

[8] See Vukina and Leegomonchai, *Oligopsony Power, Asset Specificity, and Hold-Up: Evidence From The Broiler Industry, American Journal of Agricultural Economics,* 88(3): 589–605 (August 2006).

[9] MacDonald, James M. Technology, Organization, and Financial Performance in U.S. Broiler Production. USDA, Economic Research Service, June 2014.

[10] Percentages were determined from the USDA Agricultural Resource Management Survey (ARMS), 2011. ''Respondents were asked the number of integrators in their area. They were also asked if they could change to another integrator if they stopped raising broilers for their current integrator.'' Ibid. p. 30.

TABLE 4—INTEGRATOR CHOICE FOR BROILER GROWERS [9]—Continued

Integrators in grower's area [10] (number)	Farms (% of total)	Birds (% of total)	Production (% of total)	Can change to another integrator (% of farms)
2	30.2	31.9	31.7	52
3	20.4	20.4	19.7	62
4	16.1	14.9	14.8	71
>4	7.8	6.7	6.6	77
No Response	3.8	2.7	2.7	Na

The data in the table show that 52 percent of broiler growers, accounting for 56 percent of total production, report having only one or two integrators in their local areas. This limited integrator choice may accentuate the contract risks. A 2006 survey indicated that growers facing a single integrator received 7 to 8 percent less compensation, on average, than farmers located in areas with 4 or more integrators.[11] If live poultry dealers already possess some market power to force down prices for poultry growing services, some contracts can extend that power by raising the costs of entry for new competitors, or allowing for price discrimination.[12]

Many beef, pork, and poultry processing markets face barriers to entry including; (1) Economies of scale; (2) high asset-specific capital costs with few alternative uses of the capital; (3) brand loyalty of consumers, customer loyalty to the incumbent processors, and high customer switching costs; and (4) governmental food safety, bio-hazard, and environmental regulations. Consistent with these barriers, there has been limited new entry.

However, an area where entry has been successful is in developing and niche markets, such as organic meat and free-range chicken. Developing and niche markets have a relatively small consumer market that is willing to pay higher prices, which supports smaller plant sizes. Niche processors are generally small, however, and do not offer opportunities to many producers or growers.

Economies of scale have resulted in large processing plants in the beef, pork, and poultry processing industries. The barriers to entry discussed above may have limited the entry of new processors, which limits the expansion of choice of processors to which livestock producers market their livestock. Barriers to entry also limit the expansion of choice for poultry growers who have only one or two integrators in their local areas with no potential entrants on the horizon. The limited expansion of choice of processors by livestock producers, swine production contract growers, and poultry growers may limit contract choices and the bargaining power of producers and growers in negotiating contracts.

One indication of potential market power is industry concentration.[13] The following table shows the level of concentration in the livestock and poultry slaughtering industries for 2005–2015.

TABLE 5—FOUR-FIRM CONCENTRATION IN LIVESTOCK AND POULTRY SLAUGHTER [14]

Year	Steers & heifers (%)	Hogs (%)	Broilers (%)	Turkeys (%)
2005	80	64	n.a.	n.a.
2006	81	61	n.a.	n.a.
2007	80	65	57	52
2008	79	65	57	51
2009	86	63	53	58
2010	85	65	51	56
2011	85	64	52	55
2012	85	64	51	53
2013	85	64	54	53
2014	83	62	51	58
2015	85	66	51	57

The table above shows the concentration of the four largest steer and heifer slaughterers has remained relatively stable between 79 and 86 percent since 2005. Hog and broiler slaughter concentration has also remained relatively steady at over 60 percent and 50 percent, respectively.

The data in Table 5 are estimates of national concentration and the size differences discussed below are also at the national level, but the economic markets for livestock and poultry may be regional or local, and concentration in regional or local areas may be higher than national measures. For example, while poultry markets may appear to be the least concentrated in terms of the four-firm concentration ratios presented above, economic markets for poultry growing services are more localized than markets for fed cattle or hogs, and local concentration in poultry markets is greater than in hog and other livestock

[11] MacDonald, J. and N. Key. ''Market Power in Poultry Production Contracting? Evidence from a Farm Survey.'' *Journal of Agricultural and Applied Economics.* 44(4) (November 2012): 477–490.

[12] See, for example, Williamson, Oliver E. *Markets and Hierarchies: Analysis and Antitrust Implications,* New York: The Free Press (1975); Edlin, Aaron S. & Stefan Reichelstein (1996) ''Holdups, Standard Breach Remedies, and Optimal Investment,'' *The American Economic Review* 86(3): 478–501 (June 1996).

[13] For additional discussion see MacDonald, J.M. 2016 ''Concentration, contracting, and competition policy in U.S. agribusiness,'' *Competition Law Review,* No. 1–2016: 3–8.

[14] The data on cattle and hogs were compiled from USDA's NASS data of federally inspected slaughter plants. Data on broilers and turkeys were compiled from Packers and Stockyards industry annual reports. Both data sources are proprietary.

markets.[15] The data presented earlier in Table 4 highlight this issue by showing the limited ability a poultry grower has to switch to a different integrator. As a result, national concentration may not demonstrate accurately the options poultry growers in a particular region actually face.

Empirical evidence does not show a strong or simple relationship between increases in concentration and increases in market power. Other factors matter, including the ease of entry by new producers into a concentrated industry and the ease with which retail food buyers or agricultural commodity sellers can change their buying or marketing strategies in response to attempts to exploit market power.

For example, in 2009, the Government Accountability Office (GAO) reviewed 33 studies published since 1990 that were relevant for assessing the effect of concentration on commodity or food prices in the beef, pork, or dairy sectors.[16] Most of the studies found no evidence of market power, or found that the efficiency gains from concentration were larger than the market power effects. Efficiency gains would be larger if increased concentration led to reduced processing costs (likely to occur if there are scale economies [17] in processing), and if the reduced costs led to a larger effect on prices than the opposing impact of fewer firms. For example, with respect to beef processing, the GAO report concluded that concentration in the beef processing sector has been, overall, beneficial because the efficiency effects dominated the market power effects, thereby reducing farm-to-wholesale beef margins.

Several studies reviewed by the GAO did find evidence of market power in the retail sector, in that food prices exceeded competitive levels or that commodity prices fell below competitive levels. However, the GAO study also concluded that it was not clear whether market power was caused by concentration or some other factor. In interviews with experts, the GAO report concluded that increases in concentration may raise greater concerns in the future about the potential for market power and the manipulation of commodity or food prices.

[15] MacDonald and Key (2012) Op. Cit. and Vukina and Leegomonchai (2006) Op. Cit.

[16] United States Government Accountability Office. Concentration in Agriculture. GAO–09–746R. Enclosure II: Potential Effects of Concentration on Agricultural Commodity and Retail Food Prices.

[17] Scale economies are present when average production costs decrease as output increases.

Another factor GIPSA considered in proposing §§ 201.210 and 201.211 is the contrast in size and scale between livestock producers, swine production contract growers, and poultry growers and the packers, swine contractors, and live poultry dealers they supply. The disparity in size between large oligopsonistic buyers and atomistic sellers may lead to market power and asymmetric information. The 2012 Census of Agriculture reported 740,978 cattle and calf farms with 69.76 million head of cattle for an average of 94 head per operation. Ninety-one percent of these were family or individually-owned operations.[18] The largest one percent of cattle farms sold about 51 percent of the cattle sold by all cattle farms.

There were 33,880 cattle feeding operations in 2012 that sold 25.47 million head of fed cattle for an average of 752 head per feedlot. The 607 largest feedlots sold about 75 percent of the fed cattle, and averaged 32,111 head sold. About 80 percent of feedlots were family or individually owned.[19] As Table 5 shows, the four largest cattle packers processed about 85 percent, 25.47 million head, for an average of 5.41 million head per cattle packer. This means the average top four cattle packers had 57,574 times the volume of the average cattle farm, and 1,054 times the volume of the largest one percent of cattle farms. It also means the average top four cattle packers had 7,197 times the volume of the average feedlot, and 169 times the volume of the very largest feedlots.

The USDA, National Agricultural Statistics Service 2012 livestock slaughter summary reported that in 2012, 113.16 million head of hogs were commercially slaughtered in the United States.[20] Table 5 shows that the top four hog packers processed about 64 percent of those hogs, which comes to an average of about 18.1 million head of hogs per top four packer. The 2012 Census of Agriculture reported 55,882 farms with hog and pig sales.[21] About 83 percent of the farms were family or individually owned. Of the 55,882 farms with hog and pig sales, 47,336 farms were independent growers raising hogs and pigs for themselves (sold an average of 1,931 head), 8,031 were swine production contract growers raising hogs and pigs for someone else (an average of 10,970 head per swine production contract grower), and 515 were swine contractors (sold an average of 38,058 head per swine contractor).[22]

[18] Census of Agriculture, 2012.

[19] Ibid.

[20] Ibid.

[21] A pig is a generic term for a young hog.

