NATIONAL CHICKEN COUNCIL

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June 12, 2017

SUBMITTED ELECTRONICALLY

M. Irene Omade
Grain Inspection, Packers and Stockyards Administration,
U.S. Department of Agriculture,
1400 Independence Avenue, SW
Room 2542A-S
Washington, DC 20250-3613

RE: Proposed Rule: Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, Federal Register Volume 82, No. 69 page 17594, RIN 0580-AB28

Dear Sir or Madam:

The National Chicken Council (NCC) appreciates the opportunity to comment on the Grain Inspection, Packer and Stockyards Administration's (GIPSA) proposed rule on the interim final rule (the IFR) regarding the Scope of Sections 202(a) and (b) of the Packers and Stockyards Act (P&S Act). NCC represents the vertically integrated broiler chicken production and processing companies that provide more than 95 percent of the chicken marketed in the United States, and our members would be directly affected by the new regulations.

We are pleased GIPSA acknowledges that the interim final rule raises "significant policy and legal issues" that "warrant further review" and has delayed the effective date of the interim final rule until October 19, 2017 to review such issues. 1/ The proposed rule asks which of four possible dispositions of the interim final rule would be the best course of action for GIPSA to take: 1) allow the rule to become effective; 2) suspend the rule indefinitely; 3) delay the effective date of the rule further; and 4) withdraw the rule. For the reasons detailed in our previous comments on the IFR (attached as Attachment A), as well as the reasons detailed below, we urge the agency to withdraw the interim final rule. In addition, although GIPSA separated the interim final rule from the two proposed rules on Poultry Grower Ranking Systems 2/ and Unfair Practices and Undue Preferences in Violation of the P&S Act, 3/ all three of these rules are inherently intertwined. Specifically, the proposed rules are premised upon the interim final rule, and share a common origin with the interim final rule in GIPSA's 2010 proposed rule.

1/ Proposed Rule, Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 Fed. Reg. 17594 (Apr. 12, 2017).
2/ Proposed Rule, Poultry Grower Ranking Systems, 81 Fed. Reg. 92723 (Dec. 20, 2016).
3/ Proposed Rule, Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act, 81 Fed. Reg. 92703 (Dec. 20, 2016).

Accordingly, we also ask the agency to withdraw the two proposed rules in addition to the interim final rule.

EXECUTIVE SUMMARY

These comments explain the numerous reasons why the interim final rule is ill-advised, antithetical to well-established court precedent, and inconsistent with the principles for regulatory reform set forth by the President in Executive Order 13771, 4/ Executive Order 13777, 5/ and related guidance from the Office of Management and Budget (OMB). 6/

Even by GIPSA's own estimates, which we believe understate costs, the IFR promises to inflict approximately $1 billion in economic harm on the meat and poultry industries, with no quantifiable benefit. GIPSA has failed to provide a sufficient justification for imposing such burdensome, expensive changes to the poultry industry and does not explain the corresponding benefits this rulemaking provides to counterbalance the billions of dollars of detrimental effects this rule will have on the U.S. economy. Moreover, the agency fails to consider the negative consequences this rule will have on consumers and competition. And the IFR would inflict this harm despite uniform and contradictory court precedent rejecting the interpretation of the P&S Act embodied in the IFR. Continuing forward with the IFR would only perpetuate confusion in a sector that needs certainty to efficiently structure business dealings.

Section I of these comments discusses how the interim final rule is GIPSA's attempt to set aside decades worth of settled law and accomplish via rulemaking what it could not accomplish in the courts—eliminating the requirement to show a likelihood of competitive injury to establish a violation of Sections 202(a) and (b) of the P&S Act.

Section II of these comments details how this rulemaking is incompatible with the President's regulatory reform agenda. Not only has GIPSA failed to identify regulations for repeal to ensure a net zero total cost increase from the interim final rule, but the interim final rule is also fundamentally irreconcilable with the Administration's efforts to eliminate burdensome regulations on industry and only promulgate rules whose benefits outweigh their costs.

Section III of these comments explains why GIPSA's other proposed dispositions of the interim final rule are not the correct action for the agency to take. Any disposition of the rule other than withdrawing the rule would only serve to perpetuate uncertainty in the industry without resolving

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4/ Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, 82 Fed. Reg. 12285 (March 1, 2017).

5/ Executive Order 13777, "Enforcing the Regulatory Reform Agenda," Feb. 24, 2017.

6/ Memorandum: Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs," Feb. 2, 2017; Memorandum: Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce, Apr. 12, 2017.

any of the core issues with the interim final rule. For these reasons, we urge GIPSA to pursue Option 4 and withdraw the IFR once and for all. Furthermore, because the interim final rule is inextricably related to GIPSA's two proposed rules on poultry grower ranking systems and unfair practices and undue preferences, we request the agency withdraw these two proposed rules as well.

I. The Interim Final Rule Should Be Withdrawn Because GIPSA Cannot Ignore or Attempt to Rewrite Well-Established Court Precedent Construing the P&S Act

The interim final rule seeks to abolish the requirement that either the agency or private plaintiffs prove a likelihood of competitive injury to establish a violation of Sections 202(a)-(b) of the P&S Act. 7/ The agency claims that "a violation of section 202(a) or (b) can be proven without proof of predatory intent, competitive injury, or likelihood of injury." 8/ That position is contrary to the plain language of the statute and the unanimous construction given it by every federal appellate court to have addressed the issue. Indeed, the agency effectively concedes as much in the preamble of the interim final rule and invites judicial reconsideration of settled law based on the new interim final rule. 9/

When Congress passed the P&S Act, it specifically intended to prohibit practices that harmed the competitive process. Congress derived the language in the P&S Act from other regulatory statutes – most notably, the Interstate Commerce Act and the Federal Trade Commission Act – that were plainly designed to protect the competitive process for the benefit of the consuming public. The competitive injury requirement, therefore, is not some judicial gloss on section 202(a)-(b), but an integral part of the statutory scheme. By importing language from other enactments with well-established legal meaning, Congress necessarily "adopt[ed] the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use convey[ed]." 10/ Accordingly, it is the statutory language itself that imposes the requirement of competitive injury. Indeed, there is no other reasonable reading of the statute, underscored by the fact that every federal appellate court has construed the meaning of the statute in this way.

Despite GIPSA's efforts to the contrary, there is no dispute that the purpose of section 202 of the P&S Act is the elimination of monopolistic or other anticompetitive practices. Only a year after the Act's passage, the Supreme Court in *Stafford v. Wallace* recognized that the "chief evil" that section 202 sought to address was "the monopoly of the packers, enabling them unduly and

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7/ 7 U.S.C. § 192(a)-(b).

8/ 81 Fed. Reg. 92566, 92567 (Dec. 20, 2016).

9/ *Id.* at 92568 (stating that "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, this new regulation may constitute a material change in circumstances that warrants judicial reexamination of the issue").

10/ *Morissette v. United States,* 342 U.S. 246, 263 (1952).

arbitrarily to lower prices to the shipper, who sells, and unduly and *arbitrarily to increase the price to the consumer, who buys*." 11/ "Another evil," according to the Court, was "exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of the live stock through the stockyards, *all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers, on the other*." 12/

Certainly nothing in *Stafford* or in the language of the statute suggests that Congress intended the Act to protect producers (e.g., growers) distinct and apart from its protection of overall competition in the market and consumer interests. Rather, in identifying the aims of section 202, *Stafford* explicitly connects any protection of producers to the protection of consumers. The Court's additional statements that Congress sought to remove "undue burden[s] on . . . commerce" 13/ and "unjust obstruction[s] to . . . commerce" 14/ flowing from any "unjust or deceptive practice or combination" only confirm that Congress enacted the P&S Act to maximize market output for the benefit of consumers.

This is hardly surprising. It has long been recognized that the P&S Act has its roots in antitrust law. 15/ Antitrust law exists to protect the competitive process so that consumers may obtain the highest quality goods and services at the lowest possible cost. 16/ In the absence of some likely

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11/ *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922) (emphasis added).

12/ *Id.* (emphasis added).

13/ *Id*.

14/ *Id*.

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

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

consumer harm, "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws." 17/ In short, the Sherman Act and other antitrust statutes have not been construed to protect producers from the rigors of competition or to strike against aggressively competitive practices. Instead, they aim to enhance consumer welfare by ensuring that there are no collusive or monopolistic practices that restrict output and deprive consumers of the benefit of free and open markets. *Stafford* makes clear that the goals of the P&S Act are identical. 18/

In light of *Stafford*, every appellate court to have construed section 202 of the P&S Act has held that no violation of subsections (a) or (b) occurs without a showing of competitive injury. Eight different circuits have addressed the issue, and they have uniformly and resoundingly rejected the position advanced by GIPSA in the interim final rule. 19/ In several of these cases, the agency has argued its position directly to the court in question; 20/ in others, it has filed *amicus* briefs urging the court to adopt its preferred construction. 21/ In the interim final rule, GIPSA suggests that the courts may reconsider the scope of Sections 202 (a) and (b) in light of the interpretation offered in the interim final rule. But GIPSA has already offered that interpretation to the courts, and the courts have roundly rejected it. Rather than acquiesce in these decisions,

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17/ *Brooke Group*, 509 U.S. at 225.

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

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

20/ *IBP*, 187 F.3d 974; *Farrow*, 760 F.2d 211; *De Jong*, 618 F.2d 1329; *Armour & Co.*, 402 F.2d 712.

21/ *Terry*, 604 F.3d 272; *Wheeler*, 591 F.3d 355.

however, GIPSA now seeks to misuse the rulemaking process to achieve what it has not won in court. 22/

The agency offers no analysis undermining any of these court decisions. Aside from GIPSA's *ipse dixit* that these judicial opinions are incorrect, nothing in the interim final rule itself or in the Federal Register notice explains any flaws in the reasoning of any of these cases. To the extent GIPSA discusses this plethora of judicial pronouncements at all, it either ignores certain decisions or denies that they mean what they say. 23/ In fact, the agency attempts to minimize the uniformity with which the appellate courts have rejected its position by conceding only that "[f]our 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 provide their claims under section 202(a) and/or (b) without proving harm to competition or likely harm to competition." 24/ Besides ignoring the unbroken string of cases going back more than 40 years explicitly construing section 202 to require a showing of competitive injury, the agency's discussion of the cases is blatantly misleading in at two respects.

First, the agency asserts that the United States "was not a party" to any of the "recent" cases. Yet GIPSA omits that it participated in both *Terry* and *Wheeler v. Pilgrim's Pride Corp.*, 25/ as an *amicus* and made the same arguments in both cases that it makes in the Federal Register notice. GIPSA's insistence that it has not participated in recent cases construing the P&S Act is disingenuous; GIPSA has fought this battle in court, and has lost each time.

22/ The agency's Federal Register notice points to statements by the court in *Wheeler* for the proposition that "while decisions of 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." However, the agency fails to recognize that promulgating such a regulation exceeds the agency's authority, as the statute does not contemplate application of sections 202(a) and (b) of the P&S Act absent a showing of competitive harm. *See* 81 Fed. Reg. at 92570.

23/ In one instance, the agency seeks to justify its refusal to acquiesce in the uniform judicial decisions rejecting its position by making the curious assertion that two of the appellate decisions adverse to its contention "were issued over vigorous dissents." 81 Fed. Reg. at 92568. Exactly how that observation undermines the reasoning of the ten cases holding that injury to competition is an element of a section 202 claim is never explained. Apparently the agency believes that the fervor of its opposition to those decisions is a suitable substitute for sober legal analysis and can override unanimous federal precedent rejecting the agency's position.

