



November 22, 2010

Tess Butler
GIPSA, USDA
1400 Independence Ave., SW
Room 1643-S
Washington, D.C. 20250-3604

Sent via email: comments.gipsa@usda.gov

Re: Comments on GIPSA Proposed Rule, 75 Federal Register 35338 (June 22, 2010)

Dear Ms. Butler:

These comments on the Grain Inspection, Packers & Stockyards Administration (GIPSA) Proposed Rule to clarify provisions of the Packers & Stockyards Act (PSA) are submitted on behalf of the National Sustainable Agriculture Coalition (NSAC).

NSAC is an alliance of grassroots organizations that advocates for federal policy reform to advance the sustainability of agriculture, food systems, natural resources, and rural communities. Our vision of agriculture is one where a safe, nutritious, ample, and affordable food supply is produced by family farmers who make a decent living pursuing their trade, while protecting the environment, and contributing to the strength and stability of their communities. Many NSAC organizations include farmers and ranchers who raise livestock and poultry among their members.

Congress has clearly stated in its legislative history that the central goal of the PSA is to create fair, open, efficient, and transparent markets for livestock. Overall, NSAC commends GIPSA for proposing a comprehensive and clear Proposed Rule that will help redress the large and increasing imbalance in market power between the nation's livestock and poultry producers and large-scale corporate packers and processors. Although more needs to be done, the Proposed Rule will make U.S. livestock and poultry markets more open, transparent and competitive for our farmers and ranchers. By giving clarity and specific definitions to terms used in the PSA, the Proposed Rule will provide more certainty for farmers and ranchers in their market relations with livestock and poultry packers and processors.

Thank you for considering our viewpoint and positions on the Proposed Rule.

Sincerely,

Martha L. Noble

Martha L. Noble, Senior Policy Associate

Comments of the National Sustainable Agriculture Coalition

A. Threshold Issues

1. The Proposed Rule is squarely within the authority granted to USDA by Congress in the Packers & Stockyards Act (PSA).

USDA's authority to implement this Proposed Rule rests squarely on the Packers & Stockyards Act (PSA). Section 407 of the PSA provides that the Secretary of Agriculture may “. . . *make such rules, regulations, and orders as may be necessary to carry of the provisions of this Act.*” Therefore, USDA has clear and comprehensive authority under the PSA to provide regulatory clarification to any terms used in the provisions of the PSA.

In addition, the PSA provides authority to the Secretary to bring actions for violations of the provisions of the PSA, including the imposition of penalties. As noted in the preamble to the Proposed Rule, the PSA provides broad prohibitions on the conduct of entities subject to its jurisdiction. This can give rise to uncertainty for livestock processors and meatpackers about compliance with the PSA and can make enforcement by USDA difficult. USDA has the duty to ensure that the regulations provide clarity about conduct that violates the PSA. This clarity is needed both for farmers and ranchers who depend on the protection of the PSA and packers and processors subject to its sanctions.

In the 2008 Farm Bill, Congress recognized the authority of USDA to implement regulations under the PSA by directing USDA to use its existing authority under the PSA to provide regulatory criteria for specific provisions of the PSA. Section 11006 of the 2008 Farm Bill requires the USDA Secretary to promulgate regulations that establish criteria that USDA 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.¹

These regulatory criteria apply both to existing provisions of the PSA and to new measures added to the PSA by Section 11005 of the 2008 Farm Bill. In addition, the 2008 Farm Bill included added a new Section 210 to the PSA concerning arbitration, which is intended to ensure that farmers and ranchers are free to accept or decline arbitration clauses in production contracts. In this statutory provision, Congress provided a directive that USDA promulgate a regulation to establish criteria for whether an arbitration process provided for in a contract provides a meaningful opportunity for the grower or producer to participate fully in the arbitration process.

¹ Food, Conservation & Energy Act of 2008 (hereinafter 2008 Farm Bill), Pub. L. 110–246, title XI, § 11006 June 18, 2008, 122 Stat. 1664, 2120 (as codified at 7 U.S.C. 228 note)).

These congressional directives to USDA to exercise its authority under the PSA to regulate on specific topics do not in any way restrict USDA from using its comprehensive, general authority under the PSA to address additional issues that arise in implementation of the Act in the absence of congressional directives.

2. The Proposed Rule is a necessary step in rebalancing the market power exercised by large packing and processing firms over farmers and ranchers who raise livestock and poultry.

Over the last few decades, farmers and ranchers have had to deal with a drastic reduction in access to markets for livestock and poultry as a few very large packing and processing firms have merged with or bought out small and mid-scale packing and processing facilities. Nationwide the concentration ratio of the top four firms, relative to 100 percent - the CR4 - has increased dramatically. By 2007, four beef packing firms processed over 80 percent of the nation's beef; four pork packers had control over 67 percent of hog processing; and over 60 percent of broiler chickens were processed by four large firms.² In some areas, farmers and ranchers effectively have only one purchaser for their products or have even given up livestock or poultry production because there are no processing or packing facilities within a reasonable distance.