The National Chicken Council states that in 2016, approximately 35 companies were involved in the business of raising, processing, and marketing chicken on a vertically integrated basis, while about 25,000 family farmers had production contracts with those companies.[23] That comes to about 714 family-growers per company. Collectively, the family-growers produced about 95 percent of the nearly 9 billion broilers produced in the United States in 2015. The other 5 percent were grown on company-owned farms. That means the average family-grower produced about 342,000 broilers. As Table 5 shows, the four largest poultry companies in the United States accounted for 51 percent of the broilers processed. That means the average volume processed by the four largest poultry companies was about 1.15 billion head, which was 3,357 times the average family grower's volume.

As the above discussion highlights, there are large size differences between livestock producers and meat packers. There are also large size differences between poultry growers and the live poultry dealers which they supply. These size differences may contribute to unequal bargaining power due to monopsony market power or oligopsony market power, or asymmetric information. The result is that the contracts bargained between the parties may have detrimental effects on livestock producers, swine production contract growers, and poultry growers due to the structural issues discussed above and may result in inefficiencies in the marketplace.

Hold-Up as a Potential Market Failure

Integrators demand investment in fixed assets from the growers. One example is specific types of poultry houses and equipment the integrator may require the grower to utilize in their growing operations. These investments may improve efficiency by more than the cost of installation. Typically, the improved efficiency would accrue to both the integrator and the grower. The integrator has lower feed costs, and the grower performs better relative to other poultry growers in a settlement group. If the grower bears the entire cost of installation, then the grower should be further compensated for the feed conversion gains that accrue to the integrator. The

[22] Agricultural Census, 2012.

[23] *http://www.nationalchickencouncil.org/about-the-industry/statistics/broiler-chicken-industry-key-facts/.*

risk is that after the assets are installed, the cost to the grower is ''sunk.'' This means that if the integrator reneges on paying compensation for the additional capital investments, and insists on maintaining the lower price, the grower will accept that lower price rather than receive nothing. This allows the integrator to get the benefit of efficiency gains, at no expense to them, with the grower bearing all of the cost. This reneging is termed ''hold-up'' in the economic literature.[24]

Hold-up can have two consequences that result in a misallocation of resources. If the growers do not anticipate hold-up, then growers will spend too much on investments because the integrator who demands them is not incurring any cost. That is inefficient. If the grower does anticipate hold-up, they will act as if the integrator were going to renege even when they were not, resulting in too little investment and loss of potential efficiency gains.

Hold-up can be resolved with increased competition. If an integrator developed a reputation for reneging, and growers could go elsewhere, the initial integrator would be punished and disincentivized from reneging in the future. Unfortunately, in practice, many growers do not have the option of going elsewhere.

Data shown above in Table 4 indicate that there are few integrators in these markets, and that growers have limited choice. Table 5, above, indicates the level of concentration in the livestock and poultry slaughtering industries and shows that integrators and livestock packers operate in concentrated markets.

This rule would allow growers to file complaints against integrators that renege, giving some of the incentive benefit of competition, without compromising the efficiency of having a few large processors.

Contracting, Industry Structure, and Market Failure: Summary of the Need for Regulation

There are benefits of contracting in the livestock and poultry industries, as well as structural issues that may result in unequal bargaining power and market failures. These structural issues and market failures will be mitigated by relieving plaintiffs from the requirement to demonstrate competitive injury. Because proving competitive injury is difficult and costly, removing that burden will facilitate the use of litigation by producers and growers to address violations of the Packers and Stockyards Act. If growers are able to seek legal remedies, then their contracts are easier to enforce. This will incentivize packers, swine contractors, and integrators to avoid exploitation of market power and asymmetric information, as well as behaviors that result in the market failure of hold-up. The result will be improved efficiency in the livestock and poultry markets.

GIPSA has a clear role to ensure that market failures are mitigated so that livestock and poultry markets remain fair and competitive. Moreover, even assuming that the market organization is efficient from a societal perspective, the disparity in bargaining power between the regulated entities and the producers from whom they purchase may lead to individual cases of unfair, unjustly discriminatory, deceptive, or undue or unreasonable prejudice or disadvantage that result in harm to individual producers but not harm to competition at a market level. Sections 201.210 and 201.211 promote fairness and equity for livestock producers, swine production contract growers, and poultry growers regardless of whether or not harm rises to the level of harm to competition.

Costs of the Regulations Proposed on June 22, 2010

GIPSA issued a proposed rule on June 22, 2010, which included §§ 201.3, 201.210, and 201.211. GIPSA considered thousands of comments before proposing the current versions of §§ 201.210 and 201.211. Many of the provisions that contributed to the costs estimated by the Informa Study and the Elam Study are not in the current proposed regulations. The following provisions were in the 2010 rule, but are not in the currently proposed regulations.

- Requirement that packers, live poultry dealers, and swine contractors maintain records justifying differences in prices (§ 201.210(a)(5)).
- Provision prohibiting packers from purchasing livestock from other packers (§ 201.212(c)).
- Requirement that packers offer the same terms to groups of small producers as offered to large producers when the group can collectively meet the same quantity commitments (§ 201.211(a)).
- Requirement that packers refrain from entering into exclusive agreements with livestock dealers (§ 201.212(b)).
- Requirements that packers and live poultry dealers submit sample contracts to GIPSA for posting to the public (§ 201.213).

Additionally, GIPSA adjusted the rule proposed in 2010 to give live poultry dealers more flexibility in suspending the delivery of birds and requiring capital improvements and those adjustments are reflected in current §§ 201.215 and 201.216, respectively, which were finalized in 2011 and modified in 2015. Although many thousands of the comments submitted contained general qualitative assessments of either the costs or benefits of the proposed rule, only two comments systematically described quantitative costs across the rule provisions. Comments from the National Meat Association (NMA) included cost estimates by Informa Economics (the Informa Study). The Informa Study projected costs of $880 million, $401 million, and $362 million for U.S. cattle and beef, hogs and pork, and poultry industries respectively.[25] However, these cost estimates were for all of the 2010 proposed changes, many of which do not apply. The Informa Study estimated $133.4 million to be one-time direct costs resulting from rewriting contracts, additional record keeping, etc.[26] In the study, the majority of the costs would be indirect costs. The Informa Study estimated $880.9 million in costs due to efficiency losses and $459.9 million in costs due to reduced demand caused by a reduction in meat quality resulting from fewer AMAs.

Comments from the National Chicken Council included cost estimates prepared by Dr. Thomas E. Elam, President, FarmEcon LLC (the Elam Study).[27] The Elam Study estimated that the entire 2010 rule would cost the chicken industry $84 million in the first year increasing to $337 million in the fifth year, with a total cost of $1.03 billion over the first five years.[28] The Elam Study identified $6 million as one-time administrative costs. The study states that most of the costs would be indirect costs resulting from efficiency losses,[29] while more than half of the costs estimated would be due to a reduced rate of improvement in feed efficiency. Again, these cost estimates were for all of the 2010 proposed changes, many of which do not apply.

Estimates of the costs in the Informa Study and the Elam Study were largely due to projections that packers, swine contractors, and live poultry dealers would alter business practices in

[24] See for example, Benjamin Klein, Robert G. Crawford, and Armen A. Alchian, ''Vertical Integration, Appropriable Rents, and the Competitive Contracting Process,'' *The Journal of Law and Economics* 21, no 2 (Oct., 1978): 297–326.

[25] Informa Economics, Inc. ''An Estimate of the Economic Impact of GIPSA's Proposed Rules,'' prepared for the National Meat Association, 2010, Tables 7 to 9, Pages 51 to 53.

[26] Ibid. Page 53

[27] See Elam, Dr. Thomas E. ''Proposed GIPSA Rules Relating to the Chicken Industry: Economic Impact.'' FarmEcon LLC, 2010.

[28] Ibid. Page 24

[29] Ibid. Page 24

reaction to the proposed rule. For example, the Informa Study projected that packers would reduce the number and types of AMAs to avoid potential litigation,[30] and the Elam Study expected live poultry dealers to evaluate each load of feed delivered to growers to avoid litigation.[31]

The studies relied on interviews that queried the willingness of packers, swine contractors, or live poultry dealers to alter their business practices. The estimates, based on interviews, may overstate costs because the packers, swine contractors, live poultry dealers, and other stakeholders would face adjustment costs from the rule proposed in 2010 and had incentives to respond that they would discontinue current practices.

There also may have been some confusion concerning GIPSA's administrative enforcement authority. The Informa Study indicated that 75 percent of the costs of the rule proposed in 2010, were directly related to proposed § 201.3(c) enabling a finding of a violation of sections 202(a) or (b) of the P&S Act without a finding of harm or likely harm to competition.[32] However, with respect to packers buying livestock for the purpose of slaughter, proposed § 201.3(c) would not cause a change with respect to GIPSA's enforcement activities. 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. It is only in the poultry industry that, with the exception of timely payment to growers (section 410), GIPSA does not have the authority to bring administrative enforcement actions. Though GIPSA has administratively enforced section 202(a) and/or 202(b) violations in the livestock industry without demonstrating harm or likely harm to competition, some federal courts have held that it is necessary to demonstrate harm or likely harm to competition in some livestock cases and in many poultry cases.