24/ *Id*.

25/ 591 F.3d 355 (5th Cir. 2009) (en banc). The agency also fails to note that it participated in *London v. Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir. 2005), in which the Eleventh Circuit also rejected the arguments it makes on this issue in the preamble.

Second, GIPSA fails to note that its interpretation of the statute has been rejected in four cases in which the United States has been a party. 26/

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

II. The Interim Final Rule Should Be Withdrawn Because it is Inconsistent with the President's Regulatory Reform Agenda

The interim final rule is precisely the type of regulation that the Administration has made clear it wants to stamp out: a regulation with costs that well exceed the benefits, both to consumers and industry, and is therefore unnecessary and burdensome.

The IFR should be withdrawn because adoption of this rule would run afoul of Executive Order 13771 on Reducing Regulation and Controlling Regulatory Cost issued by the President on January 30, 2017. Under this Executive Order, designed to ensure that regulatory activities do not unduly burden the economy, an agency must identity at least two existing regulations to be repealed when it publicly proposes for notice and comment or otherwise promulgates a new regulation, and the total incremental cost of all finalized regulations must be zero. Thus, under Executive Branch policy, the interim final rule cannot be finalized without further analysis and regulatory cost offsetting, a process that should be conducted with ample opportunity for public comment. Moreover, as an interim final rule, administrative procedures contemplate that the "scope" rule—if not rescinded—will ultimately be finalized by publishing a final rule in the *Federal Register*, an action that would trigger regulatory cost offsetting under the Executive Order. Therefore, the rule must satisfy the Executive Order and otherwise meet the Administration's regulatory reform priorities.

GIPSA has not identified any existing regulations that it would repeal in conjunction with promulgating this new rule, as required by the Executive Order. Nor has GIPSA identified means to offset the staggering costs associated with the rule. Executive Order 13771 states that "it is essential to manage the costs associated with governmental imposition of private expenditures required to comply with federal regulations." 27/ GIPSA's own economic analysis estimates the cost of this rule to the livestock and poultry industry to be approximately $1 billion

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26/ *IBP*, 187 F.3d 974; *Farrow*, 760 F.2d 211; *De Jong*, 618 F.2d 1329; *Armour & Co.*, 402 F.2d 712.

27/ Executive Order 13771, Section 1.

dollars. 28/ Further, this staggering cost estimate from GIPSA actually underestimates the costs associated with this rule, as an economic impact analysis from Dr. Thomas E. Elam, President of FarmEcon LLC shows that the interim final rule would inflict substantial economic harm, orders of magnitude greater than projected by GIPSA, as detailed in our previous comments. 29/ Dr. Elam concludes that the interim final rule would significantly increase costs for the poultry industry and consumers by increasing administrative overhead, increasing the costs and frequency of litigation, and reducing the rate of efficiency improvements. For this reason, it is untenable that GIPSA would continue to pursue a rulemaking that the agency itself acknowledges would result in significant costs. Issuing a regulation with the expectation that industry bear significant expense to litigate the meaning of the regulation is quite the opposite of "managing the costs associated with governmental imposition of private expenditures."

Further, the President has also issued a memorandum on streamlining permitting requirements and reducing regulatory burdens on domestic manufacturing. 30/ At a time when the President is directing agencies to identify ways to reduce burden on industry, GIPSA should not be attempting to finalize a rule that would increase burdens on the domestic poultry and livestock industries without any corresponding benefits.

The interim final rule is also inconsistent with the principles set forth in Executive Order 13777, which directs agencies on how to implement the regulatory reform agenda. 31/ Executive Order 13777 requires each agency to establish a Regulatory Reform Task Force that is responsible for evaluating existing regulations and making recommendations regarding which regulations should be repealed, replaced, or modified. Each agency Task Force is directed to identify regulations

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28/ 81 Fed. Reg. at 92582. GIPSA's cost estimate of the interim final rule appears deliberately convoluted, and, in some cases, disingenuous. For example, the upper boundary estimate that GIPSA's cost estimate starts from is based on a study by Informa Economics, which estimated the costs of the rule to be a little over $1.6 billion for the livestock and poultry industries. However, GIPSA immediately cut this figure by 25% based on an implication in the Informa Study that the elimination of the requirement to demonstrate injury to competition was responsible for 75% of these costs. However, in the GIPSA proposed rule on poultry grower ranking systems, GIPSA did not allocate any additional litigation costs to the ranking rule based on the premise that these costs were accounted for by the interim final rule. 81 Fed. Reg. 92723, 92733 (Dec. 20, 2016). It is not clear whether GIPSA and the Informa Study are assigning costs to each rule in the same way, and therefore, whether it is warranted for GIPSA to assume a 25% reduction in the Informa Study estimate is appropriate. Regardless of GIPSA's attempts to obfuscate the costs of the rule, the simple fact remains that GIPSA has not, and cannot offer quantifiable benefits from the rule that outweigh the massive costs involved.

29/ Dr. Thomas Elam, Expert Response to GIPSA Poultry Contracting Proposed Rules, March 21, 2017.

30/ Presidential Memorandum Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing, January 24, 2017.

31/ Executive Order 13777, Enforcing the Regulatory Reform Agenda, February 24, 2017.

that, among other things, eliminate jobs or inhibit job creation, are outdated, unnecessary, or ineffective, impose costs that exceed benefits, create serious inconsistency, or otherwise interfere with regulatory reform initiatives and policies. The interim final rule runs afoul of each of these principles.

GIPSA brazenly admits that the interim final rule will spur costly litigation—a cost which is assured to inhibit job growth in this industry. As detailed in our previous comments on the interim final rule and proposed rules (Attachment A), data show that as of 2014, there is substantial interest in entering into poultry growing. Put simply, most chicken farmers voluntarily maintain business relationships with their processors, and there is a long line of people wanting to expand their farming operations to include broiler production. This is evidence of a healthy market that farmers on the whole find desirable enough to stay in and to queue to get into. By increasing uncertainty in the market and, by GIPSA's own estimate, costing the poultry industry millions of dollars, the interim final rule will severely impact the industry and consumers at a time when the Administration is trying to improve American industry and saving jobs.

The interim final rule is unnecessary and ineffective because GIPSA has not demonstrated that poultry dealers are engaged in unfair, unjustly discriminatory, or deceptive practices, or giving undue or unreasonable preferences in a way that is not already prohibited by the long-standing interpretation of Sections 202(a) and (b) of the P&S Act requiring a showing of likelihood of competitive injury. For this reason, the interim final rule remains a solution in search of a problem. If GIPSA cannot articulate a real harm that this rule is aimed at fixing, the rule is simply unnecessary. Therefore, there is no reason to enact a rule that would ensure massive costs while providing no benefit to the industry or the public.

There is no doubt that the interim final rule would impose costs that exceed the benefits of the rule. Even assuming GIPSA's own estimate of litigation costs is accurate, litigation alone will cost the poultry industry $5.74 million in the first year that the interim final rule is effective. 32/ In reality, litigation costs would drastically exceed this estimate. For example, the *Perry v. Tyson* case cited earlier in these comments involved a $1.3 billion jury award, which was overturned on appeal. 33/ GIPSA has wholly failed to identify how poultry growers, consumers, or processors will receive more than $5.74 million in benefits during the first year this rule would be effective, much less more in benefits than the staggering costs that would actually materialize. Instead, GIPSA states that it was "unable to quantify the benefits of § 201.3(a)" and attempts to justify the costs of the rule by pointing to vague qualitative benefits such as "treating growers more fairly" despite the fact that any alleged unfair conduct by the live poultry dealers

32/ 81 Fed. Reg. at 92580. This figure severely underestimates the true cost of anticipated litigation, as GIPSA also stated the baseline cost to litigate a case under the P&S Act is $3.5 million. *Id.* at 92578.

33/ *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272 (11th Cir. 2005).

against growers is left wholly unsubstantiated by GIPSA. 34/ If a regulation is not aimed at solving an identifiable, legitimate problem for American consumers, and only stands to impose costs and burdens on industry, such a rule cannot be squared with the Administration's initiative to eliminate rules that impose costs in excess of benefits.

As detailed in Section I of these comments and in our previous comments on the interim final rule (Attachment A), if the interim final rule becomes effective, it will create serious inconsistencies with the decades of caselaw interpreting the P&S Act to require a showing of competitive harm or injury. GIPSA is not free to disregard the fact that its desired interpretation of the P&S Act has been repeatedly rejected by the courts. Further, for all the reasons discussed above, finalizing this rule would be entirely inconsistent with the President's regulatory reform initiatives.

In fact, given the Administration's emphasis on deregulatory actions to eliminate red tape, lower costs, and increase certainty for American businesses, it is incomprehensible that GIPSA would continue to move forward with a rule that GIPSA expressly recognizes will cause extreme uncertainty and significant amounts of needless litigation for years to come with zero quantifiable benefits. The IFR is entirely out of step with our national economic priorities, which is reason enough to withdraw it.

Therefore, we urge GIPSA to withdraw the interim final rule.

III. The Other Alternatives in the Proposed Rule Fail to Resolve the Issues Raised by the Interim Final Rule

a. Finalizing the Interim Final Rule Would Adversely Impact the Poultry Industry and Consumers and Is Unjustified

Due to the enormous cost of this rule, consumers will assuredly end up paying more for poultry products, to the detriment of domestic growers and processors, who will be put at a competitive disadvantage compared to international growers and processors. Such a result might be justified if the rule provided significant measurable economic benefits that outweighed the costs; however, GIPSA has failed to articulate such a basis for this rulemaking. For all the reasons noted above, as well as in our attached previous comments on the interim final rule, finalizing the interim final rule would be harmful for processors, growers, and consumers.

b. Suspending the Interim Final Rule Creates Uncertainty for the Poultry Industry Despite Settled Court Precedent

Suspending the interim final rule does not completely relieve the industry of the uncertainty caused by the rule, as GIPSA could decide at any time to reinstate the rule. Given that the

34/ 81 Fed. Reg. at 92587.

agency has already pursued this rulemaking for seven years, suspension and further delay serve no purpose other than to perpetuate uncertainty. The facts have been gathered, and the IFR's economic impacts have been studied extensively. If, however, GIPSA is unwilling to withdraw the IFR entirely, then we would ask that the agency suspend the interim final rule rather than continue to delay the effective date of the rule or allow the rule to go into effect. In light of the fact that the interim final rule runs contrary to Congressional intent in drafting the P&S Act, well-established court precedent construing the P&S Act, and the President's regulatory reform objectives, we believe withdrawing the rule entirely remains the best solution.

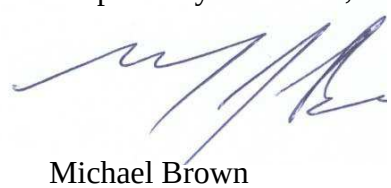
c. Delaying the Effective Date Would Only Provide a Temporary Respite and Would Ultimately Harm the Poultry Industry and Consumers

Delaying the effective date of the interim final rule does not resolve any of the infirmities the rules suffers from mentioned above and in our previous attached comments. GIPSA admits that "due to the uncertain outcome of litigation," live poultry dealers would likely take a "wait and see" approach before making significant changes in business models, marketing arrangements, or other practices. 35/ Delaying the effective date only prolongs the uncertainty caused by the rule without providing any benefits to the industry or consumers.