A growing trend is for a few corporations to control a large share of the processing and packing capacity, as well as production capacity, in more than one livestock or poultry sector. For example, since 2007, the Brazilian corporation JBS has spent more than \$2.7 billion on U.S. acquisitions in beef, pork and poultry. The company paid \$1.4 billion for the beef and pork processor Swift & Co. in 2007 and, in 2008, purchased Smithfield's cattle feeding and beef operations for \$565 million. JBS increased its share of the chicken processor Pilgrim's Pride Corporation to 67 percent from 64 percent.³ In 2007, Swift & Co. was in the top four among pork packers and among beef packers. Smithfield and ContiBeef had the largest capacity of beef feedlots, including the Five Rivers feedlot. And Pilgrim's Pride was the number one broiler chicken processor. So, in just the last three years, JBS has become one of the top four corporations in these highly concentrated markets.

Many livestock and poultry producers do not participate in open markets but instead enter into production contracts with packers or processors. This trend is most pronounced in the poultry sector where almost all broiler production occurs under production contracts. The poultry grower is required to make large capital investments in confinement facilities but has little or no control over the number and quality of chicks that will be provided, the feed quality, medications or other significant aspects of production. Moreover, in many locations, only one or two poultry processors offer contracts. The hog sector is also moving towards greater corporate control through both production and marketing agreements.

² Mary Hendrickson & William Heffernan, Concentration of Agricultural Markets (April 2007)(study prepared with the financial assistance of the National Farmers Union)(available on the web at <http://www.foodcircles.missouri.edu/07cortable.pdf>).

³ See *Meat Processor JBS Reports Revenue Surge, Is Optimistic On Global Demand* (available at Drovers Cattle Network (Nov. 12, 2010)) (http://www.cattlenetwork.com/Meat-Processor-JBS-Reports-Revenue-Surge--Is-Optimistic-On-Global-Demand/2010-11-12/Article.aspx?oid=1282455&fid=CN-LATEST_NEWS).

The beef sector still has numerous independent farmers and ranchers but both cattle and hog producers are using a shrinking spot market for open, public sales. Those thin markets in turn serve to determine the price offered to farmers in many marketing agreements and other contracts with packers. For example, in the last 15 years, the share of hogs sold on the open market has declined from 62 percent to 5 percent. Moreover, this thin spot market is easily susceptible to price manipulation by packers making sales to each other or bringing to these markets large numbers of animals which they own or control.

As open, public markets for livestock and poultry have decreased, livestock and poultry packers and processors have gained the power to drive down and manipulate the prices paid to farmers and ranchers. Farmers and ranchers lack robust markets for their animals, sound information about the markets in which they participate, and a relative lack of market power to command fair prices and negotiate favorable terms in contracts relative lack of power to ensure fair prices and negotiate favorable terms in production contracts.⁴

The overall result has been a major transfer of wealth from our nation's livestock and poultry farmers and ranchers and our rural communities into the hands of fewer and fewer multi-national corporations. The last few years have seen record high profits for many packing and processing corporations coupled with a shrinking farmer and rancher population and, in many regions, depopulated rural communities.

3. GIPSA has provided sufficient cost analysis in the Proposed Rule.

In the preamble to the Proposed Rule, GIPSA provides over four pages of cost-benefit analysis in keeping with Executive Order 12866 and the Regulatory Flexibility Act. The agency independently gathered cost-benefit information and heard from many participants in the livestock and poultry markets as it developed the proposed regulation.

The cost-benefit analysis notes that many provisions of the Proposed Rule specify actions already required under the PSA or actions that are common practice in current livestock and poultry marketing. These actions are not expected to impose new costs.

In addition, some new actions may impose additional costs on packers and processors but will likely provide economic benefits to farmers and ranchers. Moreover, some new requirements that increase certainty and clarity in livestock marketing and in the application of the PSA can decrease the costs of livestock and poultry marketing both for farmers and ranchers and for packers and processors.

GIPSA also notes that some information about the costs and benefits of provisions of the Proposed Rule may be in the hands of packers and processors and farmers and ranchers. In the preamble, GIPSA requests, at eight separate points, additional information on costs and benefits as part of the public comments on the Proposed Rule. The agency also extended the comment period on the Proposed Rule from 60 days to 150 days, ample time for the gathering of cost-benefit information by those submitting comments on the Proposed Rule. The economic information received in the

⁴ See Timothy A. Wise & Sarah E. Trist, *Buyer Power in U.S. Hog Markets: A Critical Review of the Literature* (2010)(Global Development and Environment Institute Working Paper NO. 10-04)(available on the web at <http://www.ase.tufts.edu/gdae/Pubs/wp/10-04HogBuyerPower.pdf>).

public comments on the Proposed Rule will be considered by GIPSA in the development of the Final Rule.