Given the changes made in response to comments, GIPSA does not expect that either new proposed § 201.210 or new proposed § 201.211 will cause packers to reduce their use of AMAs.

Cost-Benefit Analysis of Proposed §§ 201.210 and 201.211

Regulatory Alternatives Considered

Executive Order 12866 requires an assessment of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation and an explanation of why the planned regulatory action is preferable to the identified potential alternatives.[33] GIPSA considered three regulatory alternatives. The first alternative that GIPSA considered was to maintain the status quo and not propose the regulations. The second alternative that GIPSA considered was revising the versions of §§ 201.210 and 201.211 that were published in 2010 and proposing new versions. This is GIPSA's preferred alternative as will be explained below. The third alternative that GIPSA considered was proposing new versions of §§ 201.210 and 201.211, but instituting a phased implementation of the proposed regulations. Under this alternative, proposed §§ 201.210 and 201.211 would only take effect when a written or verbal livestock marketing, swine growing, or poultry growing contract expires, is replaced, or is modified. The costs and benefits of these alternatives are discussed in order below.

Regulatory Alternative 1: Status Quo

If §§ 201.210 and 201.211 are never finalized, there are no marginal costs and marginal benefits as industry participants will not alter their conduct. This alternative would not address the 2008 Farm Bill requirement to promulgate regulations establishing criteria the Secretary would consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of the P&S Act, nor would it connect the criteria established in 2011 to a violation of the P&S Act. From a cost standpoint, this alternative costs the least as compared to the other two alternatives. This alternative also has no marginal benefits. Since there are no changes from the status quo under this regulatory alternative, it will serve as the baseline against which to measure the other two alternatives.

Regulatory Alternative 2: The Preferred Alternative

A. Cost Estimation of the Preferred Alternative

GIPSA believes that the costs of §§ 201.210 and 201.211 will mostly consist of the costs of reviewing and re-writing marketing and production contracts to ensure that packers, swine contractors, and live poultry dealers are not engaging in conduct or action that is unfair, unjustly discriminatory, or deceptive or that in any way gives an undue or unreasonable preference or advantage to any livestock producer, swine production contract grower, or poultry grower or subjects any livestock producer, swine production contract grower, or poultry grower to an undue or unreasonable prejudice or disadvantage.

Sections 201.210 and 201.211 do not impose any new requirements and mainly serve as guidance for compliance with sections 202(a) and 202(b). GIPSA does not expect the proposed regulations will result in a decrease in the use of AMAs or other incentive payment systems, or decreased efficiencies in the cattle, hog, and poultry industries. The only indirect costs that GIPSA anticipates are the effects of the increase in administrative costs on supply and demand and the resulting quantity and price impacts on the retail markets for beef, pork, and chicken and the related input markets for cattle, hogs, and broilers.

To estimate costs, GIPSA divided costs into two major categories, direct and indirect costs. GIPSA expects the direct costs to be comprised of administrative costs. Administrative costs for regulated entities include items such as review of marketing and production contracts, additional record keeping, and all other associated administrative office work to demonstrate that they are not engaging in conduct or action that is unfair, unjustly discriminatory, or deceptive or that in any way gives an undue or unreasonable preference or advantage to any livestock producer, swine production contract grower, or poultry grower or subjects any livestock producer, swine production contract grower, or poultry grower to an undue or unreasonable prejudice or disadvantage.

Indirect costs include costs caused by changes in supply and/or demand in the markets for beef, pork, and chicken and the related input markets for cattle, hogs, and poultry resulting from the proposed rule.

1. Direct Costs—Administrative Costs of the Preferred Alternative

To estimate administrative costs of the proposed rule, GIPSA relied on its experience reviewing contracts and other business records commonly maintained in the livestock and poultry industries for compliance with the P&S Act and regulations. GIPSA has data on the number of production contracts between swine production contract growers and swine contractors and poultry growers and live poultry dealers. GIPSA estimated the number of

[30] Informa, page 30.

[31] Elam, page 18.

[32] Informa, page 71.

[33] See section 6(a)(3)(C) of Executive Order 12866.

marketing contracts between producers and packers based on the number of feedlots and the percentage of livestock procured under AMAs. GIPSA then multiplied the hourly estimates of the administrative functions of reviewing and revising contracts by the average annual wages to arrive at the total estimated administrative costs for implementation of §§ 201.210 and 201.211. Since packers, swine contractors, and live poultry dealers have to review their contracts to ensure that they are not engaging in conduct or action that is unfair, unjustly discriminatory, or deceptive or that in any way gives an undue or unreasonable preference or advantage to any livestock producer, swine production contract grower, or poultry grower or subjects any livestock producer, swine production contract grower, or poultry grower to an undue or unreasonable prejudice or disadvantage, GIPSA estimates that the regulated entities will only review the contract once and split the contract review time between the two regulations.

Based on GIPSA's experience, it developed time estimates for the number of hours for attorneys and company managers to review and revise marketing and production contracts and for staff to make changes, copy, and obtain signed copies of the contracts. For poultry contracts, GIPSA estimates that each unique contract type would require 12 hours of attorney time to review and rewrite a contract, 20 hours of company management time, and for each individual contract, 4 hours of administrative time, and 6.5 hours of additional record keeping time. GIPSA estimates that each of the 133 live poultry dealers who report to GIPSA rely on 10 unique contract types on average. For cattle marketing contracts, GIPSA estimates that each contract would require 4 hours of attorney time to review and rewrite a contract, 4 hours of company management time, 2 hours of administrative time, and 8 hours of additional record keeping time. For hog production and marketing contracts, GIPSA estimates that each contract would require 2 hours of attorney time to review and rewrite a contract, 2 hours of company management time, 1 hour of administrative time, and 6.5 hours of additional record keeping time.

GIPSA multiplied estimated hours to conduct these administrative tasks by the average hourly wages for managers at $58/hour, attorneys at $83/hour, and administrative assistants at $34/hour as reported by the U.S. Bureau of Labor Statistics in its Occupational Employment Statistics to arrive at its estimate of contract review costs for regulated entities.[34]

GIPSA recognizes that contract review costs will also be borne by livestock producers, swine production contract growers, and poultry growers. GIPSA estimates that each livestock producer, swine production contract grower, and poultry grower will spend two hours of time reviewing a contract and will spend two hours of their attorney's time to review the contract. GIPSA multiplied two hours of livestock producer, swine production contract grower, and poultry grower time and two hours of attorney time to conduct the marketing and production contract review by the average hourly wages for attorneys at $83/hour and managers at $58/hour as reported by the U.S. Bureau of Labor Statistics in its Occupational Employment Statistics to arrive at its estimate of contract review costs for livestock producers, swine contract growers, and poultry growers. GIPSA then applied this cost to the estimated 2,355 cattle marketing contracts, 1,290 hog marketing contracts, 8,031 hog production contracts, and 21,925 poultry growing contracts that have been reported to GIPSA.

After determining the administrative costs to both the regulated entities and those they contract with, GIPSA then added the administrative costs of the regulated entities and the livestock producers, swine production contract growers, and poultry growers together and subsequently split them in half to arrive at the first-year total estimated administrative costs attributable to each of the two regulations. A summary of the first-year total estimated administrative costs for implementation of §§ 201.210 and 201.211 appear in the following table:

TABLE 6—FIRST-YEAR ADMINISTRATIVE COSTS OF §§ 201.210 AND 201.211

[Indirect costs include costs caused by:]

Regulation	Cattle ($ millions)	Hogs ($ millions)	Poultry ($ millions)	Total ($ millions)
201.210	1.39	3.81	8.40	13.60
201.211	1.39	3.81	8.40	13.60
Total	2.79	7.61	16.79	27.19

The first-year total administrative costs are $27.19 million and are the same for §§ 201.210 and 201.211 for cattle, hogs, and poultry because packers, swine contractors, live poultry dealers, livestock producers, swine production contract growers, and poultry growers must conduct the same administrative functions of contract review and record keeping in response to both regulations. The administrative costs are the highest for poultry, followed by hogs and cattle. This is due to the greater prevalence of contract growing arrangements in the poultry industry.

2. Direct Costs—Litigation Costs of the Preferred Alternative

Interim final regulation 201.3(a) will be in effect when §§ 201.210 and 201.211 become effective. GIPSA expects that § 201.3(a) will result in additional litigation as this rule states that certain conduct or action can be found to violate sections 202(a) and/or 202(b) of the P&S Act without harm or likely harm to competition in all cases. Section 201.3(a) formalizes GIPSA's longstanding position that, in some cases, violations of sections 202(a) and 202(b) can be proven without demonstrating harm or likely harm to competition in all cases. Section 201.210 provides clarity to the industry regarding the conduct or action, absent demonstration of a legitimate business justification that constitutes an unfair, unjustly discriminatory, or deceptive practice or device and a violation of section 202(a) regardless of harm to competition. Section 201.211 provides

[34] All salary costs are based on mean annual 2015 salary adjusted for benefit costs, set to an hourly basis. *http://www.bls.gov/oes/*. Accessed on August 26, 2016.

clarity to the industry regarding the conduct or action that constitutes an undue or unreasonable preference or advantage and a violation of section 202(b) by establishing criteria that the Secretary will consider in making such a determination.