* * *

In conclusion, for the reasons stated herein, GIPSA should withdraw the interim final rule. Further, although GIPSA tried to separate this rulemaking from the proposed rules on poultry grower ranking systems and unfair practices and undue preferences, all three of these rules are interrelated and stem from the same 2010 proposal. Therefore, we request that GIPSA withdraw the interim final rule and proposed rules altogether. Thank you for your consideration.

Respectfully submitted,



Michael Brown
President
National Chicken Council

Attachments
Attachment A – NCC Comments on GIPSA Interim Final Rule and Proposed Rules

35/ 81 Fed. Reg. at 92583.

National Chicken Council Comments on GIPSA Interim Final Rule on Scope of Packers and Stockyards Act and Proposed Rules on Poultry Grower Ranking Systems and Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act

March 24, 2017

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March 24, 2017

SUBMITTED ELECTRONICALLY

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1400 Independence Avenue, SW
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RE: Interim Final Rule: Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, Federal Register Volume 81, No. 244 page 92566, Docket RIN 0580-AB25; Proposed Rule: Poultry Grower Ranking Systems, Federal Register Volume 81, No. 244 page 92723, Docket RIN 0580-AB26; Proposed Rule: Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act, Federal Register Volume 81, No. 244 page 92703, RIN 0580-AB27

Dear Sir or Madam:

The National Chicken Council (NCC) appreciates the opportunity to comment on the Grain Inspection, Packer and Stockyards Administration's (GIPSA) interim final rule on the Scope of Sections 202(a) and (b) of the Packers and Stockyards Act and the proposed rules on Poultry Grower Ranking Systems and Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act (collectively, "the Rules"). NCC represents the vertically integrated broiler chicken production and processing companies that provide more than 95 percent of the chicken marketed in the United States, and our members would be directly affected by the new regulations.

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

1/ Although our comments focus specifically on the interim final rule and the proposed rules as they would affect chicken processors, the Rules also would have a detrimental impact on the turkey, hog, and cattle industries as well as their customers and consumers.

Although GIPSA has separated the interim final rule and the two proposed rules into separate entries in the *Federal Register*, all three Rules are deeply intertwined and share a common origin in GIPSA's 2010 proposed rule. 2/ We therefore offer comments addressing all three Rules, and we are submitting these comments to all three dockets. Comments made herein should be construed as applying to the interim final rule and the two proposed rules.

EXECUTIVE SUMMARY

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

Section I of these comments focuses on the adverse effects to the poultry industry and consumers that would result from the proposal. Our practical concerns focus on the provisions of the proposal that would increase costs and harm competition and innovation in the poultry industry. Several sections of the proposal would result in decreased innovation and efficiency. The provisions regarding poultry grower ranking systems would reward the most inefficient growers by, in effect, closing the pay gap between them and the best growers. This would result in decreased incentives for growers to make capital improvements or increase efficiency. Additionally, nearly every section of the proposal is rife with vague and undefined terms that would result in superfluous and costly litigation, unnecessarily increasing the costs of doing business.

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

Section III of these comments explains why these Rules are contrary to the President's regulatory reform agenda. GIPSA has failed to identify regulations to remove in conjunction with finalizing

2/ GIPSA, Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35338 (June 22, 2010).

these Rules, and GIPSA has not identified the regulations that would have to be removed to ensure a net zero total cost increase from the regulations. Moreover, the strong likelihood that the Rules will increase litigation and uncertainty flies in the face of the Administration's priorities.

Section IV discusses issues in common to both the proposed rules, including an inadequate administrative record, flawed economic impact analysis, and unconstitutionally vague criteria. Moreover, because both proposed rules are premised on the interim final rule on scope, the proposals suffer from all the legal infirmities of the interim final rule.

Section V addresses issues specific to the proposed rule on poultry grower ranking systems. Primarily, GIPSA fundamentally misunderstands the role of the risk-allocating contract model, does not establish that the alleged market abuses are anything more than theoretical possibilities, establishes arbitrary criteria contradicted by GIPSA's own findings, and threatens to undermine the competitiveness of the American chicken industry.

Section VI identifies issues with the proposed rule on unfair practices and undue preferences, including issues associated with the proposed standards for severing ties with growers who are breaking the law.

Attached to these comments, and referenced throughout, is an economic analysis conducted by Dr. Thomas E. Elam, President of FarmEcon LLC. 3/ This analysis was commissioned by NCC because of the lack of a comprehensive economic analysis in GIPSA's proposal. As discussed further below, Dr. Elam concludes that the Rules would significantly increase costs for the poultry industry and consumers by reducing the rate of efficiency improvements, increasing administrative overhead, and increasing the costs and frequency of litigation.

I. The Interim Final Rule and Proposed Rules would Adversely Affect the Poultry Industry and Consumers and Are Unjustified

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

Throughout the Rules, GIPSA consistently substitutes government fiat for private, market-based decision making. The Rules reflect little or no understanding of the practical implications of these mandates and often no inkling of their (i) cost to industry participants and the consuming public

3/ Dr. Thomas Elam, Expert Response to GIPSA Poultry Contracting Proposed Rules, March 21,2017. *See* Attachment A.

or (ii) effect on the competitiveness of the U.S. poultry industry both domestically and globally. As a result of GIPSA's command-and-control approach, instead of improving industry performance, the Rules are likely to usher in a number of detrimental outcomes. For example: poultry quality might decrease by virtue of decreased grower compensation; the incentives for growers to compete on the basis of efficiency, quality of birds, and quality of facilities and services are likely to be reduced; and better growers are likely to be deprived of appropriate rewards for their labors and, ultimately, penalized by legal mandates that in effect compel them to subsidize less efficient growers. Considered in their entirety, the Rules seem aimed more at punishing business efficiency and innovation than redressing any identifiable economic distortions that might not ordinarily be corrected by market forces. Congress has not authorized the agency to engage in central planning or empowered it to redistribute income based on its own conception of "fairness" at the expense of rational, legitimate, and efficient business practices that benefit both industry participants and the consumers that they serve.

Compounding this overarching defect, the Rules are rife with ambiguities and undefined terms that would result in considerable uncertainty for the poultry industry. Vague definitions and undefined terms would likely result in numerous lawsuits with the litigation costs effectively operating as a tax on market participants that would continue to be extracted until there is a sufficient body of case law clarifying the proposed rule. These costs are wholly unnecessary and provide no benefit to the industry or the public.

We are particularly troubled that the interim final rule and proposed rule appear designed to increase uncertainty and costly litigation—GIPSA even admits that substantial litigation will ensue—with no quantifiable benefits to society. Regulation should increase certainty and decrease the risk of wasteful litigation, not the other way around.

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

II. Comments on the Interim Final Rule on the Scope of Sections 202(a) and (b) of the Packers and Stockyards Act

a. The Agency Lacks Statutory Authority to Promulgate Any Regulation That Permits a Finding of a Violation of Section 202(a)-(b) of the Packers and Stockyards Act Absent a Showing of Injury to Competition.

The interim final rule purports to abolish the requirement that either the agency or private plaintiffs prove a likelihood of competitive injury to establish a violation of sections 202(a)-(b) of the P&S

Act. 4/ The agency claims that "a violation of section 202(a) or (b) can be proven without proof of predatory intent, competitive injury, or likelihood of injury." 5/ That position is contrary to the plain language of the statute and the unanimous construction given it by every federal appellate court to have addressed the issue. Indeed, the agency effectively concedes as much in the proposal's preamble and invites judicial reconsideration of settled law based on the new interim final rule. 6/

When Congress passed the P&S Act, it specifically intended to prohibit practices that harmed the competitive process. The language that it used in the statute was understood at the time of enactment to address those practices that were collusive or monopolistic (or monopsonistic) and had a substantial likelihood of reducing output and ultimately raising prices to consumers. Congress incorporated terminology from other regulatory statutes – most notably, the Interstate Commerce Act and the Federal Trade Commission Act – that were plainly designed to protect the competitive process for the benefit of the consuming public. The competitive injury requirement, therefore, is not some judicial gloss on section 202(a)-(b), but an integral part of the statutory scheme. By importing language from other enactments with well-established legal meaning, Congress necessarily "adopt[ed] the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use convey[ed]." 7/ Accordingly, it is the statutory language itself that imposes the requirement of competitive injury. Indeed, there is no other reasonable reading of the statute. The agency has no authority to promulgate any regulation that is broader than, or conflicts with, the underlying statutory provision on which it is based. 8/ Because sections 202(a) and (b) of the P&S Act mandate a showing of competitive injury, GIPSA has no power to abrogate that statutory element through its rulemaking authority.

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

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

4/ 7 U.S.C. § 192(a)-(b).

5/ 81 Fed. Reg. 92566, 92567 (Dec. 20, 2016).

6/ *Id.* at 92568 (stating that "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, this new regulation may constitute a material change in circumstances that warrants judicial reexamination of the issue").

7/ *Morissette v. United States*, 342 U.S. 246, 263 (1952).

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

There is no dispute that the purpose of section 202 of the P&S Act is the elimination of monopolistic or other anticompetitive practices. Only a year after the Act's passage, the Supreme Court in *Stafford v. Wallace* recognized that the "chief evil" that section 202 sought to address was "the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and *arbitrarily to increase the price to the consumer, who buys*." 9/ "Another evil," according to the Court, was "exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of the live stock through the stockyards, *all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers, on the other*." 10/

GIPSA apparently treats the existence of these multiple remedial purposes as evidence that Congress did not intend to prohibit only those practices resulting in competitive injury. 11/ That contention cannot be squared with *Stafford*. The common thread linking the statutory purposes identified by the Supreme Court is the elimination of anticompetitive practices. First, as the *Stafford* Court noted, Congress sought to prohibit the abuse ("unduly and arbitrarily") of monopsony power by packers that leads to a monopolistic restriction of output with the effect of ("arbitrarily") increasing the price of products purchased by consumers. Second, Congress intended to prevent "exorbitant charges" and other anticompetitive practices resulting from collusion among market participants. As the Court noted, because of that collusion, "[e]xpenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and *increase the price to be paid by the consumer*." 12/ In other words, every aim of section 202 identified in *Stafford* manifests an intent to protect the competitive process for the benefit of consumers.

GIPSA's explanation of Congressional intent is an exercise in cherry-picking the record to muster up a weak defense of the Agency's interpretation, evidenced by the fact that the discussion of Congressional intent is a mere single paragraph in the preamble with only three statements from the record. Certainly nothing in *Stafford* or in the language of the statute suggests that Congress intended the Act to protect producers (e.g., growers) distinct and apart from its protection of overall competition in the market and consumer interests. Rather, in identifying the aims of section 202, *Stafford* explicitly connects any protection of producers to the protection of consumers. The

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9/ *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922) (emphasis added).

10/ *Id.* (emphasis added).

11/ *See* 81 Fed. Reg. at 92568 (claiming that statements in the legislative history that the "handling of the great volume of live poultry is attendant with various unfair, deceptive, and fraudulent practices and devices" and that "the protection extends to "unfair, deceptive, unjustly discriminatory" practices by "small" companies in addition to "monopolistic practices" demonstrates that "courts and commentators have recognized that the purposes of the P&S Act are not limited to protecting competition" despite four courts of appeals disagreeing with USDA's interpretation of the P&S Act).