The cost-benefit analysis already conducted by GIPSA for the Proposed Rule, coupled with a call for additional cost-benefit information upon release of a Proposed Rule, is a proper way for an agency to meet the legal requirements for a Proposed Rule and to ensure that the Final Rule includes a legally sufficient cost-benefit analysis. As USDA Secretary Tom Vilsack stated in response to some members of Congress who called for a delay in the GIPSA rule, "Beyond the cost-benefit analysis we have conducted for the Proposed Rule, we look forward to reviewing the public comments to inform the Department if all factors have been properly considered, if or how changes should be incorporated, and to aid more rigorous cost-benefit and related analyses pursuant to the rulemaking process."⁵

B. Comments on Specific Provisions of the Proposed Rule

1. Proposed Rule Section 201.210: Unfair, unjustly discriminatory and deceptive practices.

NSAC commends GIPSA for providing eight clear examples of common actions in livestock and poultry marketing that constitute unfair, unjustly discriminatory and deceptive practices or devices in violation of PSA Section 202(a). Over the years, many courageous farmers and ranchers have stepped forward to report on and document the various activities detailed in this Section. Many farmers involved in vertically integrated production systems paid the price of being blackballed by processors in their region or provided with sick animals or inferior feed. Other producers complied with some or all of these measures, including a limitation on legal rights that essentially shut off their access to the courts and legal remedies that are intended to protect farmers and ranchers from economic exploitation.

NSAC was pleased to see that in developing this rule GIPSA took notice of the testimony and comments submitted to the ongoing USDA/DOJ Workshops on Agriculture and Antitrust enforcement, which also encompass the PSA and other statutes. As provided in the opening sentence of Section 201.210, this listing of actions violating the Proposed Rule Section 202(a) is not exhaustive. An overview of the testimony and comments submitted to the Public Workshops may reveal other practices that can also be considered for inclusion as violations of PSA Section 202(a) and we would encourage appropriate additions in the Final Rule.

2. Proposed Rule Section 201.211: Undue or unreasonable preference or advantage.

A key measure in the PSA is Section 202(b) prohibiting price discrimination by livestock and poultry processors against small and midsized farmers and ranchers by providing that it 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 make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever."

⁵ Letter from USDA Secretary Tom Vilsack to Representative Frank Lucas (R-OK)(dated Oct. 15, 2010)(posted on the web at <http://www.cfra.org/files/Vilsack%20letter%20to%20Congress%20-%20GIPSA.pdf>).

NSAC recommends that GIPSA modify the Proposed Rule in Section 201.211 for determining a violation of PSA Section 202(b) as follows:

The Final Rule should clearly provide that premiums based solely on volume-are disallowed, but that premiums are allowed for:

- (1) Measurable and verifiable differences in carcass and meat quality, if those premiums are available to producers of all sizes,
- (2) Specified time of delivery and for delivery at times of urgent need, if those premiums are available to producers of all sizes, and
- (3) Volume related savings that result from real and verifiable efficiencies in the cost of procuring, transporting or handling livestock and conducting other transactions that occur outside the plant. The Final Rule should, however, include a "bright line" test that disallows volume-based premiums for so-called efficiencies that occur within the plant or from operating at full capacity. For example, hog producers who pool their hogs and deliver a truckload that is the size commonly handled by a processing plant should be on the same footing as a larger single producer who provides the same size truckload to the plant.

As noted in a position paper issued by the Center for Rural Affairs, it is common for packers to offer smaller volume hog producers up to \$6 per hundredweight less than large volume producers selling to the same buyer. This difference can mean a discount of over \$50,000 for a family farmer with a 150 sow farrow-to-finish operation.⁶

In addition, NSAC urges GIPSA to provide in this Section of the Proposed Rule that any penalty imposed on a grower which is based on inputs affecting performance which are the not within the grower's control should be considered an undue preference. This measure would prohibit the use of tournament systems in determining the price paid for poultry in poultry growout systems where the poultry chicks, feed, medication or other factors affecting the feed conversion and other performance measures are provided by the live poultry dealer and not subject to the control of the grower.

NSAC further recommends that the Proposed Rule be amended to provided that a showing of a "legitimate business reason" by a packer, swine contractor or poultry dealer will not be sufficient to shield a challenged action from being unlawful under PSA Section 202 (b) as an undue or unreasonable preference or advantage.

NSAC approves of the scope of Proposed Rule Section 201.211 which recognizes that undue preferences arise in a variety of packer-producer transactions detailed in the Section.

Some representatives of the packing and processing sector have contended that the Proposed Rule Section 201.211 would inhibit or prevent adoption of marketing agreements, the development of niche markets including markets for grassfed livestock or humanely raised livestock, or other

⁶ See John Crabtree, Packers and Stockyards Act – Unreasonable Preference Rulemaking (Dec. 8, 2008)(Center for Rural Affairs position statement posted on the web at <http://www.cfra.org/node/1601>).

markets where farmers and ranchers can receive premium prices for the breeds or quality of their animals or for using specific production practices. With so many members who rely on such niche markets, such a result would be devastating to us. However, we do not believe it to be true. Rather, NSAC contends that Section 201.211 will be more likely lead to an increase in such marketing arrangements.

This Section will help ensure that farmers and ranchers do not receive arbitrary or disparate treatment. Packers, swine contractors, and live poultry dealers will need document verifiable and measurable legitimate business reasons for differential treatment. In addition, they will be required to make the contract terms available to all poultry growers, livestock producers, or swine production contract growers who individually or collectively can meet the conditions set by the contract. Critical information regarding acquiring, handling, processing and quality of livestock will be disclosed to all producers when it is disclosed to one or more producers.