Regulation 201.3(a) is broad in nature. Sections 201.210 and 201.211 provide additional clarity. Thus, GIPSA considers the additional litigation under § 201.3(a) to be the baseline litigation costs for §§ 201.210 and 201.211 and that the litigation costs for § 201.3(a) already include the litigation costs of §§ 201.210 and 201.211. Since those litigation costs have already been counted under § 201.3(a), GIPSA does not allocate any additional litigation costs to §§ 201.210 and 201.211. For the purposes of this RIA, the marginal litigation costs of §§ 201.210 and 201.210 are zero.

3. Total Direct Costs of the Preferred Alternative

The total first-year direct costs of §§ 201.210 and 201.211 are the sum of administrative and litigation costs from above and are summarized in the following table.

TABLE 7—DIRECT COSTS OF §§ 201.210 AND 201.211

Cost Type	Cattle ($ millions)	Hogs ($ millions)	Poultry ($ millions)	Total ($ millions)
Admin Costs	2.79	7.61	16.79	27.19
Litigation Costs	0.00	0.00	0.00	0.00
Total Direct Costs	2.79	7.61	16.79	27.19

GIPSA estimates that the total direct costs of proposed §§ 201.210 and 201.211 to be $27.19 million. As the above table shows, the costs are highest for the poultry industry, followed by hogs and cattle. The primary reason is the high utilization of growing contracts and the estimated higher administrative costs in the poultry industry.

4. Indirect Costs of the Preferred Option

As previously discussed, GIPSA does not expect that proposed §§ 201.210 and 201.211 will result in a decreased use of AMAs, use of grower ranking systems or other incentive pay, reduced capital formation, or decreased efficiencies in the meat and poultry industries because the regulations simply clarify conduct and action that are unfair, unjustly discriminatory, and deceptive and a violation of section 202(a) and clarify the conduct or action that constitutes an undue or unreasonable preference or advantage and a violation of section 202(b) by establishing criteria the Secretary will consider in making such a determination. The only indirect costs that GIPSA expects are the effects of the increase in total industry costs from the administrative costs on supply and demand, and the resulting quantity and price impacts of the retail markets for beef, pork, and poultry, and the related input markets for cattle, hogs, and poultry.

GIPSA modeled the impact of the increase in total industry costs resulting from the direct costs of implementing §§ 201.210 and 201.211 in a Marketing Margins Model (MMM) framework.[35] The MMM allows for the estimation of changes in consumer and producer surplus and the quantification of deadweight loss or gain caused by changes in supply and demand in the retail markets for beef, pork, and poultry and the input markets for cattle, hogs, and poultry.

GIPSA modeled the increases in industry costs resulting from higher direct costs as an inward (or upward) shift in the supply curves for beef, pork, and poultry. This has the effect of increasing the equilibrium prices and reducing the equilibrium quantity traded. This also has the effect of reducing the derived demand for cattle, hogs, and poultry, which causes a reduction in the equilibrium prices and quantity traded. Economic theory suggests that these shifts in the supply curves and derived demand curves and the resulting price and quantity impacts will result in a reduction in social welfare through a deadweight loss.

To estimate the output and input supply and demand curves for the MMM, GIPSA constructed linear supply and demand curves around equilibrium price and quantity points using price elasticities of supply and demand from the GIPSA Livestock Meat and Marketing Study and from USDA's Economic Research Service.[36]

GIPSA then shifted the supply curves for beef, pork, and chicken up by the amount of the increase in total cost for each industry and calculated the new equilibrium prices and quantities. GIPSA calculated the new equilibrium prices and quantities in the input markets resulting from the decreases in derived demand. GIPSA also calculated the resulting social welfare changes in the input and output markets for each industry.

The calculation of the price impacts from the increases in industry costs from §§ 201.210 and 201.211 resulted in price increases of approximately one-hundredth of a cent or less in retail prices for beef, pork, and poultry. This is because the increase in total industry costs is very small in relation to overall industry costs.[37] The result is that the resulting deadweight losses from the increases in total industry costs are indistinguishable from zero and, therefore, GIPSA concludes that the indirect costs of §§ 201.210 and 201.211 for each industry are zero.

5. Total Costs of the Preferred Alternative

GIPSA added all direct costs to the indirect costs (equal to zero), to arrive at the estimated total first-year costs of §§ 201.210 and 201.211. The total first-year costs are summarized in the following table.

[35] The framework is explained in detail in Tomek, W.G. and K.L. Robinson "*Agricultural Product Prices,*" third edition, 1990, Cornell University Press.

[36] RTI International "GIPSA Livestock Meat and Marketing Study" prepared for Grain Inspection, Packers and Stockyards Administration, 2007.

ERS Price Elasticities: *http://www.ers.usda.gov/data-products/commodity-and-food-elasticities/demand-elasticities-from-literature.aspx*.

[37] The $27.19 million increase in total industry costs from §§ 201.210 and 201.211 is only 0.02 percent of total industry costs of approximately $178 billion for the beef, pork, and poultry industries.

TABLE 8—TOTAL COSTS OF §§ 201.210 AND 201.211

Cost type	Cattle ($ millions)	Hogs ($ millions)	Poultry ($ millions)	Total ($ millions)
Admin Costs	2.79	7.61	16.79	27.19
Litigation Costs	0.00	0.00	0.00	0.00
Total Direct Costs	2.79	7.61	16.79	27.19
Total Indirect Costs	0.00	0.00	0.00	0.00
Total Costs	2.79	7.61	16.79	27.19

GIPSA estimates that the total costs of §§ 201.210 and 201.211 will be $27.19 million in the first year of implementation.

6. Ten-Year Total Costs of the Preferred Option

To arrive at the estimated ten-year costs of §§ 201.210 and 201.211, GIPSA expects the costs of the regulations to be constant for the first five years while courts are setting precedents for the interpretation of the regulations. GIPSA expects that case law with respect to the regulations will be settled after five years and by then, industry participants will know how GIPSA will enforce the regulations and how courts will interpret the regulations. Once courts establish precedents in case law, GIPSA expects the direct administrative costs of reviewing and revising contracts to decrease rapidly as contracts will already contain any language modifications necessitated by implementation of the regulations.

To arrive at the estimated ten-year costs of §§ 201.210 and 201.211, GIPSA estimates that in the first five years, 20 percent of all contracts will either expire and need to be renewed each year or new marketing and production contracts will be put in place each year. As discussed above, GIPSA expects the costs of reviewing and revising contracts will remain constant in the first five years. However, the overall costs will be lower because the direct administrative costs of reviewing and revising contracts will only apply to the 20 percent of expiring contracts or new contracts. GIPSA estimates that in the second five years, the direct administrative costs of reviewing and revising contracts will decrease by 50 percent per year as the courts establish precedents and contracts already contain any language modifications necessitated by implementation of the regulations.

The total ten-year costs of the regulations appear in the table below.

TABLE 9—TEN-YEAR TOTAL COSTS OF §§ 201.210 AND 201.211

Year	Total direct ($ millions)
2018[38]	27.19
2019	5.44
2020	5.44
2021	5.44
2022	5.44
2023	2.72
2024	1.36
2025	0.68
2026	0.34
2027	0.17
Totals	54.21

Based on the analysis, GIPSA expects the ten-year total costs of §§ 201.210 and 201.211 will be $54.21 million.

7. Net Present Value of Ten-Year Total Costs of the Preferred Alternative

The total costs of §§ 201.210 and 201.211 in the table above show that the costs are highest in the first year, decline to a constant lower level over the next four years, and then gradually decrease again over the subsequent five years. Costs to be incurred in the future are less expensive than the same costs to be incurred today. This is because the money that will be used to pay the costs in the future can be invested today and earn interest until the time period in which the cost is incurred.

To account for the time value of money, the costs of the regulations to be incurred in the future are discounted back to today's dollars using a discount rate. The sum of all costs discounted back to the present is called the net present value (NPV) of total costs. GIPSA relied on both a three percent and seven percent discount rate as discussed in Circular A–4.[39] GIPSA measured all costs using constant dollars.

GIPSA calculated the NPV of the ten-year total costs of the regulations using both a three percent and seven percent discount rate and the NPVs appear in the following table.

TABLE 10—NPV OF TEN-YEAR TOTAL COSTS OF §§ 201.210 AND 201.211

Discount rate	($ millions)
3 Percent	50.33
7 Percent	45.95

GIPSA expects the NPV of the ten-year total costs of §§ 201.210 and 201.211 will be $50.33 million at a three percent discount rate and $45.95 million at a seven percent discount rate.