12/ *Stafford*, 258 U.S. at 515.

Court's additional statements that Congress sought to remove "undue burden[s] on . . . commerce" 13/ and "unjust obstruction[s] to . . . commerce" 14/ flowing from any "unjust or deceptive practice or combination" only confirm that Congress enacted the P&S Act to maximize market output for the benefit of consumers.

This is hardly surprising. It has long been recognized that the P&S Act has its roots in antitrust law. 15/ Antitrust law exists to protect the competitive process so that consumers may obtain the highest quality goods and services at the lowest possible cost. 16/ In the absence of some likely consumer harm, "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws." 17/ In short, the Sherman Act and other antitrust statutes have not been construed to protect producers from the rigors of competition or to strike against aggressively competitive practices. Instead, they aim to enhance consumer welfare by ensuring that there are no collusive or monopolistic practices that restrict output and deprive consumers of the benefit of free and open markets. *Stafford* makes clear that the goals of the P&S Act are identical. 18/

13/ *Id*.

14/ *Id*.

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

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

17/ *Brooke Group*, 509 U.S. at 225.

18/ The P&S Act may be broader than some antitrust provisions in that it prohibits acts that are *likely* to have a detrimental effect on competition rather than only those having an *actual* anticompetitive effect. *See, e.g., De Jong*, 618 F.2d at 1335 n.7 ("the courts that have considered § 202 have consistently looked to decisions under the Sherman Act for guidance, although recognizing that § 202 in some cases proscribes practices which the Sherman Act would permit");

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

In light of *Stafford*, every appellate court to have construed section 202 of the P&S Act has held that no violation of subsections (a) or (b) occurs without a showing of competitive injury. Eight different circuits have addressed the issue, and they have uniformly and resoundingly rejected the position advanced by GIPSA in the interim final rule (and thus in the proposed rules). 19/ In several of these cases, the agency has argued its position directly to the court in question; 20/ in others, it has filed *amicus* briefs urging the court to adopt its preferred construction. 21/ In the interim final rule, GIPSA suggests that the courts may reconsider the scope of Sections 202 (a) and (b) in light of the interpretation offered in the interim final rule. But GIPSA has already offered that interpretation to the courts, and the courts have roundly rejected it. Rather than acquiesce in these decisions, however, GIPSA now seeks to misuse the rulemaking process to achieve what it has not won in court. 22/

Armour & Co., 412 F.2d at 722 ("While Section 202(a) of the Packers and Stockyards Act may be broader than antecedent antitrust legislation found in the Sherman, Clayton, Federal Trade Commission and Interstate Commerce Commission Acts, there is no showing that there was any intent to give the Secretary of Agriculture complete and unbridled discretion to regulate the operations of packers."). The point remains, however, that section 202 does not permit either the agency or a private plaintiff to dispense with some showing of competitive injury – actual or likely – to prove a violation.

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

20/ *IBP*, 187 F.3d 974; *Farrow*, 760 F.2d 211; *De Jong*, 618 F.2d 1329; *Armour & Co.*, 402 F.2d 712.

21/ *Terry*, 604 F.3d 272; *Wheeler*, 591 F.3d 355.

22/ The agency's Federal Register notice points to statements by the court in *Wheeler* for the proposition that "while decisions of 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." However, the agency fails to recognize that promulgating such a regulation exceeds the agency's authority, as the statute does not contemplate application of sections 202(a) and (b) of the P&S Act absent a showing of competitive harm. is quite explicit about this effort. *See* 81 Fed. Reg. at 92570.

The agency offers no analysis undermining any of these court decisions. Aside from GIPSA's *ipse dixit* that these judicial opinions are incorrect, nothing in the interim final rule itself or in the Federal Register notice explains any flaws in the reasoning of any of these cases. To the extent GIPSA discusses this plethora of judicial pronouncements at all, it either ignores certain decisions or denies that they mean what they say. 23/ In fact, the agency attempts to minimize the uniformity with which the appellate courts have rejected its position by conceding only that "[f]our 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 provide their claims under section 202(a) and/or (b) without proving harm to competition or likely harm to competition." 24/ Besides ignoring the unbroken string of cases going back more than 40 years explicitly construing section 202 to require a showing of competitive injury, the agency's discussion of the cases is blatantly misleading in at two respects.

First, the agency asserts that the United States "was not a party" to any of the "recent" cases. Yet GIPSA omits that it participated in both *Terry* and *Wheeler v. Pilgrim's Pride Corp.*, 25/ as an *amicus* and made the same arguments in both cases that it makes in the Federal Register notice.

Second, GIPSA fails to note that its interpretation of the statute has been rejected in four cases in which the United States has been a party. 26/

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

23/ In one instance, the agency seeks to justify its refusal to acquiesce in the uniform judicial decisions rejecting its position by making the curious assertion that two of the appellate decisions adverse to its contention "were issued over vigorous dissents." 81 Fed. Reg. at 92568. Exactly how that observation undermines the reasoning of the ten cases holding that injury to competition is an element of a section 202 claim is never explained. Apparently the agency believes that the fervor of its opposition to those decisions is a suitable substitute for sober legal analysis and can override unanimous federal precedent rejecting the agency's position.

24/ *Id*.

25/ 591 F.3d 355 (5th Cir. 2009) (en banc). The agency also fails to note that it participated in *London v. Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir. 2005), in which the Eleventh Circuit also rejected the arguments it makes on this issue in the preamble.

26/ *IBP*, 187 F.3d 974; *Farrow*, 760 F.2d 211; *De Jong*, 618 F.2d 1329; *Armour & Co.*, 402 F.2d 712.

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

The agency's attempt to abrogate the competitive injury requirement of section 202 rests on the premise that the words used in the Act are malleable and open to variable interpretation. 27/ Rather than base this argument on any legal authority, GIPSA dredges up contemporaneous dictionary definitions of the terms and then seeks to impress them on the statute's language. 28/ The agency cites no authority for this proposed form of statutory construction, which borders on the frivolous. In exercising its rulemaking authority, GIPSA must follow the canons of statutory interpretation. It is neither "free to pour a vintage that [it] think[s] better suits present-day tastes" 29/ nor otherwise permitted to construe a statute in a linguistic vacuum. The Administrative Procedure Act does not sanction such "make-it-up-as-the-agency goes-along" exercises of regulatory power.

The agency's attempt to manufacture ambiguity, however, is utterly unavailing. Apparently, GIPSA believes that if the definition of statutory terms is not readily ascertainable without resort to outside sources, then the text is ambiguous and has no "plain meaning." This facile version of the "plain meaning" rule would eviscerate it as a mode of statutory construction. Contrary to GIPSA's premise, the terms actually used by Congress in sections 202(a) and (b) of the P&S Act had precise and well defined legal meanings when the statute was enacted. The relevant provisions of the Act prohibit "unfair," "unjustly discriminatory," and "deceptive" practices and devices, as well as "undue" or "unreasonable" preferences and advantages and "undue" or "unreasonable" prejudices and disadvantages. All of these terms had established statutory and common-law antecedents that were well-known to members of Congress. Read in legal context, these terms concern only business conduct that has an actual or likely adverse effect on competition. 30/ Therefore, the interpretation given by the courts to sections 202(a) and (b) is not merely the best reading but rather is the only permissible reading of the statute.

The language of sections 202(a) and (b) is lifted almost verbatim from provisions of the Interstate Commerce Act and the Federal Trade Commission Act. 31/ By the time of the P&S Act's passage in 1921, these statutes had been addressed a number of times by the Supreme Court. There was no question at the time that the aims of those laws were to preserve or restore competition and prevent monopolistic practices either generally, in the case of the Federal Trade Commission Act,

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27/ 81 Fed. Reg. at 92568.

28/ *Id*. at 92567 n.4.

29/ *United States v. Sisson*, 399 U.S. 267, 297 (1970).

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

31/ 81 Fed. Reg. at 92570.

or in specific economic sectors, in the case of the Interstate Commerce Act. 32/ The language used in those enactments was understood to effectuate those Congressional goals.

Words used in a statute that "have acquired a specialized meaning in the legal context must be accorded their *legal* meaning." 33/ When Congress transports phrases from one statute to another, there is a strong presumption that adoption of such terminology "carries with it the previous judicial interpretations of the wording." 34/ Moreover, Congress "presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." 35/ "[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it." 36/ Here, nothing in sections 202(a) and (b) of the P&S Act suggests that Congress intended the words used in those provisions to have a meaning different from the meaning given them in other statutes. 37/ Rather, Congress used terms of art to describe the unlawful practices prohibited by sections 202(a) and (b). The "plain language" rule requires that those terms of art be given their commonly understood meaning at the time of the P&S Act's passage. Accordingly, the statutory language itself requires that either the agency or a private plaintiff prove some competitive injury in order to show a violation of sections 202(a) and (b).

iv. The Structure of Section 202 of the Act Mandates a Competitive Injury Requirement.

The existence of a competitive injury requirement is also manifest from the structure of the statute. In its Federal Register notice, GIPSA makes much of the fact that subsections (a) and (b) of section 202 do not mention competitive injury while the other subsections of that provision expressly reference it. The agency claims that this difference "is a strong indication that Congress did not intend subsections (a) and (b) to be limited to instances in which there was harm to competition." 38/ It is nothing of the sort. For the reasons described above, the words used in section 202(a) and (b) do expressly enshrine a competitive injury requirement in those subsections.

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

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

34/ *Carolene Prods. Co. v. United States*, 323 U.S. 18, 26 (1944).

35/ *Morissette*, 342 U.S. at 263.

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

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

38/ 81 Fed. Reg. at 92567.

Thus, GIPSA's argument rests on a fundamental error. In addition, the structure of the statute indicates that sections 202(a) and (b) are intended to prohibit only practices that injure competition.

Sections 202(a) and (b) do not ban all forms of economic discrimination, preference or advantage. Rather, they prohibit only those that are "unjust," "undue," "unfair" or "unreasonable." Therefore, there must be some forms of discrimination, preference or advantage that are legitimate and some that are not. Both the courts and the agency must have an objective standard by which to distinguish lawful conduct from unlawful conduct. The explicit requirement of competitive injury in other subsections of sections 202 demonstrate precisely what Congress intended that objective standard to be. When examined in context, the only reasonable conclusion that can be drawn is that sections 202(a) and (b) are intended to be catch-all provisions that sweep up anticompetitive practices not otherwise prohibited by the more narrowly drawn subsections of the statute. 39/

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

GIPSA's preferred interpretation would make it virtually impossible for any business subject to the P&S Act to order its affairs rationally to comply with section 202(a) or (b). What is "unfair," "unjust," "undue," or "unreasonable" would depend solely on what an agency adjudicator or, in civil litigation, a judge or jury decided that it meant in any particularly case. To exercise that function, the agency or court would have to make value judgments, choosing one set of priorities over another without any guidance from the statutory text or any other source about which value or set of values is to be preferred in any particular case. Such an approach raises significant constitutional issues, but in any event, there is no need to address those matters because nothing in the statutory text suggests that Congress intended to empower the agency or the courts to make such standardless value judgments. 40/

39/ *Wheeler*, 591 F.3d at 371 (Jones, J., concurring).