The result will be increased certainty for farmers and ranchers that they will be rewarded for their efforts to produce livestock and poultry that achieve higher levels of quality or that are raised using practices that have a premium in consumer markets. It will reduce practices of packers and processors to provide more favorable terms for corporate insiders. Coupled with the protections provided in Proposed Rule Section 201.210, it will lessen the chance that a company will make arbitrary changes to contracts for some producers while favoring others.

3. Proposed Rule Section 201.213: Livestock and Poultry Contract Sample Copies

As discussed in Section A-2 of these comments, many farmers and ranchers market cattle and hogs through marketing arrangements including forward contracts, formula contracts, production contracts, and other marketing agreements. Most poultry is marketed through production contracts with vertically integrated processors. The general practice among packers, swine contractors, and live poultry dealers has been to provide these contracts only to farmers and ranchers and keep them from public view. Indeed, until recently, poultry growers and some swine growers were forbidden by clauses in their production contracts from sharing the contract or information in the contract with others, even with their lawyers.

Proposed Rule Section 201.213 will shine a brighter light on these contracts by requiring that sample copies of each unique type of contract or agreement for marketing arrangements and poultry growing arrangements be submitted to USDA within 10 business days after a packer, swine contractor, or live poultry dealer enters into an agreement. This sample copy will be publicly available including posting on the GIPSA website. Farmers and ranchers will be able to compare terms in their individual contracts with the sample contracts to determine if there are deviations in their individual contracts. Such deviations may be a signal of a violation of the PSA Section 202(b) prohibition on undue or unreasonable preferences or advantages and undue or unreasonable prejudice or disadvantages.

Section 201.213 also provides that contract provisions for trade secrets, confidential business information, and personally identifiable information not be made public. NSAC recommends that GIPSA amend this regulation to require that, except for information that would provide personal identification of a farmer or rancher, the type of information that packers, swine contractors, and live poultry dealers wish to conceal be made public, so that farmers and ranchers, as well as the public in general, can challenge the determination of whether information is properly designated by

GIPSA as confidential. Providing the public with the type or categories of information that may be deemed confidential is a reasonable, open government amendment to the rule that will help prevent the scope of “confidential business information” and “trade secrets” expanding until a sample contract is more blackout than text.

4. Proposed Rule Section 201.94: Requirement for Written Records

NSAC finds that Proposed Rule Section 201.94, which provides a new requirement for the maintenance of written records, is a reasonable requirement that will help ensure that packers, swine contractors, and poultry dealers meet the requirements of Sections 201.110 and 201.112 of the Proposed Rule. The measure requires packers, swine contractors, and live poultry dealers to maintain written records that provide the justification for differential pricing and any deviation from standard price or contract terms offered to poultry growers, swine production contract growers, or livestock producers.

GIPSA indicated in the preamble to the Proposed Rule that the justification provided in the written records need not be extensive but it should be enough to identify the benefit/cost basis of any pricing differentials. GIPSA would consider the particular circumstances of any pricing disparity in determining if a violation of the Act has occurred. This provision is important in that if a violation is suspected, then records dated from the time the violation occurred must be accounted for and not altered.

Packers have complained that they would have additional recordkeeping tasks and that under the Proposed Rule USDA would be allowed to scrutinize individual transactions. But this recordkeeping and scrutiny of transactions is exactly what is needed to help ensure that violations of the PSA have not occurred. Without such checks and assurances, packers and processors can continue to exploit farmers and ranchers when they have livestock and poultry ready for the market and are the most vulnerable to unfair and deceptive practices or to accepting price discrimination or other disparate treatment. The development and maintenance of such records concerning pricing and contract terms is also a simple and sound business practice.

5. Proposed Rule Section 201.3(c): Elimination of a “competitive injury” test, so that conduct can be found to violate PSA Section 202(a) or 202(b) without a finding of harm or likely harm to competition.

PSA Section 202(a) clearly lays out seven separate and independent circumstances, in clauses designated (a) through (f), which constitute unlawful practices that violate the Act. The section reads as follows:

“Section 202. Unlawful practices enumerated. It 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:

(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; or

(c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or

(g) Conspire, combine, agree or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section. (7 U.S.C. 192).”

The clauses are separated from each other by the disjunctive term “or”. By the traditional rules of statutory construction the use of “or”, in contrast to the conjunctive term “and”, clearly indicates that each clause is to be read separately. In addition, the plain meaning of the text of the statute, with its use of the disjunctive “or”, indicates that each clause is to be read separately.

Section (a) requires only a showing that a packer, swine contractor, or live poultry dealer has engaged in or used any unfair, unjustly discriminatory, or deceptive practice or device. Section (b) requires only the showing that a packer, swine contractor, or live poultry dealer has made or given an undue or unreasonable preference or advantage to any particular person or locality in any respect, or subjected a particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.

Sections (c)-(e) are in sharp contrast to sections (a)-(b), in that they require not only proof of prohibited acts but also additional showings that the prohibited acts have the tendency or effect of restraining commerce or creating monopoly or the purpose or effect of manipulating or controlling prices. These additional showings required under sections (c)-(e) are commonly referred to as “competitive injuries”.