8. Annualized Costs of the Preferred Alternative

GIPSA then annualized the NPV of the ten-year total costs (referred to as annualized costs) of §§ 201.210 and 201.211 using both a three percent and seven percent discount rate as required by Circular A–4 and the results appear in the following table.[40]

TABLE 11—ANNUALIZED COSTS OF §§ 201.210 AND 201.211

Discount rate	($ millions)
3 Percent	5.90
7 Percent	6.54

GIPSA expects the annualized costs of §§ 201.210 and 201.211 will be $5.90 million at a three percent discount rate and $6.54 million at a seven percent discount rate.

B. Impacts on Costs of Interim Final § 201.3(a)

Concurrent with proposing §§ 201.210 and 201.211, GIPSA is issuing an interim final version of § 201.3(a). Section 201.3(a) states that conduct or action can be found to violate sections 202(a) and/or 202(b) of the P&S Act without a finding of harm or likely harm to competition. As a stand-alone regulation, § 201.3(a) formalizes GIPSA's longstanding position that, in some cases, violations of sections 202(a) and 202(b) can be proven without

[38] GIPSA uses 2018 as the date for the proposed rule to be in effect for analytical purposes only. The date the proposed rule becomes final is not known.

[39] *https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf.*

[40] Ibid.

demonstrating harm or likely harm to competition.

In its Regulatory Impact Analysis, GIPSA estimated the annualized costs of § 201.3(a) to range from $6.87 million to $96.01 million at a three percent discount rate and from $7.12 million to $98.60 million at a seven percent discount rate. The range of potential costs is broad and GIPSA relied on its expertise to arrive at a point estimate of expected annualized costs. GIPSA expects the cattle, hog, and poultry industries to primarily take a ''wait and see'' approach to how courts will interpret § 201.3(a) and only slightly adjust its use of AMAs, and incentive or performance-based payment systems. GIPSA estimates that the annualized costs of § 201.3(a) at the point estimate will 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 by the cattle, hog, and poultry industries.

GIPSA recognizes that courts, after the implementation of § 201.3(a), may opt to continue to apply earlier precedents of requiring the showing of harm or potential harm to competition in section 202(a) and 202(b) cases. This has the potential to affect the costs of §§ 201.210 and 201.211 should they become finalized. GIPSA expects that even if courts continue to require showing of harm or potential harm to competition in section 202(a) and 202(b) cases, that firms will likely still incur costs of complying with §§ 201.210 and 201.211. Even if regulated entities expect that courts will require showing of a harm to competition for §§ 201.210 and 201.211 violations, the regulated entities may still expect litigation as private parties test the courts application of § 201.3 as it relates to §§ 201.210 and 201.211 violations. To reduce this threat of litigation, regulated entities may still incur the administrative costs detailed above. Should §§ 201.210 and 201.211 become finalized and courts still require a showing of harm or potential harm to competition, regulated entities may still voluntarily undertake the adjustment costs detailed above.

GIPSA expects proposed §§ 201.210 and 201.211 to reduce the costs of implementing § 201.3 by providing more clarity in the appropriate application of sections 202(a) and (b) of the P&S Act. Section 201.210 provides illustrative examples of conduct or action, absent demonstration of a legitimate business justification, that GIPSA considers as unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) regardless of whether the conduct or action harms or is likely to harm competition. Section 201.211 provides criteria the Secretary will consider in determining whether conduct or action constitutes an undue or unreasonable preference or advantage and a violation of section 202(b).

C. Benefits of the Preferred Alternative

GIPSA was unable to quantify the benefits of §§ 201.210 and 201.211. However, there are qualitative benefits of §§ 201.210 and 201.211 coupled with § 201.3(a) that merit discussion.

An important qualitative benefit of § 201.210 coupled with § 201.3(a) is the increased ability for the enforcement of the P&S Act for violations of 202(a) that do not result in harm or likely harm to competition. An illustrative example is the inaccurate weighing of live poultry grown to a target slaughter weight by a poultry grower under contract for a live poultry dealer. The weight of poultry is used as one factor to determine the payment to growers under most contract growing arrangements. The poultry grower is harmed if the true weight is more than the inaccurate weight used to compensate the poultry grower. The harm to the poultry grower is very small when compared to the entire industry and there is no discernible or provable harm to competition from this one instance. Because there is no discernible or provable harm or likely harm to competition, courts have been reluctant to find a violation of section 202(a) of the P&S Act in such a situation, despite the harm suffered by the individual poultry grower. However, if similar, though unrelated, harm is experienced by a large number of poultry growers, the cumulative effect does result in significant harm to competition. The individual harm is inconsequential to the industry, but the sum total of all individual harm has the potential to be quite significant when compared to the poultry industry. Under proposed § 201.210(b)(8), failing to ensure accurate weights of live poultry, absent a legitimate business justification, will constitute unfair, unjustly discriminatory, or deceptive practices or devices and a violation of section 202(a) of the P&S Act. Whether or not the conduct harms or is likely to harm competition becomes irrelevant.

The sum of all individual harm is likely to increase total industry costs of producing beef, pork, and chicken due to inefficiencies through the production and marketing complex due to an inefficient allocation of resources. The costs of all unfair, unjustly discriminatory, or deceptive practices or devices are reflected in higher costs of producing cattle, hogs, and poultry at the producer/grower level of the industry and of producing beef, pork, and chicken in the packing/wholesale level of the industry, with some portion of these costs passed along to consumers in the form of higher prices.

GIPSA expects proposed §§ 201.210 and 201.211 coupled with interim final § 201.3(a) to increase enforcement actions against packers, swine contractors, and live poultry dealers for violations of sections 202(a) and/or 202(b) when the conduct or action does not harm or is not likely to harm competition. Several appellate courts have disagreed with USDA's interpretation of the P&S Act that harm or likely harm to competition is not necessary in all cases to prove a violation of sections 202(a) or 202(b). In some cases in which the United States was not a party, these courts have concluded that plaintiffs could not prove their claims under sections 202(a) and/or 202(b) without proving harm to competition or likely harm to competition. One reason the courts gave for declining to defer to USDA's interpretation of the statute is that USDA had not previously formalized its interpretation in a regulation. Section 201.3(a) addresses that issue and §§ 201.210 and 201.211 provide further clarity.

GIPSA expects the successful litigation of enforcement actions brought under proposed §§ 201.210 or 201.211 combined with interim final 201.3(a) to deter violations of sections 202(a) and (b). Successful deterrence will result in lower overall costs throughout the entire production and marketing complex of all livestock, poultry, and meat.

Sections 201.210 and 201.211 also contain several provisions that GIPSA expects will improve efficiencies in the regulated markets for cattle, hogs, and poultry and reduce market failures. For regulations to improve efficiencies for market participants and generate benefits for consumers and producers, they must increase the amount of relevant information to market participants, protect private property rights, and foster competition.

Section 201.210(b) will increase the amount of relevant information to market participants by providing notice to all market participants of specific examples of conduct or action that, absent demonstration of a legitimate business justification, are unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the P&S Act regardless of whether the conduct or action harms or is likely to harm competition. Market participants will all know, for example, that absent demonstration of a legitimate business justification, retaliatory conduct and the limiting, by contract, the legal rights and remedies afforded by law to livestock producers, swine production contract growers, or poultry growers is a violation of § 201.210 and section 202(a) regardless of whether the conduct or action harms or is likely to harm competition. Additionally, market participants will all know that absent demonstration of a legitimate business justification, failure to ensure accurate scales and weights, and failing to ensure the accuracy of electronic evaluation systems and devices is a violation of § 201.210 and section 202(a) regardless of whether the conduct or action harms or is likely to harm competition. Ensuring the accuracy of weighing and grading devices serves to increase economic efficiency. Inaccurate weighing and grading reduces economic efficiency by effectively distorting per-unit prices and harms livestock producers, swine production contract growers, and poultry growers, even though the resulting harm may not have an overall effect on competition if the conduct is directed at only one livestock producer, swine production contract grower, or poultry grower.

Similarly, § 201.211 increases the amount of relevant information to market participants and offsets any potential abuse of market power by clearly stating to all contracting parties the criteria that the Secretary will consider in determining whether conduct or action constitutes an undue or unreasonable preference or advantage and a violation of 202(b) of the P&S Act.

Both regulations may also serve to reduce the risk of violating sections 202(a) and 202(b) because they provide clarification to the livestock and poultry industries as to the conduct or action that, absent demonstration of a legitimate business justification, is unfair, unjustly discriminatory, or deceptive and violates section 202(a) of the Act regardless of whether the conduct or action harms or is likely to harm competition and the criteria that the Secretary will consider in determining whether conduct or action constitutes an undue or unreasonable preference or advantage and a violation of section 202(b) of the P&S Act. Less risk through the clarification provided in the regulations will likely foster competitiveness and fairness in contracting and provide protections for livestock producers, swine production contract growers, and poultry growers against unfair, unjustly discriminatory, and deceptive practices and devices and undue or unreasonable preferences or advantages.