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

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

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

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

Because competitive injury is an element of a violation under the statutory language of sections 202(a) and (b) of the P&S Act, GIPSA is not free to abolish or abrogate it by regulation. "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law." 41/ Rather, it is "'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" 42/ Accordingly, the scope of a regulation may not (i) exceed the power granted to the agency under the statute pursuant to which the regulation is promulgated or (ii) ban conduct that the statute does not prohibit. 43/

By purporting to eliminate the requirement that the agency or a private plaintiff prove competitive injury in cases under sections 202(a) and (b), the proposed rule plainly extends beyond the scope of what the statute allows. 44/ For that reason alone, the interim final rule is unlawful and should be rescinded.

Yet even giving section 201.3(a) the most generous reading possible, it is still clear that it exceeds the agency's authority. Injury to competition is not some vague concept. Because the P&S Act has its historical roots in antitrust law, it incorporates basic antitrust principles. 45/ Unless a practice actually restricts output and raises prices or reduces the quality of goods and services to consumers (or is reasonably likely to do so), there can be no injury to competition under the

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41/ *Hochfelder*, 425 U.S. at 213.

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

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

44/ *See, e.g.*, 81 Fed. Reg. 92594, Interim Final Rule §201.3(a) (prohibiting certain vaguely defined practices without any requirement that there be competitive injury).

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

antitrust laws. 46/ Even aggressive competitive practices – so long as they do not result in or threaten consumer injury – are not prohibited. As one court noted, "Inefficiency is precisely what the market aims to weed out. The Sherman Act, to put it bluntly, contemplates some roadkill on the turnpike to Efficiencyville." 47/

Similar principles apply under the P&S Act. Section 202(a) and (b) do not stamp out every practice that some may regard as "unfair," "undue," "unjust" or "unreasonable" in order to protect growers from the vagaries of the market. Congress declined to do so because the ultimate beneficiaries of the statute are consumers. 48/ Any protection given to growers is the means to that end. The interim final rule, however, makes grower protection an end unto itself. Whatever else that may be called, it is not "competitive injury."

ii. Nothing in the 2008 Farm Bill Authorized the Agency to Eliminate the Competitive Injury Requirement of Section 202 by Regulation

The Rules ultimately stem from rulemaking driven by the 2008 Farm Bill. But the 2008 Farm Bill 49/ granted no authority to GIPSA to promulgate a rule that abrogates the competitive injury requirement of section 202(a) or (b). Section 11006 of the 2008 Farm Bill stated in pertinent part that the "Secretary of Agriculture shall promulgate regulations with respect to the Packers and Stockyards Act, 1921 (7 U.S.C. § 181 *et seq.*) to establish criteria that the Secretary will consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of such Act." 50/ The Farm Bill, therefore, authorized only a rule setting forth *criteria* that the Agency would use in determining whether a violation of section 202(b) of the P&S Act has occurred. It did not give GIPSA power to alter the fundamental elements of the statute or abrogate them in any way.

Not only did the plain language of the 2008 Farm Bill make that clear, but the legislative record unmistakably demonstrates that Congress authorized no radical alteration of sections 202(a) or (b).

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

47/ *Freeman*, 322 F.3d at 1154.

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

49/ Pub. L. 100-246.

50/ *Id.* § 11006(1).

The original draft of the 2008 Farm Bill proposed by Senator Harkin contained an express provision eliminating the competitive injury requirement under sections 202(a) and (b). Congress removed that language from the final enactment. Accordingly, the 2008 Farm Bill does not provide statutory authority for the proposed rule's abrogation of the competitive injury element of section 202 violations.

Moreover, the 2014 Farm Bill does not include this same instruction, nor does it make any reference to the GIPSA rulemaking that had started—and then had been halted by Congress—in response to the 2008 Farm Bill. Had Congress truly intended for GIPSA to conduct rulemaking reinterpreting Sections 202 (a) and (b), Congress readily could have clarified as much in the 2014 Farm Bill, especially in light of the considerable controversy caused by GIPSA's 2010 proposed rule. Instead, the 2014 Farm Bill was silent on the topic, suggesting if anything that Congress felt it was time to move on from the issue raised in the interim final rule.

d. The Agency's Construction of Section 202 as Embodied in the Interim Final Rule Is Not Entitled to Deference.

Without a sound legal basis under the statute for its attempt to abrogate the competitive injury requirement, GIPSA retreats to its shopworn argument that its determination that sections 202(a) and (b) of the statute do not require a showing of competitive injury is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 51/ Such deference is not warranted for at least three reasons.

First, the agency or private plaintiffs have made this argument to at least three courts in cases under section 202(a) or (b) and been rebuffed on each occasion. 52/ The argument is no more persuasive in the rulemaking context than it was in any of these judicial proceedings.

Second, for the reasons set forth above, the plain language of sections 202(a) and (b) requires a showing of competitive injury. *Chevron* deference is a two-step analysis. The first asks whether the statute in question speaks to the question presented. If so, then the inquiry ends. When Congressional intent is clear from the statutory language, as it is here, the agency "must give effect to the unambiguously expressed intent of Congress." 53/ The interim final rule, therefore, is not entitled to *Chevron* deference.

Third, GIPSA's proposed interpretation of the statute, as noted above, is unreasonable. It would render sections 202(a) and (b) of the P&S Act empty vessels to be filled with whatever standards

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51/ 467 U.S. 837 (1984).

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

53/ *Chevron*, 467 at 841-43.

happen to strike the agency or a court or jury as "fair," "just" or "reasonable" at any particular moment. The interim final rule does not establish any framework for how such a decision is to be made. It offers no hint whether economically efficient and rational business practices will be exempted from this formless inquiry and does not suggest how a poultry dealer or any other entity subject to the statute can bring its conduct into conformity with the statutory mandate. Abandonment of the competitive injury requirement is tantamount to abandonment of the only objective criteria by which the lawfulness of any commercial practice may reasonably be judged. Such an approach is not faithful to Congressional goals in enacting the statute or sensible as public policy. Since the proposed rule is not based on "a permissible construction of the statute," it is entitled to no deference under *Chevron*. 54/

Finally, the Supreme Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services* 55/ provides no refuge for the interim final rule. Nothing in *Brand X* alters the *Chevron* rule that deference is unwarranted when a statute is unambiguous. 56/ Moreover, *Brand X* does not authorize Executive Branch agencies to issue regulations to abrogate judicial decisions with which they disagree. When a court holds that "the statute unambiguously forecloses the agency's interpretation," 57/ then *Chevron* deference is not applicable. At least two courts have specifically noted that the plain language of sections 202(a) and (b) requires a showing of competitive injury. 58/ In light of these holdings, *Brand X* cannot be stretched to cover the interim final rule here.

Furthermore, any attempt to use *Brand X* to circumvent the decisions of the lower federal courts would raise significant constitutional issues. "Judgments within the powers vested in courts by

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54/ *Chevron*, 467 U.S. at 841-43.

55/ 545 U.S. 967 (2006).

56/ *See id.* at 980 (*Chevron* deference applies only "[i]f a statute is ambiguous, and if the implementing agency's construction is reasonable").

57/ *Id.* at 982-83.

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

the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government." 59/ When the courts have placed a definitive judicial interpretation on the statute in question, a precedent holding a statute to be unambiguous forecloses a contrary agency construction." 60/ The doctrine of separation of powers prohibits agency interpretations that effectively undermine or seek to reverse authoritative judicial constructions of a statute. Furthermore, an administrative agency should not adopt any statutory interpretation that unnecessarily raises a constitutional question. 61/ The interim final rule would do precisely that. Accordingly, the agency's construction of the statute is impermissible for this reason as well.

e. **The Interim Final Rule is Unconstitutionally Vague.**

GIPSA's misbegotten effort to abolish the competitive injury requirement of sections 202(a) and (b) suffers from significant constitutional infirmities as well. An interim final rule having the force of law must give persons and entities subject to it fair notice of what is prohibited so that they may comply with it. Several portions of the proposed rule fail this basic constitutional test.

Under the due process clause of the Fifth Amendment, a rule of law must define a legal violation "with sufficient definiteness that ordinary people can understand what conduct is prohibited and . . . in a manner that does not encourage arbitrary and discriminatory enforcement." 62/ Any legal rule failing to meet that standard is "void for vagueness." While the vagueness doctrine is most often employed in criminal cases, it has also been applied in cases in which a party faced civil sanctions as well. 63/

The Supreme Court has applied the void-for-vagueness doctrine to strike down economic regulations that are remarkably similar to the proposed rule. In *Cline v. Frink Dairy Co.*, 64/ the Court held unconstitutional under the Fourteenth Amendment Due Process Clause a Colorado antitrust statute prohibiting certain business combinations except those that were necessary to obtain a "reasonable profit." Similarly, in *United States v. L. Cohen Grocery Co.*, 65/ the Court held unconstitutional section 4 of the Lever Act, which made unlawful any "unjust or unreasonable

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59/ *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948).
60/ *Brand X*, 545 U.S. at 984.
61/ *See INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems") (internal quotations and citations omitted); *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).
62/ *Skilling v. United States*, 130 S. Ct. 2896, 2927-28 (2010).
63/ *Gentile v. State Bar*, 501 U.S. 1030, 1048-50 (1991) (invalidating state bar disciplinary rule under the void-for-vagueness doctrine).
64/ 274 U.S. 445, 453-65 (1927).
65/ 255 U.S. 81 (1921).

rate or charge" for "necessities." And in *International Harvester Co. v. Kentucky*, 66/ the Court concluded that a Kentucky antitrust statute proscribing the fixing of prices at levels "greater or less than the real value of the article" was unconstitutionally vague. The fatal flaw in each law was the indeterminate liability standard imposed. None of the statutes proscribed any specific conduct but rather made illegality turn on "elements . . . [that] are uncertain both in nature and degree of effect to the acutest commercial mind." 67/

The interim final rule suffers from the exact same flaws. GIPSA provides commentary in the preamble identifying conditions that could constitute "likelihood of competitive injury," such as "wrongfully depressing prices" paid to growers "below market value" or "impair[ing]" a grower's "ability to compete" with other growers. 68/ In fact, this commentary merely reframes as preamble commentary vague criteria that had originally been proposed in 2010 as criteria defining "likelihood of injury to competition." Similarly, the two proposed rules incorporate the concept of "legitimate business interest" without providing even a tentative definition of the term. These criteria provide virtually no guidance on when conduct would be unlawful. Rather, an act can be determined to be unlawful under the proposed rule only *after* some event has occurred. A poultry dealer or other entity subject to sections 202(a) and (b) acting in utmost good faith and ordering its affairs in the most rational fashion in an effort to comply with the proposed rule might nonetheless be liable if economic events beyond its control render an agreed-upon price "below market value." Phrases such as "below market value" have no definitive measurement. A party subject to the interim final rule, therefore, could not reasonably anticipate, much less determine with any reasonable degree of certainty, what business practices would ultimately be held illegal under these and other provisions. The interim final rule, and the two proposed rules, therefore, cannot withstand constitutional scrutiny. They should be withdrawn. 69/

III. The Rules Run Afoul of the President's Regulatory Reform Agenda

The interim final rule and proposed rules should be rescinded, as adoption of these Rules would run afoul of the Executive Order 13771 on Reducing Regulation and Controlling Regulatory Cost issued by the President on January 30, 2017. Under this Executive Order, designed to ensure that regulatory activities do not unduly burden the economy, an agency must identity at least two

66/ 234 U.S. 216 (1914).
67/ *Id.* at 223.
68/ 81 Fed. Reg. 92566, 92568 (Dec. 20, 2016).
69/ The interim final rule cannot be salvaged by a limiting construction. Even the agency will not be able to provide any reasonable guidance about what the vague provisions of the rule mean unless it pre-determines factors like "market values" and thereafter imposes its guesses on those on entities subject to the proposed rule. The absurdity of issuing a regulation to construe a regulation aside, the proposed rule, if it is to be made coherent, will necessarily devolve into a regime of price controls. The P&S Act, however, does not authorize the agency to control prices or otherwise displace competition in any market. *Swift & Co. v. Wallace*, 105 F.2d 848, 853 (7th Cir. 1939).

existing regulations to be repealed when it publicly proposes for notice and comment or otherwise promulgates a new regulation, and the total incremental cost of all finalized regulations must be zero. Thus, under Executive Branch policy, the proposed rules cannot be finalized without further analysis and regulatory cost offsetting, a process that should be conducted with ample opportunity for public comment. Moreover, as an interim final rule, administrative procedures contemplate that the "scope" rule—if not rescinded—will ultimately be finalized by publishing a final rule in the *Federal Register*, an action that would trigger regulatory cost offsetting under the Executive Order. Therefore, all three rules must satisfy the Executive Order and otherwise meet the Administration's regulatory reform priorities.