USDA has consistently, and for a long period of time, held the position that each clause in Section 202 is to be read separately and that clauses (a) and (b) do not require that farmers and ranchers must make a showing of a competitive injury. But the agency has failed until now to promulgate regulations supporting its position. In recent years, five of the twelve federal Circuit Courts of Appeals have ruled that farmer and ranchers seeking redress for harms proven under sections (a) and (b) must also demonstrate harm to competition or likely harm to competition arising from the

PSA violation, even though both the text of these sections and the legislative history of the PSA do not require such a finding. Seven federal Circuit Courts of Appeal have not made clear rulings that affirmatively require a finding of harm to competition or likely harm to competition and several federal district courts have held that an anticompetitive effect is not necessary to establish a claim for a violation of the Act.

The imposition of a competitive injury test is a high bar to the remedies of the PSA for farmers and ranchers who have clearly demonstrated that they have been harmed by unfair and deceptive practices or undue preferences or prejudicial actions. In some cases, the economic harm inflicted on individual farmers or ranchers, or even a large group of farmers and ranchers, will simply not result in a competitive injury to the entire sector, especially where a court requires proof of an actual or likely increase in the resale price or consumer prices for the product. In other cases, the harm could result in a competitive injury but the costs to farmer or rancher plaintiffs of proving the injury can be prohibitive, especially when the information needed to show the competitive injury is in the hands of the packing and processing sector and requires. The discovery actions needed to obtain the information may be both extensive and prohibitively expensive.

An example of the need for eliminating the competitive injury requirement is illustrated in the facts alleged in a recent administrative complaint brought by USDA against JBS USA, LLC.⁷ The complaint alleges that the company, which purchased hogs on a carcass merit basis, was not actually assessing the condition of the carcasses. Instead, the company allegedly substituted an arbitrary “lean value” for the condition of the carcass for many hogs provided by sellers. The complaint identifies 16 lots of hogs that would have received a lower price because of the application of this deceptive practice. If each hog lot were provided by an individual producer, the loss to each hog producer would be \$21,875, a major loss for many family farms. But it could be impossible for this relatively small group of farmers to demonstrate that the harm done to them, which is significant on an individual basis, also harmed the competitiveness of the entire industry.⁸

This provision in the Proposed Rule is critical. It clearly provides to the courts USDA’s determination that a showing of a competitive injury is not required for farmers and ranchers to bring successful actions under PSA Sections 202 (a) and (b). It correctly interprets the plain language of the statute and the PSA’s legislative history and will serve to rein in those courts which have imposed a judicially-fashioned competitive injury test on PSA Sections 202 (a) and (b). Without this measure, farmers and ranchers clearly injured by violations of the PSA will likely continue without a remedy because of the judicially fashioned competitive injury test imposed by some courts

6. Proposed Rule Section 201.2 (t) and 201.2 (u): New Definition for “competitive injury” and “likelihood of competitive injury.”

NSAC approves of the inclusion of definitions in the Proposed Rule for “competitive injury” and

⁷ *In Re: JBS USA, LLC, f/k/a Swift & Company and Swift Pork Company*, Complaint of the USDA and Notice of Hearing (September 30, 2010)(copy posted on the web at <http://www.r-calfusa.com/Competition/100930-GIPSAComplaintAgainstJBS.pdf>).

⁸ See *GIPSA Complaint against Brazilian-owned JBS Demonstrates Need for GIPSA Competition Rule* (Oct. 14, 2010)(commentary posted on R-CALF website at http://www.r-calfusa.com/news_releases/2010/101015-complaint.htm).

“likelihood of competitive” which are sufficiently broad to encompass relations among packers, swine contractors, or live poultry dealers as well as situations arising from actions between packers, swine contractors, and live poultry dealers and livestock and poultry producers.

We recommend, in addition, that these definitions make clear that the finding of a competitive injury or likelihood of a competitive injury does not require a showing of a likely effect on resale price levels. USDA notes in the preamble to the Proposed Rule that this showing is not required and indeed that it goes beyond the showing required by antitrust laws. However, it is likely that defendants whose violation of the PSA rests solely on a competitive injury will argue in court that the showing of a likely effect on resale price levels is required in addition to a showing of their anti-competitive conduct. Therefore we urge the addition of a clear statement in the definitions that showing a likely effect on resale price levels is not required.

7. Section 201.212: Livestock Purchasing Practices

As discussed about in Section A-2 of these comments, over the past two decades market power in the livestock and poultry sector has been concentrated in a few large packing and processing firms. In addition, many markets have changed from open public markets to marketing arrangements and production contracts. In the poultry sector the change to production contracts is virtually complete. But even in the beef and hog sectors where there are still significant numbers of independent producers the spot markets are thin. Even though these spot markets are thin, hog and beef marketing contracts, including forward contracts and marketing agreements, often use the spot market to set the contract price. Thus, the conditions are ripe for price manipulation and collusion among packers and processors who control significant numbers of cattle or hogs or who arrange sales among each other or through the same dealer.

The restrictions of Section 201.212 will help ensure that price manipulation and collusion are not unintended or intended consequences of packer and processor purchases on thin spot markets and we support their inclusion in the Final Rule, with one amendment. The measure prohibits packer-to-packer sales that are not in open, public markets and that are clearly a condition ripe for collusion. In addition dealers that operate as packer buyers must purchase livestock only for the packer that identifies the dealer as its packer buyer. The measure also requires that packers may not enter into exclusive arrangements with a dealer except for those dealers which are designated as the packer’s buyer and are reported to USDA on approved forms.