Benefits to the livestock and poultry industries and the cattle, hog, and poultry markets also arise from establishing parity of negotiating power between packers, swine contractors, and live poultry dealers and livestock producers, swine production contract growers, and poultry growers by reducing the ability to use market power with the resulting deadweight losses.[41] Establishing parity of negotiating power in contracts promotes fairness and equity and is consistent with GIPSA's mission [t]o protect fair trade practices, financial integrity, and competitive markets for livestock, meats, and poultry.'' [42]

D. Cost-Benefit Summary of the Preferred Alternative

GIPSA expects the annualized costs of §§ 201.210 and 201.211 will be $5.90 million at a three percent discount rate and $6.54 million at a seven percent discount rate. GIPSA expects the costs to be highest for the poultry industry due to its extensive use of poultry growing contracts, followed by the hog industry and the cattle industry, respectively.

GIPSA was unable to quantify the benefits of the regulations, but explained numerous qualitative benefits that will protect livestock producers, swine production contract growers, and poultry growers from retaliation, promote fairness and equity in contracting, increase economic efficiencies, and reduce the negative effects of market failures throughout the entire livestock and poultry value chain. The primary benefit of § 201.210 and § 201.211 is the increased ability for the enforcement of the P&S Act for violations of sections 202(a) and (b) that do not result in harm or likely harm to competition. This, in turn, will reduce instances of unfair, unjustly discriminatory, or deceptive practices or devices, unfair advantages and increased efficiencies in the marketplace. This benefit of additional enforcement of the P&S Act will accrue to all segments of the value chain in the production of livestock and poultry, and ultimately to consumers.

Regulatory Alternative 3: Contract Duration—Phased Implementation

GIPSA considered a third regulatory alternative of phased implementation. Under this third alternative, §§ 201.210 and 201.211 would only apply to marketing and production contracts when they expire, are altered, or new contracts are put in place. Consider for example, a poultry growing contract with three years remaining in the contract when the regulations become effective. The provisions of the regulations that apply to contracts would not be applicable to this contract until the contract expires after three years and is either renewed or replaced.

A. Cost Estimation of Phased Implementation

GIPSA estimated the costs of phased implementation by multiplying the costs of §§ 201.210 and 201.211 for the preferred alternative (Table 8) for each year of the first 10 years the regulations would be effective starting in 2018 by the percentage of contracts expiring or altered in the same year. USDA's Economic Research Service Agricultural Resource Management Surveys conducted in 2003 and 2011 provided data about the length of hog and broiler production contracts. GIPSA relied on its knowledge of hog and cattle marketing contracts based on regular reviews of packer procurement practices to estimate contract lengths for hog and cattle marketing contracts. The data on contract length appear in the following table:

TABLE 12—PRODUCTION AND MARKETING CONTRACT DURATIONS

Contract duration	Broilers production [43] (percent)	Hogs production [44] (percent)	Hogs marketing (percent)	Cattle marketing (percent)
Short Term <= 12 months	65.20	40.50	100.00	100.00

[41] Nigel Key and Jim M. MacDonald discuss evidence for the effect of concentration on grower compensation in ''Local Monopsony Power in the Market for Broilers? Evidence from a Farm Survey'' selected paper American Agri. Economics Assn. meeting Orlando, Florida, July 27–29, 2008.

[42] See additional discussion in Steven Y. Wu and James MacDonald (2015) ''Economics of Agricultural Contract Grower Protection Legislation,'' *Choices* 30(3): 1–6.

[43] USDA's Economic Research Service Agricultural Resource Management Survey (ARMS) 2011.

[44] USDA's Economic Research Service Agricultural Resource Management Survey (ARMS) 2003.

TABLE 12—PRODUCTION AND MARKETING CONTRACT DURATIONS—Continued

Contract duration	Broilers production [43] (percent)	Hogs production [44] (percent)	Hogs marketing (percent)	Cattle marketing (percent)
Medium Term 13–60 months	19.20	3.50	0.00	0.00
Long Term > 60 months	15.60	56.00	0.00	0.00

The data in the table show that 65.2 percent of broiler production contracts have a duration of 12 months or less. GIPSA estimates that 100 percent of all hog and cattle marketing contracts expire or are altered every 12 months or less. Even if the contracts do not expire, GIPSA expects changes every year to the base prices, premiums and discounts, lean percentages, etc. of hog and cattle marketing contracts and GIPSA would consider a change to any one of these items in the contract as an alteration to the contract, which would trigger the application of the new regulations.

For the first year of the regulations, GIPSA multiplied the poultry costs of the regulations by 65.20 percent, the percentage of the hog costs attributable to hog production contracts by 40.5 percent, the percentage of the hog costs attributable to hog marketing contracts by 100 percent, and the cattle costs by 100 percent. For years two through five, GIPSA followed the same procedure, but adjusted poultry and hog production costs by the number of contracts that are five years or less. For broilers, 84.4 percent are five years or less in duration and 44 percent of all hog production contracts are five years or less years in duration. For years six through ten, GIPSA applied 100 percent of the preferred alternative costs to reflect full implementation costs.

The following table shows the ten-year total costs for each year of the phased implementation alternative. The ten-year total costs for each year of the preferred alternative (Table 9) are also shown for convenience.

TABLE 13—PHASED IMPLEMENTATION TOTAL COSTS OF §§ 201.210 AND 201.211

Year	Preferred option ($ millions)	Phased implementation ($ millions)
2018	27.19	17.45
2019	5.44	4.18
2020	5.44	4.18
2021	5.44	4.18
2022	5.44	4.18
2023	2.72	2.72
2024	1.36	1.36
2025	0.68	0.68
2026	0.34	0.34
2027	0.17	0.17

TABLE 13—PHASED IMPLEMENTATION TOTAL COSTS OF §§ 201.210 AND 201.211—Continued

Year	Preferred option ($ millions)	Phased implementation ($ millions)
Totals	54.21	39.43

GIPSA estimates that the first-year total costs of §§ 201.210 and 201.211 under the phased implementation alternative will be $17.45 million and the ten-year total costs will be $39.43 million. As the table shows, the costs in the first five years are lower under the phased implementation alternative than under the preferred alternative because the regulations apply to fewer contracts until the time period in which all contracts are phased in.

B. NPV of Ten-Year Total Costs of Phased Implementation

GIPSA calculated the NPV of the ten-year total costs of §§ 201.210 and 201.211 under phased implementation using both a three percent and seven percent discount rate and the NPVs are shown in the following table.

TABLE 14—NPVS OF TEN-YEAR TOTAL COSTS OF §§ 201.210 AND 201.211—PHASED IMPLEMENTATION

Discount rate	($ Millions)
3 Percent	36.33
7 Percent	32.86

GIPSA expects the NPV of the ten-year total costs of §§ 201.210 and 201.211 under the phased implementation option to be $36.33 million at a three percent discount rate and $32.86 million at a seven percent discount rate.

C. Annualized Costs of Phased Implementation

GIPSA then annualized the costs of §§ 201.210 and 201.211 using both a three percent and seven percent discount rate as required by Circular A–4 and the results appear in the following table.

TABLE 15—ANNUALIZED COSTS OF REGULATIONS—PHASED IMPLEMENTATION

Discount rate	($ millions)
3 Percent	4.26
7 Percent	4.68

GIPSA expects the annualized costs of §§ 201.210 and 201.211 under phased implementation will be $4.26 million at a three percent discount rate and $4.68 million at a seven percent discount rate.

D. Benefits of the Phased Implementation Alternative

The benefits of phased implementation are identical to the benefits of the preferred alternative with the exception of when the benefits will be received and the amount of the benefits. Like the costs, the benefits will be received only when contracts expire, are altered, or new contracts are put in place. Moreover, benefits to be received in the future are worth less than benefits received today. The benefits will be received in the same proportion of the total costs and are based on contract durations. The benefits of the phased implementation alternative are less than under the preferred alternative, because the full benefits will not be received until all contracts have expired, been altered, or replaced by new contracts. The full benefits of phased implementation will be received beginning in year six.

E. Cost-Benefit Summary of Phased Implementation

GIPSA expects the annualized costs of §§ 201.210 and 201.211 under phased implementation will be $4.26 million at a three percent discount rate and $4.68 million at a seven percent discount rate. The benefits will be received in the same proportion as total costs and are based on contract durations. The benefits of the phased implementation alternative are less than under the preferred alternative because the full benefits will not be received until all contracts have expired, been altered, or replaced by new contracts.

Cost-Benefit Comparison of Regulatory Alternatives

The status quo alternative has zero marginal costs and benefits as GIPSA does not expect any changes in the livestock and poultry industries. GIPSA compared the annualized costs of the preferred alternative to the annualized costs of the phased implementation alternative by subtracting the annualized costs of the phased implementation alternative from the preferred alternative and the results appear in the following table.