GIPSA has not identified any existing regulations that it would repeal in conjunction with promulgating these new rules, as required by the Executive Order. Nor has GIPSA identified means to offset the staggering costs associated with the Rules. GIPSA's own economic analysis estimates the costs of these rules to the livestock and poultry industry to be over $1 billion dollars (a figure, as discussed further below, that underestimates the true costs of the regulations) and are not offset by repealing any existing regulations. Although GIPSA identifies most of these costs as linked to the interim final rule, in reality the three rules are intertwined (for example, the proposed rules are expressly premised on there no longer being a need to demonstrate injury to competition), and the economic impact of GIPSA's attempt to eliminate the injury to competition requirement necessarily inflicts costs under the interim final rule and the proposed rules.

In fact, given the Administration's emphasis on clearing red tape, lowering costs, and increasing certainty for American businesses, it is shocking that GIPSA would continue to move forward with a set of Rules that GIPSA expressly recognizes will cause extreme uncertainty and significant amounts of needless litigation for years to come with zero quantifiable benefits. These Rules are entirely out of step with our national economic priorities, which is reason enough to withdraw them.

Therefore, GIPSA must withdraw the interim final rule and proposed rules until it can identify existing regulations that it can repeal to offset the costs of the new regulations and otherwise harmonize these exceedingly costly and needlessly complex rules with Administration priorities.

IV. Issues Common to both Proposed Rules

The proposed rules share a number of critical infirmities, which we address together here for succinctness.

a. The Proposed Rules are Premised on the Fatally Flawed "Scope" Rule and Therefore Equally Infirm

Both proposed rules are expressly premised on not needing to demonstrate injury to competition to establish a violation of Section 202 (a) or (b) of the P&S Act. Accordingly, they suffer from all the same infirmities as the interim final rule, and all of our comments presented on the interim

final rule apply in full to each proposed rules. If anything, the legally unsound nature of the interim final rule on "scope" introduces even more potential vagueness and uncertainty into the proposed rules, as invalidating the provisions stating that injury to competition need not be shown raises innumerable questions about the role, meaning, and effect of the remaining provisions.

b. The Proposed Rules Serve No Meaningful Purpose In Light of the Well-Established Role of Injury to Competition in the P&S Act

GIPSA explains that the proposed rules are necessary to provide guidance on what type of conduct constitutes a violation of Section 202 (a) or (b) of the P&S Act in light of GIPSA's position that competitive injury is not a requirement for a violation. First, if that were true—and if, as GIPSA contends, the proposed rules would add significant clarity to what conduct constitutes a violation of Sections 202 (a) and (b)—the interim final rule should be delayed until GIPSA can complete the rulemaking for the proposed rules. To do otherwise would be to wantonly inflict potentially billions of dollars of economic harm on the meat and poultry industries out of regulatory impatience. But, given the significant legal infirmities associated with the interim final rule, the proposed rules likely would serve no meaningful function. If the substantial amount of litigation predicted by GIPSA results in courts upholding existing precedent, maintaining injury to competition as a necessary prerequisite to establishing a violation of Section 202 (a) or (b) of the P&S Act, and invalidating the interim final rule, the proposed rules would be in effect meaningless because the key inquiry would be whether there had been injury to competition. If the complained of conduct did not result in injury to competition, the content of the proposed rules would be meaningless because no Section 202 (a) or (b) violation would have occurred. The criteria in the proposed rules would, however, likely prove extremely confusing as both processors and growers tried to make sense of them in light of the necessity of showing competitive injury.

c. The Proposed Rules Incorporate an Unconstitutionally Vague "Legitimate Business Interest" Test

Both proposed rules incorporate an exception for conduct supported by an undefined "legitimate business justification." This exception at first glance appears to provide opportunities for businesses to justify otherwise violative conduct, but in reality it is an empty term that will only invite more litigation. The "legitimate business justification" exception is the only possible exception to an otherwise broad and strangling rule, yet GIPSA provides no indication as to how it plans to define a "legitimate business justification." GIPSA provides no clear guidance for live poultry dealers as to what type of documentation would be required for any pricing differentials, and recordkeeping burdens would require a case-by-case assessment of the facts. Such a requirement would be very onerous considering the volume of the transactions that live poultry dealers engage in annually.

Without understanding how GIPSA anticipates this key term would be interpreted, stakeholders are not in a position to comment on the rest of the proposed rules in an informed manner. Moreover, the term "legitimate" is ill-suited to definition and hopelessly vague; its meaning would

likely be different for every judge or jury hearing a case, which would only add to the extreme litigation costs presented by the Rules. Premising the only exception on a hopelessly vague term renders the exception meaningless, as no rational company would take risk a billion dollar jury verdict on whether it could prove its business interest was "legitimate." This impossible-to-define term would render the proposed rules unconstitutionally vague, adding further reason to withdraw the proposals.

d. The Proposed Rules are Arbitrary and not Rooted in Well-Established Facts

GIPSA claims that the proposed rules will improve efficiency and fairness in the market for animal production. For example, in describing the Poultry Grower Ranking System proposed rule, GIPSA explains the proposed rule would improve the poultry market by incentivizing integrators to "avoid exploitation of market power and asymmetric information, as well as behaviors that result in the market failure of hold-up." 70/ However, GIPSA fails to establish that these issues are anything more than theoretical, at the same time ignoring more-than-theoretical business consequences that would already punish any complained of behavior.

Mere supposition and allegations included in the preamble do not establish a sufficient record to support the agency's claims. Courts will not defer to a declaration of fact that is "capable of exact proof" but unsupported by evidence. 71/ GIPSA has failed to meet its burden of providing "substantial" evidence in support of its rulemaking. 72/ That default alone makes the proposed rule arbitrary and capricious. 73/

Despite having pursued this rulemaking for seven years, GIPSA provides no concrete evidence of actual problems with the current poultry grower ranking system. We are not aware of any efforts by GIPSA to actually gather the information necessary to support these cursory conclusions. The proposed rules, if finalized, would be arbitrary and capricious because they are not based on reasoned fact-finding and a well-developed agency record. GIPSA's concerns about the animal production market are based only on an unknown number of complaints that may or may not have been verified. Absent evidence that processors are in fact engaging in exploitation of market power, withholding information from growers, or otherwise causing the complained-of market failures, GIPSA has no reasoned basis for imposing such significant restrictions on the industry, and the proposed rules are arbitrary and capricious.

70/ 81 Fed. Reg. at 92729.

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

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

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

e. Dramatically Flawed Economic Impact Analysis

The economic impact analysis for the proposed rules is as shocking in its methods as its results. GIPSA appears to be trying a regulatory sleight of hand: front-loading nearly all the anticipated costs onto the interim final rule, and showing only modest costs for the proposed rules. In reality, GIPSA underestimates the costs for all the Rules across the board. For example, attached to and incorporated by reference in these comments is an economic impact analysis of the Rules prepared by Dr. Thomas E. Elam, President of FarmEcon LLC. 74/ This analysis shows that the proposed rules—and the Poultry Grower Ranking System in particular—would inflict substantial economic harm orders of magnitude greater than projected by GIPSA.

GIPSA contends that all the uncertainty and accompanying litigation costs would flow from the interim final rule and that the proposed rules would actually help bring clarity to the situation. If so, that is an argument for delaying the implementation of the interim final rule until the proposed rules are ready to be finalized as well, unless GIPSA's goal is to increase uncertainty and stoke litigation. But in reality, the proposed rules would themselves invite substantial litigation not acknowledged in GIPSA's economic impact analysis.

Even if, as GIPSA presumes, the issues related to demonstrating a violation of the P&S Act absent a demonstration of injury to competition are fully litigated, finalizing the proposal would present an entirely new host of issues as parties litigate how the vague criteria in § 201.214 should be interpreted to show that a poultry grower ranking system has been used in an unfair manner. How GIPSA will apply the criteria enumerated in proposed § 201.214, for example, how GIPSA will determine whether a live poultry dealer has provided "sufficient information" to growers, or whether the processor has supplied a "comparable quality" of inputs, or demonstrated a "legitimate business justification", are issues that will unfold in court, likely in many different circuits. Similarly, the criteria enumerated in proposed §§ 201.210 and 201.211 are non-exhaustive lists of unspecified conduct that could violate the P&S Act. Without specific examples of conduct or practices that would violate the P&S Act, the proposed rule will likely trigger litigation to determine whether certain conduct is a "retaliatory action," or whether the processor has demonstrated a "legitimate business justification" to justify differential treatment of growers.

Therefore, while GIPSA states that it expects proposed §§ 201.210, 201.211, and 201.214 to provide clarity as to what conduct violated Sections 202 (a) and (b) of the P&S Act, in reality the proposed rules would trigger even more litigation, a cost that GIPSA wholly fails to account for.

V. Issues with the Proposed Rule on Poultry Grower Ranking Systems

74/ Dr. Thomas Elam, Expert Response to GIPSA Poultry Contracting Proposed Rules, March 21, 2017 (hereinafter "Elam"). *See* Attachment A.

In addition to the serious issues identified above—including the drastic economic impact and the legal necessity of showing injury to competition—the Poultry Grower Ranking System proposal suffers from a number of key problems.

f. GIPSA Misconstrues the Current Use of Poultry Grower Ranking Systems

GIPSA misunderstands a key benefit of the contracting model—that processors are responsible for a number of inputs—as a supposed problem. But by assuming the responsibility for supplying chicks, medicine, and feed (and maintaining all of the infrastructure to do so), processors assume the overwhelming majority of risk due to volatility in input prices. The live poultry dealer bears the full risk of volatile feed ingredient prices, production risks inherent in producing baby chicks, costs risk of medication requirements, and the price risks in the finished chicken market. 75/ Data show that chicken processors insulate growers from approximately 97% of the economic risks associated with chicken production. 76/

For example, GIPSA's commentary and analysis implies that chicken farmers would be better off and would have more control over their businesses if they, not processors, were responsible for procuring feed. Quite to the contrary, processors are much better positioned to control this risk, and the current structure is to everyone's advantage. Processors have the size and scale to manufacture their own feed and to secure inputs at favorable prices. In only rare situations would it make economic sense for individual farmers to manufacture their own feed, and individual farmers buying feed on the open market would not be able to negotiate as favorable terms as processors can. Moreover, processors can manufacture or purchase feed specifically formulated to optimize the growth of the birds they place, resulting in better performance for chicken farmers. For example, over roughly the past decade, chicken feed costs have increased substantially as corn prices have skyrocketed. Chicken processors have absorbed these costs under the existing contract structure. Had they not, family farmers would have faced ever-increasing feed costs, would have risked acquiring inappropriate feed that affected their growing efficiency, and serious bankruptcy risks.