We recommend a revision to the ban on packer-to-packer sales in the Final Rule to exempt very small lots of livestock on a weekly basis or monthly basis. Such a revision will alleviate the concerns some small packers have had in managing their supplies. Such a provision could be added across the board, provided all sales are duly reported, or could be restricted to small packers by limiting its application to firms below the mandatory price reporting threshold.

8. Section 201.214: Tournament Systems

NSAC generally opposes the use of tournament systems by live poultry dealers. Under these systems, poultry growers have less certainty about required standards for condition of birds, feed conversion rates, and other factors used by the live poultry dealers to set prices. The tournament establishes a constantly moving target for poultry growers.

Moreover, the live poultry dealers get to call the shots on who is in and who is out of any specific set of growers grouped into a tournament system. By eliminating a few growers at the lower end of performance, usually measured as efficiency of feed conversion, otherwise average growers can find themselves subject to a significant discount in the price paid for their birds.

The poultry dealers can also game the system because they control almost all the inputs for the grow-out operations, including the health of the chicks provided, the sex of the chicks provided, and the quality of the feed, medications, and other inputs. A perusal of the testimony at a House Agriculture Committee hearing on April 17, 2007 and testimony and comments submitted to the USDA and Department of Justice at May 21, 2010 workshop poultry sector concentration and regulation reveals numerous farmer complaints about the system.

Because of these abuses, NSAC recommends in Section B-2 of these comments that tournament systems be designated as undue preference and/or discriminatory practices and this provision for tournament systems be eliminated in the Final Rule. Poultry firms should be required to establish clear verifiable and measurable standards for the quality and condition of poultry in setting contract prices.

GIPSA may continue to view the tournament system, despite the ease at which it can be rigged, as a legitimate means of setting the price. Again, in our opinion this would be a highly questionable conclusion given that poultry farmers have almost no bargaining power and little recourse but to accept the inputs supplied by the poultry firm. If the tournament system is allowed to continue, however, NSAC considers that the Proposed Rule requirements for a uniform base payment, which cannot be discounted, as a minimum safeguard against price manipulation by poultry firms. We also agree that poultry dealers should rank growers in settlement groups with growers with other like poultry house types.

9. Proposed Rule Section 201.215: Suspension of Delivery of Birds

The provisions for suspension of delivery of birds will do little to improve the conditions of poultry growers. Most growers must bear the costs of building and maintaining poultry houses as well as bearing whatever price is charged for inputs. The measure does require written notice 90 days prior to a suspension of deliver, which states the reason for the suspension and the length of the suspension and the date delivery will resume. But the measure implies that a “suspension” can be regarded as a routine action that does not rise to the level of an unfair, unjustly discriminatory and deceptive practice.

The Final Rule should make clear that a suspension of delivery of birds for most poultry growers is action that can have serious consequences. It should also be made clear in the Final Rule that suspension can constitute a breach of the production contract by the poultry firm. If a poultry firm cannot demonstrate that suspension occurred because of a weather disaster or other event outside the control of the firm which precludes delivery, suspension should be considered an unfair, unjustly discriminatory and deceptive practice in violation of Section 202(a) of the PSA.

After years of poultry firms apportioning territories among each other, many growers effectively have only one poultry firm available as the “market” for the poultry they raise. A suspension can leave a poultry grower with no way to keep up with payments on poultry houses and equipment required to raise poultry in confinement. The recent bankruptcy of Pilgrim’s Pride, a major poultry

processor illustrates this issue. The bankruptcy left poultry growers in states across the Southern tier with empty poultry houses and threw numerous communities into an economic downturn. U.S. taxpayers are now paying out some \$60 million to help farmers and communities recover from the aftermath of this bankruptcy.

10. Proposed Rule Section 201.216 and Section 201.217: Criteria for determining whether a capital investment is unfair practice in violation of PSA Section 202(b).

NSAC recommends that for clarity, GIPSA reverse the order of Sections 201.216 and 201.17 in the Proposed Rule. Section 201.217 sets a starting point by addressing the requirements and prohibitions on capital investments within an initial poultry grower or swine production contract. This measure offers protection for poultry and swine producers from coercive or unfair actions by processing and packing firms in the requirements for capital investments. NSAC approves of the measure that requires that contract or growing arrangements allow the producer to recoup at least 80 percent of the capital investment. This is a measure that will help insure fair practice in the course of dealings between the farmer and the packer, swine contractor or poultry dealer. Without this provision, farmers can be easily coerced into making unfair concessions in subsequent contracts if they are carrying considerable debt from the initial capital investment.

Section 201.216 provides criteria for determining whether additional capital investment requirements, imposed after a contract has been entered into, constitute an unfair practice in violation of the PSA. NSAC recommends that any additional capital investments that a company requires beyond the original poultry house specifications in the original contract should be designated an unfair or deceptive practice, unless the company provides additional, fair compensation to the grower for the cost of the upgrade at the time of the upgrade. The PSA should not be read to allow farmers to be faced with continual expensive upgrades that can increase the productivity of the operations and enrich the swine contractor or poultry firm but leave the farmers in debt because their costs are larger than their payment for birds or hogs.