TABLE 16—DIFFERENCE IN ANNUALIZED COSTS OF §§ 201.210 AND 201.211 BETWEEN PREFERRED ALTERNATIVE AND PHASED IMPLEMENTATION ALTERNATIVE

Discount rate	($ millions)
3 Percent	1.64
7 Percent	1.86

The annualized costs of the phased implementation alternative is $1.64 million less expensive using a three percent discount rate and $1.86 million less expensive using a seven percent discount rate. As is the case with costs, the benefits will be highest for the preferred alternative because the full benefits will be received immediately and not when contracts have expired, been altered, or replaced by new contracts as is the case under the phased implementation alternative.

Though the phased implementation alternative would save between $1.64 million and $1.86 million on an annualized basis, this alternative would deny the benefits offered by §§ 201.210 and 201.211 to a substantial percentage of poultry growers and swine production contract growers for five or more years based on the length of their production contracts. As the data in Table 12 show, 15.6 percent of poultry growers and 56 percent of swine production contract growers have contracts with durations exceeding five years. Under the phased implementation alternative, these poultry growers and swine production contract growers would continue to be exposed to the potential market failures discussed above in the section on *Contracting, Industry Structure, and Market Failure: Summary of the Need for Regulation* until an alteration to an existing contract or the entering of a new contract triggered application of §§ 201.210 and 201.211. GIPSA considered all three regulatory alternatives and believes that the preferred alternative is the best alternative as the benefits of the regulations will be captured immediately by all livestock producers, swine production contract growers, and poultry growers, regardless of the length of their production or marketing contracts.

Regulatory Flexibility Analysis of the Preferred Option

The Small Business Administration (SBA) defines small businesses by their North American Industry Classification System Codes (NAICS).[45] 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. Cattle and hog packers, NAICS 311611, are defined as small businesses if they have fewer than 1,000 employees.

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. The Census provides the number of head sold from their own operations by size classes for swine contractors, but not the value of sales nor number of head sold from the farms of the contracted production. Thus, to estimate the entity size and average per-entity revenue by the SBA classification, the average value per head for sales of all swine operations is multiplied by production values for firms in the Census size classes for swine contractors. The estimates reveal that although 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.

GIPSA maintains data on live poultry dealers from the annual reports these firms file with GIPSA. Currently, there are 133 live poultry dealers that would be subject to the proposed regulations. According to U.S. Census data on County Business Patterns, there were 74 poultry slaughter firms that had more than 1,250 employees in 2013. The difference yields approximately 59 poultry slaughterers that have fewer than 1,250 employees and would be considered as small businesses that would be subject to the proposed regulations.

Another factor that is important in determining the economic effect of the regulations is the number of contracts held by a firm. 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 poultry slaughterers 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.

Live poultry dealers classified as large businesses are responsible for about 89.7 percent of the poultry contracts. Assuming that small businesses will bear 10.3 percent of the costs, in the first year the regulations are effective, $1.7[46] million would fall on live poultry dealers classified as small businesses. This amounts to average estimated costs for each small live poultry dealer of $29,200.

As of June 2016, GIPSA records identified 359 beef and pork packers actively purchasing cattle or hogs for slaughter. Many firms slaughtered more than one species of livestock. Of the 359 beef and pork packers, 161 processed both cattle and hogs, 132 processed cattle but not hogs, and 66 processed hogs but not cattle.

GIPSA estimates that small businesses accounted for 19.3 percent of the cattle and 17.8 percent of the hogs slaughtered in 2015. If the costs of implementing §§ 201.210 and 201.211 are proportional to the number of head processed, then in 2018, the first year the regulations would be effective, GIPSA estimates that $538,000[47] in additional costs would fall on beef packers classified as small businesses. This amounts to estimated costs of $1,900 for each small beef packer.

On average, $188,000[48] in additional first-year costs would be expected to fall on pork packers classified as small businesses, and $184,000[49] would fall on swine contractors classified as small businesses. This amounts to average

[45] See: *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

[46] Estimated cost to live poultry dealers of $16.79 million × 10.27 percent of firms that are small businesses = $1.7 million.

[47] Estimated cost to beef packers of $2.79 million × 19.3 percent of firms that are small businesses = $538 thousand.

[48] Estimated cost to hogs and pork of $7.61 million × 17.8 percent of slaughter in small businesses × 13.8 percent of costs attributed to packers = $188 thousand.

[49] Estimated cost to hogs and pork of $7.61 million × 2.8 percent of contracted hogs produced by swine contractors that are small businesses × 86.2 percent of costs attributed to contractors = $184 thousand.

estimated costs for each small pork packer of $860, and average estimated costs for each small swine contractor of $506 in the first year the regulations would be effective. To the extent that smaller beef and pork packers rely on AMA purchases less than large packers, the estimates might tend to overstate costs.

Annualized costs discounted at a three percent interest rate would be $117,000 for the cattle industry, $80,500 for the hog industry, and $374,000 for the poultry industry. This amounts to annualized costs of $410 for each beef packer, $190 for each pork packer, $110 for each swine contractor, and $6,300 for each live poultry dealer that is a small business. The total annualized costs for small businesses would be $571,500.

Annualized costs at a seven percent discount rate would be $129,400 for the cattle industry, $89,300 for the hog industry, and $415,000 for the poultry industry. This amounts to annualized costs of $450 for each beef packer, $206 for each pork packer, $122 for each swine contractor, and $7,000 for each live poultry dealer that is a small business. The total annualized costs for small businesses would be $633,800.

The table below lists the estimated additional costs associated with the proposed regulations in the first year. It also lists annualized costs discounted at three percent and seven percent discount rates.

TABLE 17—ESTIMATED COSTS TO SMALL BUSINESSES FROM §§ 201.210 AND 201.211

Estimate type	Cattle ($ millions)	Hogs ($ millions)	Poultry ($ millions)	Total ($ millions)
First-Year Costs	0.538	0.371	1.725	2.634
10 years Annualized at 3 Percent	0.117	0.081	0.374	0.572
10 years Annualized at 7 Percent	0.129	0.089	0.415	0.634

In considering the impact on small businesses, GIPSA considered the average costs and revenues of each small business impacted by §§ 201.210 and 201.211. The number of small businesses impacted by §§ 201.210 and 201.211, by NAICS code, as well as the per entity, first-year and annualized costs at both the three percent and seven percent discount rates appear in the following table.

TABLE 18—PER ENTITY COSTS TO SMALL BUSINESSES OF §§ 201.210 AND 201.211

NAICS	Number of small business	First year ($)	Annualized Costs—3% ($)	Annualized Costs—7% ($)
112210—Swine Contractor	363	506	110	122
311615—Poultry	59	29,236	6,344	7,035
311611—Cattle	287	1,874	407	451
311611—Hogs	219	856	186	206

The following table compares the average per entity first-year and annualized costs of §§ 201.210 and 201.211 to the average revenue per establishment for all firms in the same NAICS code. The annualized costs are slightly higher at the seven percent rate than at the three percent rate, so only the seven percent rate is shown as it is the higher annualized cost.

TABLE 19—COMPARISON OF PER ENTITY COST TO SMALL BUSINESSES OF §§ 201.210 AND 201.211 TO REVENUES

NAICS	Number of small business	Average first-year cost per entity ($)	Average annualized cost per entity ($)	Average revenue per establishment ($)	First-year cost as percent of revenue	Annualized cost as percent of revenue
112210—Swine Contractor	363	506	122	485,860	0.10	0.03
311615—Poultry	59	29,236	7,035	13,842,548	0.21	0.05
311611—Cattle	287	1,874	451	6,882,205	0.03	0.01
311611—Hogs	219	856	206	6,882,205	0.01	0.00

The revenue figures in the above table come from Census data for live poultry dealers and cattle and hog slaughterers, NAICS codes 311615 and 311611, respectively.[50] As discussed above, the Census provides the number of head sold by size classes for farms that sold their own hogs and pigs in 2012 and that that identified themselves as contractors or integrators, but not the value of sales nor the number of head sold from the farms of the contracted production. Thus, to estimate average revenue per establishment, GIPSA used the estimated average value per head for sales of all swine operations and the production values for firms in the Census size classes for swine contractors.

As the results in Table 19 demonstrate, the costs of §§ 201.210 and 201.211 as a percent of revenue are small as they are less than one percent, with the exception of the upper boundary for swine contractors.[51]

[50] Source: *http://www.census.gov/data/tables/2012/econ/susb/2012-susb-annual.html*. Accessed on November 29, 2016.

[51] There are significant differences in average revenues between swine contractors and cattle, hog, and poultry processors, resulting from the difference in SBA thresholds.

Annualized cost savings of exempting small businesses would be about $570,000 using a three percent discount rate and about $634,000 using a seven percent discount rate.