GIPSA's proposed rules seem designed to drive processors away from the current risk-sharing model and toward a model that could place more risk on the shoulders of farmers.

g. The Ranking System Requirements are Arbitrary and Capricious Based on the Record

GIPSA alleges processors engage in various commercially impractical methods to manipulate the inputs provided to growers as a means of altering the performance of the growers. GIPSA proposes

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75/ Elam, 12.

76/ Elam, 12, citing Knoeber, C.R. and W.N. Thurman, 'Don't Count Your Chickens…': Risk and Risk Shifting in the Broiler Industry, American Journal of Agricultural Economics, Vol. 77(3), p. 486-496, August, 1995.

a "Consistency Management System (CMS)" to track the inputs provided to growers including chicks, feed, and medication. GIPSA's own economic impact analysis recognizes that two of these inputs–feed and medication–cannot in practice be manipulated by processors. And while GIPSA alleges, but does not substantiate, that processors somehow segregate chicks by quality and distribute them in a way to impact grower performance, GIPSA offers no practical method for processors to remedy a grower receiving "inferior" quality of chicks. Further, GIPSA overlooks key economic incentives already in place in the market that strongly deter the type of behavior that GIPSA is concerned with.

GIPSA itself states that "live poultry dealers would not alter medication to such an extent that inferior medicine is consistently supplied to a grower," thereby recognizing that processors lack the incentive to provide medication to growers in a way that would impact growers performance. 77/ GIPSA points to this as a way of diminishing the cost to industry in maintaining a CMS that tracks medication. But in reality, GIPSA's observations simply underscore the arbitrariness of the requirement. In essence, GIPSA has concluded that medicine is not a factor that affects grower performance but nonetheless is expecting processors to account for medicine when evaluating grower performance. This is a classic example of rulemaking that is not based on reasoned fact finding.

Similarly, with respect to feed, GIPSA recognizes that the "process of the production and distribution of feed ensures consistency across the group of growers that receive the same batch of feed." 78/ Again, GIPSA makes this point to demonstrate that the cost to industry would be minimal to track feed quality supplied to growers, without recognizing that its statement demonstrates an absence of a problem and is an arbitrary requirement. If GIPSA has concluded that processors are not supplying feed of different quality to different growers, then requiring processors to track the quality of the feed supplied to growers is arbitrary and capricious as it is not based on reasoned facts in the record.

GIPSA alleges that the quality of chicks supplied by a live poultry dealer to a grower can vary in quality and states that live poultry dealers must "take action to ensure a poultry grower is not consistency supplied with inferior chicks." 79/ GIPSA has not provided any evidence that processors in fact distribute chicks to growers in a way to manipulate grower performance, nor has GIPSA even alleged a realistic way that processors might go about doing so. To distribute chicks in a malicious manner, processors would have to determine before the fact which chicks will prove inferior and to affect chick placements that are scheduled years in advance to target individual growers. Dr. Elam notes that "in practice growers receive chicks from breeder farm flocks that are scheduled years ahead of chick delivery to a grower," and that "even if an integrator wanted to segregate chick quality, the logistics would be difficult, and the results undependable." 80/ This

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77/ 81 Fed. Reg. at 92732.
78/ 81 Fed. Reg. at 92732.
79/ 81 Fed. Reg. at 92732.
80/ Elam, 13.

demonstrates not only that there is no current problem of processors manipulating the chicks provided to growers to impact growers' performance, but also the difficulties processors would face if trying to set up such a system.

Because processors are practically limited in their ability to segregate chick quality, requiring processors to track the quality of chicks supplied to growers as a remedy for growers receiving inferior chicks is futile. Processors have not been shown to distribute chicks in a way that would manipulate grower performance, and GIPSA provided no such evidence in the proposal. GIPSA also offers no insight as to what would be considered an "inferior" quality of chick, or how processors could ensure they are not supplying inferior qualities of chicks to a particular grower. Therefore, requiring processors to maintain a CMS to track the quality of chicks supplied to growers is arbitrary and capricious, as doing so would only burden processors without changing any existing practices by processors, offering no benefits to growers.

Furthermore, GIPSA ignores strong economic and business incentives that would deter the complained of activity. Chicken processing plants are expensive to manage, and only provide a sufficient return on investment if they are kept operating at full capacity. If a processor were, as GIPSA alleges, manipulating a grower's performance through providing inputs or engaged in practices that would drive away growers, the processor would quickly find its plants being underutilized, and its business model unsustainable. The overwhelming need to keep processing plants stocked with birds deters any efforts to reduce growers' efficiency.

It is against the interest of live poultry dealers to diminish the incentives, or impair the ability of, growers to raise the best quality broilers possible. Furnishing low quality feed or chicks, which represent about 85% of the cost of raising chickens, would significantly increase the costs of chicken production. Furthermore, it would be almost impossible for poultry dealers to have sufficiently detailed knowledge of feed and chick quality to direct below-average inputs to selected growers. If a poultry dealer wanted to terminate a grower, furnishing low quality feed and chicks would be an expensive, self-defeating means of achieving that goal. Additionally, any random variability in the quality of feed and chicks would tend to average out over time, so that there is no long term impact on grower payments from any short term variations.

Because live poultry dealers have not been shown to distribute inputs like medication, feed, and chicks in a way that disadvantages certain growers, or that the processors even could distribute such inputs in a way that disadvantages growers, GIPSA's aim to provide "better sharing of information with growers and fairness in areas under a live poultry dealer's control" would result in no material benefits to growers and only impose additional costs on processors. 81/ The proposal is therefore arbitrary and capricious.

h. GIPSA has Failed to Demonstrate that Chicken Processors are Abusing Market Power through Poultry Ranking Systems

81/ 81 Fed. Reg. at 92725.

Despite having pursued this rulemaking for seven years, GIPSA provides no concrete evidence of actual problems with the current poultry grower ranking system. The proposed rule, if finalized, would be arbitrary and capricious because it is not based on reasoned fact-finding and a well-developed agency record. Specifically, GIPSA's concerns about current poultry growing ranking systems are based only on an unknown number of complaints that may or may not have been verified. In fact, the current practices at issue do not compensate growers in an "unfair, unjustly discriminatory, or deceptive manner," as the agency avers. Rather, poultry grower ranking systems are an efficient and effective means of rewarding the best growers for performing above average and incentivizing poor growers to improve their performance, a balance that would be disrupted if GIPSA were to finalize the proposed rule. Absent evidence that processors are in fact engaging in exploitation of market power, withholding information from growers, or otherwise causing the market failure of hold-up, the proposed rule remains a poorly crafted solution in search of a problem.

GIPSA's proposed rule on poultry grower ranking systems relies on several unfounded assumptions as a basis for the proposal. One such rationale for the proposed rule is that live poultry dealers have "market power to force down prices for poultry growing services." 82/ GIPSA points to industry concentration as an indication of market power and the "limited ability a poultry grower has to switch to a different integrator." 83/ However, the market for chicken growers is relatively fluid and presents a number of choices for farmers.

To support its assertion about market power, GIPSA cites a survey of growers in which growers self-report about their integrator choice; however, even assuming the study accurately captures the number of growers with only one integrator choice, GIPSA's own data show that nearly 80% of growers have more than one integrator in their area. In other words, the vast majority of growers may choose between processors, and the vast majority of processors compete with each other for growers. A processor with a reputation for mistreating growers would quickly lose growers to its competitors and would have trouble attracting new growers. In fact, over 30 vertically integrated chicken processors compete for the best growers. Each of these companies relies on its contract farmers to supply its processing facilities with chickens, and none has an economic incentive to disrupt its own supply of chickens. 84/

The data show overwhelmingly that chicken farmers are not fleeing processors and that there is actually a long waitlist to become a chicken farmer. An NCC-commissioned study of grower-processor dynamics showed that, in 2014, 6.8 percent of chicken farmers left their processors: 1.5 percent retired, meaning that at most 5.3 percent of chicken farmers left their processor with the

82/ 81 Fed. Reg. at 92728.
83/ *Id.* at 92728.
84/ Elam, 1.

possibility of having gone to another. 85/ In other words, even though nearly 80 percent of farmers according to GIPSA could have changed processors if unsatisfied with their business arrangement, only at most 5.3 percent did (and most of these likely did not change due to perceived mistreatment). Notably, only 0.9 percent of farmers had their contracts terminated by processors in 2014, an exceedingly low figure if processors were in fact using market power to retaliate against growers. These data reflect a market for chicken farming working well, with reasonably low turnover not out of line with that of the overall national job market (and in fact, lower).

Data also show that as of 2014, companies had more than 1,858 applications from people wanting to become chicken farmers, and another 610 open applications from existing chicken farmers wanting to expand their operations, indicating that there is substantial interest in entering into poultry growing. 86/ Put simply, most chicken farmers voluntarily maintain business relationships with their processors, and there is a long line of people wanting to expand their farming operations to include broiler production. This is evidence of a healthy market that farmers on the whole find desirable enough to stay in and to queue to get into.

GIPSA also asserts that processors provide growers with incomplete or asymmetric information on the expected revenue from a growing arrangement, preventing growers from making efficient investment decisions. 87/ Proposed 201.214(a) would allow GIPSA to consider whether a processor has provided a grower with sufficient information to make informed business decisions, including the anticipated number of flocks per year, the average gross income from each flock, and "any other information necessary to enable a poultry grower to calculate the expected income from the poultry growing arrangement." 88/ These criteria, however, are unreasonable, likely provide little actionable information, and if anything risk misleading farmers.

Existing contracts generally provide growers with information about the "base pay" (i.e., the expected pay rate with average grower performance) and a guaranteed minimum pay rate. These are the terms specified in the contracts and on which parties may rely. Parties typically do not contract for a minimum of flocks or a specific flock size, making this information of little use to a farmer. Providing information such as anticipated flock size could actually give farmers misleading information, causing them for example to make business decisions based on broad averages and not information specific to their situations. Moreover, a rational processor, fearing lawsuits based on growers disappointed they did not achieve the "expected income" from the growing arrangement, might elect to present this information based on extremely conservative estimates, rendering the information effectively useless.

85/ Dr. Thomas E. Elam, Live Chicken Production Trends, 5., *available at* http://www.nationalchickencouncil.org/wp-content/uploads/2016/04/Live-Chicken-Production-FARMECON-LLC-FINAL-April-2016.pdf.

86/ *Id.* at 4.

87/ *Id.* at 92729.

88/ 81 Fed. Reg. 92723, 92740 (Dec. 20, 2016) (proposed § 201.214(a)).