11. Proposed Rule Section 201.218: Reasonable period of time to remedy a breach of contract.

NSAC approves this measure in the Proposed Rule, which is required by the directives of the 2008 Farm Bill to implement a new measure provided by Section 11005 of the Farm Bill. The measure provides criteria for determining whether a poultry grower or swine production contract grower has had a reasonable time to remedy a breach of contract. In the past, swine packers, swine contractors, and live poultry dealers who entered into production contracts with swine and poultry growers could use the excuse of *de minimis* or short duration breaches of contract to break the contracts, especially if a firm wanted to depress the number of animals reaching the market when the number is high and prices are depressed. They could also exact additional major concessions in contracts in return for not dropping a grower for a simple or temporary breach of contract or could use a temporary short term breach of contract to retaliate against a grower who voiced concerns about the contracts or advocated better terms for growers in contracts.

Section 201.218 of the Proposed Rule provides an appropriate set of criteria that will prevent firms from dropping farmers from contracts for short-term breaches but still allow firms to terminate growers who are not able to meet otherwise reasonable terms of a contract.

12. Proposed Rule Section 201.219: Arbitration

Section 11005 of the 2008 Farm Bill adds a new provision to the PSA (Section 210) that gives a poultry grower, livestock producer, or swine production contract grower the right to decline to be bound by an arbitration clause in a production agreement. Congress also directed USDA to establish criteria that the Secretary will consider in determining whether the arbitration process specified in a contract provides a meaningful opportunity for the grower or producer to fully participate in the arbitration process.

NSAC approves of the language concerning the Right to Decline Arbitration provided in the Proposed Rule, which is required in contracts with arbitration clauses. The measure requires that a producer either accept or reject the arbitration clause. If neither option is chosen, the contract is rendered void. This will provide assurance that the producer has made a clear choice about arbitration.

Arbitration can be a cost-saving and fair process for adversaries that are on an equal footing financially and in their understanding of the relative merits of going to court or entering into arbitration or other forms of mediation. In addition Section 201.219, GIPSA recognizes that arbitration proceedings can put farmers at a disadvantage relative to packing and processing firms. Arbitration can be more costly for farmers than going to court. In many arbitration proceedings, discovery is limited. This limitation can put farmers at a disadvantage because packing or processing firms will generally have greater knowledge of the circumstances leading to the arbitration. In addition, some arbitration proceedings conclude with only a cursory discussion of the legal principles, applicable law, and precedent applied in reaching the decision.

Section 201.219 provides sufficient criteria for the Secretary to determine if an arbitration process provided for in a contract provides a fair forum for the farmer. This provision is particularly important because the packing or processing firm has almost always drafted the contract and has knowledge and experience with arbitration proceedings not available to the farmer.

13. NSAC recommends that GIPSA establish methods to continuously monitor the procurement practices in the livestock and poultry industries to ensure that new practices do not result in violations of the PSA.

This monitoring should include periodic notices that the agency is taking information from farmers and ranchers on industry practices, including whether farmers and ranchers find that the practices are fundamentally fair and not in violation of the PSA.

In addition, GIPSA should initiate continuous monitoring and oversight of industry practices to ensure that packers and processors are not providing undue or unreasonable preferences. Individual farmers and ranchers are unlikely to have the resources or time monitor that activities packers or processors with many sellers. Information about these activities is generally in the packer or processors control.

This monitoring provision will provide is much needed addition to the current system which relies primarily on complaints from individual producers.

C. Related Concern: The GIPSA Proposed Rule and Animal Welfare

Although the PSA does not directly address the issue of the welfare of farm animals, trade organizations representing large-scale packers and processors have used the web and the popular press to make the bogus claim that the GIPSA Proposed Rule will have negative effects on animal welfare. NSAC strongly disagrees with this contention.

NSAC takes farm animal welfare seriously. NSAC advocates for more sustainable approaches to animal agriculture, including rotational grazing systems, more humane housing systems such as hoop houses, and an end to battery cages and gestation crates. In addition, NSAC is working improve farm animal welfare by reducing or eliminating the distances animals are transported to slaughter. We believe our nation needs more slaughterhouses that serve local small and mid-sized independent livestock producers and local and regional markets. We support Cooperative Inspection Programs to allow interstate shipment of meat from state slaughterhouses that enter into partnerships with the USDA. We also support financial and technical assistance to expand on-farm slaughter capacity, including mobile slaughter facilities.

1. The Proposed Rule's prohibition on packer-to-packer direct sales will not have a detrimental effect on animal welfare.

The Grain Inspection, Packers and Stockyards Administration (GIPSA) has proposed additions to the Packers and Stockyard Act, including a prohibition on packer to packer sales. This new provision, § 201.212(c), would prevent packers from purchasing, acquiring, or receiving swine or livestock from another packer or packer-affiliated companies. It is intended to restrict price manipulation and collusion by preventing the largest packers from selling livestock to each other. If included in the Final Rule, it will help to ensure that fairer prices are paid to small and mid-sized independent livestock producers. In Section B-7 of these comments we suggest a small revision to this provision.