One purpose of § 201.3(a) is to mitigate the risks of potential market failures or unequal bargaining power to all livestock producers, swine production contract growers, and poultry growers, not just the livestock producers, swine production contract growers, and poultry growers selling or growing livestock and poultry for large packers, swine contractors, and poultry dealers. Exempting small businesses would continue to subject the livestock producers, swine production contract growers, and poultry growers with contractual arrangements with small packers, swine contractors, and live poultry dealers to the contracting risks and potential market failures discussed above. GIPSA believes that the benefits of §§ 201.210 and 201.211 should be captured by all livestock producers, swine production contract growers, and poultry growers.

Based on the above analyses regarding §§ 201.210 and § 201.211, GIPSA certifies that this rule 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.*). While confident in this certification, GIPSA acknowledges that individual businesses may have relevant data to supplement our analysis. We would encourage small stakeholders to submit any relevant data during the comment period.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. These actions are not intended to have retroactive effect, although in some instances they merely reiterate GIPSA's previous interpretation of the P&S Act. This proposed rule will not pre-empt 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 prior to any judicial challenge to the provisions of this proposed rule. Nothing in this proposed 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.

Executive Order 13175

This proposed rule has been reviewed 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.

GIPSA has assessed the impact of this rule on Indian tribes and determined that this rule does not, to our knowledge, have tribal implications that require tribal consultation under EO 13175. 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 identified herein are not expressly mandated by Congress.

Paperwork Reduction Act

This proposed 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.

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, Poultry, Livestock, Trade Practices.

For the reasons set forth in the preamble, we propose to amend 9 CFR part 201 as follows:

PART 201—REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

■ 1. The authority citation for Part 201 continues to read as follows:

Authority: 7 U.S.C. 181–229c.

■ 2. Section 201.210 is added to read as follows:

§ 201.210 Unfair, unjustly discriminatory, or deceptive practices or devices by packers, swine contractors, or live poultry dealers.

Any packer, swine contractor, or live poultry dealer is prohibited from engaging in conduct or action that constitutes an unfair, unjustly discriminatory, or deceptive practice or device in violation of section 202(a) of the Act. Such conduct or action includes, but is not limited to:

(a) *Per se violation of section 202(a).* Any conduct or action explicitly deemed to be an ''unfair,'' ''unjustly discriminatory,'' or ''deceptive'' practice or device by the Act is a violation of section 202(a) of the Act.

(b) *Violation of section 202(a) regardless of harm to competition.* Absent demonstration of a legitimate business justification, the following is an illustrative list of conduct or action that constitutes an ''unfair,'' ''unjustly discriminatory,'' or ''deceptive'' practice or device and a violation of section 202(a) of the Act regardless of whether the conduct or action harms or is likely to harm competition:

(1) A retaliatory action or the threat of retaliatory action in response to lawful communication, association, or assertion of rights by a livestock producer, swine production contract grower, or poultry grower. A retaliatory action or the threat of retaliatory action against any livestock producer, swine production contract grower, or poultry grower includes, but is not limited to, coercion, intimidation, or unjust discrimination;

(2) Conduct or action that limits or attempts to limit by contract the legal rights and remedies afforded by law of a livestock producer, swine production contract grower, or poultry grower:

(i) The right to a trial by jury except when the livestock producer, swine production contract grower, or poultry grower has agreed to be bound by arbitration provisions in a contract that complies with § 201.218(a) and that provides a meaningful opportunity to participate fully in the arbitration process after applying the criteria in § 201.218(b);

(ii) The right, pursuant to section 209(a) of the Act, to resolve any dispute among the parties to a poultry growing arrangement, or swine production or marketing contract, in the Federal judicial district in which the principal part of the performance took place under the arrangement or contract;

(iii) The right to pursue all damages available under applicable law; or

(iv) The right to seek an award of attorney fees available under applicable law;

(3) Failing to comply with the requirements of § 201.100;

(4) Failing to provide reasonable notice to a poultry grower before suspending the delivery of birds after applying the criteria in § 201.215;

(5) Requiring unreasonable additional capital investments from a poultry grower or swine production contract grower after applying the criteria in § 201.216;

(6) Failing to provide a reasonable period of time to remedy a breach of contract before termination of the contract after applying the criteria in § 201.217;

(7) Failing to provide a meaningful opportunity to participate fully in the arbitration process after applying the criteria in § 201.218;

(8) Failing to ensure accurate scales and weighing of livestock, livestock carcasses, live poultry, or feed for the purposes of purchase, sale, acquisition, payment, or settlement as required by the regulations under the Act; or

(9) Failing to ensure the accuracy of livestock, meat, and poultry electronic evaluation systems and devices for the purposes of purchase, sale, acquisition, payment, or settlement as required by the regulations under the Act.

(c) *Conduct or action that harms competition.* Absent demonstration of a legitimate business justification, any conduct or action that harms or is likely to harm competition is an ''unfair,'' ''unjustly discriminatory,'' or ''deceptive'' practice or device and a violation of section 202(a) of the Act.

■ 3. Section 201.211 is added to read as follows:

§ 201.211 Undue or unreasonable preferences or advantages.

The Secretary will consider the following criteria when determining whether a packer, swine contractor, or live poultry dealer has engaged in conduct or action that constitutes an undue or unreasonable preference or advantage and a violation of section 202(b) of the Act. These criteria include, but are not limited to:

(a) Whether a packer, swine contractor, or live poultry dealer treats one or more livestock producers, swine production contract growers, or poultry growers more favorably as compared to one or more similarly situated livestock producers, swine production contract growers, or poultry growers who have engaged in lawful communication, association, or assertion of their rights;

(b) Whether a packer, swine contractor, or live poultry dealer treats one or more livestock producers, swine production contract growers, or poultry growers more favorably as compared to one or more similarly situated livestock producers, swine production contract growers, or poultry growers who the packer, swine contractor, or live poultry dealer contends have taken an action or engaged in conduct that violates any applicable law, rule, or regulation related to the livestock or poultry operation without a reasonable basis to determine that the livestock producer, swine production contract grower, or poultry grower committed the violation;

(c) Whether a packer, swine contractor, or live poultry dealer treats one or more livestock producers, swine production contract growers, or poultry growers more favorably as compared to one or more similarly situated livestock producers, swine production contract growers, or poultry growers for an arbitrary reason unrelated to the livestock or poultry operation;

(d) Whether a packer, swine contractor, or live poultry dealer treats one or more livestock producers, swine production contract growers, or poultry growers more favorably as compared to one or more similarly situated livestock producers, swine production contract growers, or poultry growers on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, sexual orientation, or marital or family status;

(e) Whether the packer, swine contractor, or live poultry dealer has demonstrated a legitimate business justification for conduct or action that may otherwise constitute an undue or unreasonable preference or advantage; and

(f) Whether the conduct or action by a packer, swine contractor, or live poultry dealer harms or is likely to harm competition.

Larry Mitchell,

Administrator, Grain Inspection, Packers and Stockyards Administration.

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DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

9 CFR Part 201

RIN 0580–AB26

Poultry Grower Ranking Systems

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Proposed rule.

SUMMARY: The Department of Agriculture's (USDA) Grain Inspection, Packers and Stockyards Administration (GIPSA), Packers and Stockyards Program (P&SP) is proposing to amend the regulations issued under the Packers and Stockyards Act, 1921, as amended and supplemented (P&S Act). The proposed amendments will identify criteria that the Secretary may consider when determining whether a live poultry dealer's use of a poultry grower ranking system for ranking poultry growers for settlement purposes is unfair, unjustly discriminatory, or deceptive or gives an undue or unreasonable preference, advantage, prejudice, or disadvantage. The proposed amendments will also clarify that absent demonstration of a legitimate business justification, failing to use a poultry grower ranking system in a fair manner after applying the identified criteria is unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the P&S Act regardless of whether it harms or is likely to harm competition.

DATES: We will consider comments we receive by February 21, 2017.

ADDRESSES: We invite you to submit comments on this proposed rule. You may submit comments by any of the following methods:

- *Mail:* M. Irene Omade, GIPSA, USDA, 1400 Independence Avenue SW., Room 2542A–S, Washington, DC 20250–3613.
- *Hand Delivery or Courier:* M. Irene Omade, GIPSA, USDA, 1400 Independence Avenue SW., Room 2542A–S, Washington, DC 20250–3613.
- *Internet: http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

Instructions: All comments should make reference to the date and page number of this issue of the **Federal Register**. Regulatory analyses and other documents relating to this rulemaking will be available for public inspection in Room 2542A–S, 1400 Independence Avenue SW., Washington, DC 20250–3613 during regular business hours. All comments received will be included in the public docket without change, including any personal information provided. All comments will be available for public inspection in the above office during regular business hours (7 CFR 1.27(b)). Please call the Management and Budget Services staff of GIPSA at (202) 720–8479 to arrange a public inspection of comments or other documents related to this rulemaking.

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:

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 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 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

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[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).

[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

[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)).

[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.

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 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

[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).

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 pre-empt 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]

BILLING CODE 3410–KD–P

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. 92(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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