The National Cattlemen's Beef Association, which opposes GIPSA's proposed amendments to the Packers and Stockyards Act, and Dr. Temple Grandin of Colorado State University, assert that eliminating packer to packer sales would harm animal welfare. They argue that it may result in animals being transported longer distances to slaughter and experiencing unnecessary and stressful off-loading and re-loading. In fact, § 201.212(c) does not require long distance transport of animals to slaughter and leaves open many marketing options, including selling to individuals, market agencies, dealers, or other buyers. For example, a packer who wants to sell livestock or poultry from another packer nearby can make an open offer for the animals to an independent dealer. The nearby dealer can offer a price for the livestock or poultry in a public market. It is likely that the nearby packer can offer a better price because transportation costs will be lower than for more distant bidders.

In fact, far from the rule forcing longer distance transportation, it is increased concentration of the industry that has and is continuing to cause that phenomenon. Over the last few decades, local processing and packing plants have been bought up and closed by large packing and processing corporations. With the loss of nearby facilities, most of our farmers and ranchers have been faced with transporting their animals longer distances. In addition, these vertically integrated corporations have encouraged separate facilities for breeding and raising animals. The result has been an increase in animals transported long distances in the U.S. In the last few years, 6 to 10 million live hogs have

been imported into the United States, many brought from the Canadian plains to the U.S. Corn Belt as feeder pigs. Live cattle, numbering over 2.5 million per year, have also been transported to the U.S. And live hogs, cattle and poultry are transported long distances to a few large-scale processing and packing facilities that may serve a multi-state region, as local facilities are shuttered. It strains credulity to argue that rules to enforce fairer markets and increased competition will make this situation worse. If anything the opposite will be true.

2. The Proposed Rule's restriction on undue or unreasonable preferences or advantages and undue and unreasonable prejudice or disadvantages will not have a detrimental effect on marketing agreements that include measures for livestock and poultry producers to participate in marketing agreements for more humane conditions for livestock and poultry.

Dr. Grandin, echoing the meatpacking industry, opines that the Proposed Rule will make it harder for producers who meet higher farm animal welfare standards to establish relationships with companies that seek out these value-added products and will make it easier for conventional livestock producers to sue meat companies that pay a premium for such products. Nothing could be further from the truth.

The PSA provides that it 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: ... (b) make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever."⁹

Section 201.211 of the Proposed Rule establishes criteria for the determining whether an undue or unreasonable preference has occurred. These criteria include making contract terms for number, volume or other conditions available to all farmers and ranchers who could individually or collectively meet the conditions set by the contract. These conditions can include production methods such as raising the animals in hoop houses or without gestation crates. Nothing in the undue preference rule threatens animal welfare standards.

Dr. Grandin also contends that the USDA Proposed Rule will make it harder for farmers and ranchers to participate in niche markets and receive premium prices for healthy animals, animals raised on pastures, specific breeds of animals, and other value-added features. But the opposite is true – the Proposed Rule will make it easier for farmers and ranchers to participate in these markets.

Under the Proposed Rule, a packer, swine contractor or live poultry dealer must maintain written records that provide justification for differential pricing or any deviation from standard price or contract terms offered to poultry growers, swine production contract growers, or livestock producers. In other words, the buyer must have a legitimate business reason for paying a premium price. GISPA clearly states that the justification need not be extensive but should be enough to identify the benefits-cost basis of pricing differentials, such as higher labor costs. Such documentation is already routinely kept by operations meeting meaningful animal welfare standards.

NSAC believes that farmers and ranchers who meet higher production standards, including farm animal welfare standards, deserve to be paid a premium for their products. We have long advocated

⁹ 7 U.S.C. § 192(b)

for meaningful USDA voluntary meat labels relevant to animal welfare and we support third-party animal welfare certification programs.

In conclusion, the current marketplace for livestock and poultry which allows the largest agribusiness corporations to manipulate prices in a manner that threatens the ability of small and mid-sized independent producers to survive will harm – not improve – farm animal welfare. NSAC strongly supports GIPSA’s proposed additions to the Packers and Stockyard Act regulations, with the proposed changes we recommend in section B of these comments, as an important and needed step in the right direction to ensure that farmers and ranchers have sufficient return on investments to upgrade animal facilities to improve the welfare of the animals and to participate in marketing arrangements intended to encourage improvement of animal welfare.

CONCLUSION

As noted in our opening letter submitted as part of these comments, NSAC finds that the GIPSA Proposed Rule will make U.S. livestock and poultry markets more open, transparent and competitive for our farmers and ranchers. But we also note that there is more that can be done, especially the implementation of measures to ban packer ownership of livestock and prohibit packer control of captive supplies of livestock. Proposed Rule Section 201.212 addressing livestock purchasing practices does limit packer-to-packer sales and puts restrictions on the use of dealer by more than one packer. But these measures by themselves will not be fully effective in preventing packers from using the market power of owning or controlling large numbers of livestock which can be used to manipulate market price.

NSAC looks forward to working with to provide the nation’s farmers and ranchers renewed open, transparent, and fair markets and diverse marketing channels for their livestock and poultry.