Finally, GIPSA identifies hold-up as a potential source of market failure in poultry growing arrangements. 89/ GIPSA has not supplied any data indicating the prevalence of live poultry dealers refusing to place a flock based on a grower's unwillingness to make a capital investment upgrade. Practically, if a live poultry dealer engaged in such a practice, the broiler flock that was to go to a grower would either need to be destroyed or diverted to another grower's house. 90/ Proceeding in this manner would be inefficient for the live poultry dealer, as production could be interrupted, causing lost sales and lost profits for the live poultry dealer. 91/ Again, absent evidence that integrators are engaging in this practice and that such a practice is an economically significant issue for the growers, GIPSA's proposed § 201.214 remains a solution in search of a problem. In fact, the current system where integrators often pay premiums for efficiencies resulting from housing improvements made by the grower is the most efficient way to ensure the market is operating as intended. If a grower were unwilling to make improvements, and performance and pay suffers relative to growers willing to make such improvements, then the system is operating as intended. 92/ Without a mechanism to provide incentives for upgrading housing, there would be under-investment and slower efficiency gains. 93/

i. The Proposed Rule Will Have Substantial Negative Economic and Business Consequences

The proposed rule on poultry grower ranking systems would likely result in an inefficient system of poultry growing that would be fundamentally unfair to the best growers and would decrease incentives for quality and innovation. It would be arbitrary and capricious for GIPSA to adopt the proposed rule regarding poultry grower ranking systems because the regulation would protect inefficient growers and penalize the best growers.

Quite simply, GIPSA's proposal to overhaul the live poultry grower ranking system could take money out of the pockets of the most progressive, competitive, and efficient growers and redistribute it to less competitive and efficient growers. GIPSA's proposed rule in effect would require all growers to be ranked in settlement groups with other growers with like house types. This would prohibit companies from settling premium house growers against conventional house growers. Such a practice would hurt the premium house growers who invested in upgrades, making it more difficult for growers to obtain financing for upgrades going forward, while benefitting only the growers that are not willing to invest in upgrades. For example, if a grower chose to upgrade his house, he would now have his performance compared to only the other growers with upgraded houses, making it less likely that he will perform above average at settlement, effectively eliminating the incentives and reward for improving his capabilities.

89/ 81 Fed. Reg. at 92729.
90/ Elam, 6.
91/ Elam, 6.
92/ Elam 13.
93/ Elam, 13.

The American chicken industry is extremely competitive worldwide, due in large part to efficiencies and innovation driven by the current contracting system. GIPSA risks increasing costs, reducing efficiencies, and stifling benefits, without any corresponding benefits to growers or processors. This would make American chicken farmers less competitive against growing international competition, ultimately placing at risk the very family farmers GIPSA claims to be trying to protect.

VI. Issues with the Proposed Rule on Unfair Practices and Undue Preferences

In addition to the issues identified above, the proposed rule on unfair practices and undue preferences suffers from several key issues.

- Proposed § 201.210 defines "retaliatory action or the threat of retaliatory action" as including any "unjust discrimination." This definition is circular and provides no guidance whatsoever to processors or growers about what specific actions are considered retaliatory or constitute unjust discrimination. Such a definition is virtually assured to be litigated to determine whether specific practices or actions would meet this definition, adding to the cost of the rule, and rendering the proposed rule unconstitutionally vague.
- For proposed § 201.211, GIPSA explains that a "reasonable basis" necessary for terminating a contract with a grower who violated a law might be a governmental finding or allegation of wrongdoing. This provision would make it unreasonably difficult to sever business ties with a bad actor, and could even force a processor to stand by a grower known to be violating the law while a protracted government investigation takes place, if an agency even has the awareness, resources, and inclination to investigate the alleged violations.
- In addition to being vague, some criteria in proposed § 201.211 are overly broad. For example, the provision preventing processors from treating growers differently because of lawful communications could force processors to maintain business relations with a grower who engages in extremely distasteful but nonetheless lawful speech, such as hate speech.

* * *

In conclusion, for the reasons stated herein, GIPSA should not adopt the interim final rule or proposed rules. We request that GIPSA withdraw the interim final rule and proposed rules altogether. Thank you for your consideration.

Respectfully submitted,

Michael Brown
President
National Chicken Council

Attachments
Attachment A – Dr. Thomas Elam, Expert Response to GIPSA Poultry Contracting Proposed Rules

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Expert Response to GIPSA Poultry Contracting Proposed Rules

Dr. Thomas Elam, FarmEcon LLC, March 21, 2017

Summary: USDA's Grain Inspection, Packers and Stockyards Administration (GIPSA) has revised their 2010 proposed rulemaking [i] pertaining to contract grower arrangements, and re-submitted for public comment [ii] [iii] [iv]. While the revised rules are substantially simplified and different from the 2010 version, they still fall far short in several areas. In general, GIPSA has:

- Ignored key information contained in a heavily cited USDA study that would partially contradict their assertions that the proposed rules are required to balance the bargaining power of contract growers.
- Alleged a lack of local competition for grower services as a structural problem in grower pay rates, but not proposed rules that would address the alleged issue.
- Not fully accounted for the potential impact of the proposed rules on long term productivity gains in chicken production.
- Relied on unsubstantiated grower complaints and grower-supplied data without verification from GIPSA investigation or third party sources.
- Made other allegations that are not well-defined and supported by third party sources.
- Proposed extensive changes in grower ranking systems without demonstrating that the new system is required, or would be effective in addressing issues raised.
- Calculated proposed rule costs relying on assumptions that are not based on real world costs, but rather national averages and assumed man-hours.

Contrary to GIPSA assertions, the proposed rules could reduce innovation rates, open the door for potential additional litigation, add costs, and likely have little impact on overall grower pay.

Market Structure and Competition for Grower Services

GIPSA states as a rationale for the proposed rules that integrators have "market power to force prices for poultry growing service below competitive levels." One mechanism for this alleged market power is stated as a lack of competition for growers in areas where there is only one integrator that contracts for live chicken grower services.

GIPSA presents no evidence to demonstrate that that there is a widespread issue of returns below an undefined "competitive level" in their proposal. Assuming GIPSA is correct, integrators would have difficulty recruiting new growers. Existing growers would be leaving due to financial distress. No evidence is presented to support this allegation, nor do the proposed rules address alleged market power arising from lack of grower ability to switch integrators.

A 2014 USDA study [v] (the MacDonald study) cited heavily by GIPSA states that paying growers below market rates would make it difficult to attract growers for both new capacity and to replace retiring growers. Evidence from the long history of live broiler production growth (see figure 4 below), most of which is contracted to independent growers, strongly suggests that growers do receive a competitive rate of return sufficiently high to encourage investment.

The USDA MacDonald study further states "The need to attract new growers may limit integrators' ability to exercise market power over other growers. One way to exercise that market power would be to reduce the payments made to growers. But if that reduction keeps new growers away, and if foregoing new growers means operating processing plants at less than full capacity, then reducing contract fees may not prove profitable for integrators." (page 30)

The USDA study cited above relied upon a grower survey. Growers responding to a USDA survey may have had an incentive to overstate their dependence on a single integrator, and understate their ability switch dealers. No independent third party evidence is presented to validate the survey responses. Logically inconsistent, 7% of the farms self-reported that they had only one integrator in their area, and also reported they could switch to another integrator.

As shown in table 1 below, assuming the study data does represent the percentage of growers with only one integrator alternative, almost 80% have more than one integrator in their area (page 30).

Table 1

Broiler production, by number of integrators

Integrators in Grower's Area	Farms	Birds	Production	Can change to another integrator
Number		*Percent of total*		*Percent of farms*
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	77
>4	7.8	6.7	6.6	71
Refused	3.8	2.7	2.7	na
	100.0	100.0	100.0	

GIPSA fails to acknowledge that if there are at least two integrators a significant portion of farms have the option to change integrators. Even if a particular grower cannot switch integrators, this high level of potential switching among all growers represents a very real competitive threat to integrators if growers are not satisfied with their current arrangements. A total of 7,626 of the 15,345 farmers, or 50%, responding to this question indicated that they could switch to another integrator.

Other evidence presented in the MacDonald study (page 32) suggests that growers with only a single integrator in their area benefit from longer contracts. As shown in the next table, across "years producing broilers", the average grower contract length with only one integrator in their area is consistently higher than the contract length for two or more integrators.

For relatively new growers with 0-5 years in the business the average contract is 84 months for one integrator compared to only 29 for more than 3 integrators. If there was abuse of market power on the part of the integrator we would expect to see the opposite contract length pattern. Geographically isolated integrators would need to grant only relatively short contracts, and use

frequent renewals to threaten termination. Integrators with nearby competition could want longer contracts to tie up production, and prevent growers from switching.

This evidence is clearly not consistent with integrator abuse of market power. Apparently, integrators in isolated locations feel compelled to give their growers longer contracts, and growers want longer contracts than is the case where there are more alternatives. Growers faced with alternatives get shorter contracts that offer the opportunity to switch integrators more often.

Also, geographically isolated integrators have no short-term options if they lose a grower. Any growers lost to termination or retirement would be replaced by a new grower, a process that can take months. In the meantime, the production from the lost grower is lost to the integrator. There is a stronger incentive to maintain existing growers when there are no other growers that can be enticed to switch than is the case where there are other integrators in the area.

Table 2

Contract length, by number of integrators and years producing broilers

	Years producing broilers (operation)			
Number of integrators	0-5	6-10	11-19	>19
	Mean contract duration (months)			
1	84	52	47	40
2	51	36	39	26
3	44	30	29	26
>3	29	33	21	11
	Contract is less than 12 months (Percent of farms)			
1	27	36	54	64
2	59	64	61	71
3	50	70	66	70
>3	62	63	78	89
	Contract exceeds 59 months (Percent of farms)			
1	63	48	42	26
2	36	24	25	12
3	28	22	17	18
>3	13	19	12	4

Source: USDA Agricultural Resource Management Survey, 2011, version 4. Contract growers only.

The GIPSA ranking proposal [ii] cites a 2006 statistic in the MacDonald study showing growers with only 1 integrator in their area received 8 percent less per pound than growers with 4 or more local integrators and 4 percent less than those with 2 or 3 integrators (page 30). Table 2 provides a partial explanation for the difference. The growers with only one integrator in their local area

receive substantially longer contracts compared to growers in all other areas. Growers with 2 or 3 integrators generally get longer term contracts than those with more than 3.

Finally, the proposed rules do not address the geographic structure of live chicken production. No remedy is presented for increasing the number of integrators potentially competing for growers in a local area.

Broiler Grower Income

The 2014 MacDonald study also showed 2011 broiler grower household income exceeded all household mean and median income, and was about the same as all farms. (page 42) There were significant differences in broiler grower household income based on the number of broiler houses operated. Growers with 5 or more broiler houses had household incomes that greatly exceeded all farms and all households. (table 3)

Table 3

Household income comparisons, 2011

	Annual 2011 Household Income ($)			
Household category	Mean	Median	20th Percentile	80th Percentile
All U.S. households	72,812	50,504	20,262	101,582
All U.S. farm households	87,288	57,050	24,201	114,417
All contract growers	86,883	68,445	18,782	143,294
By number of houses				
1-2 houses	61,174	45,199	7,865	106,706
3-4 houses	77,998	65,050	18,782	127,187
5-6 houses	98,392	85,159	27,069	158,326
7 or more houses	157,343	119,363	42,302	269,112

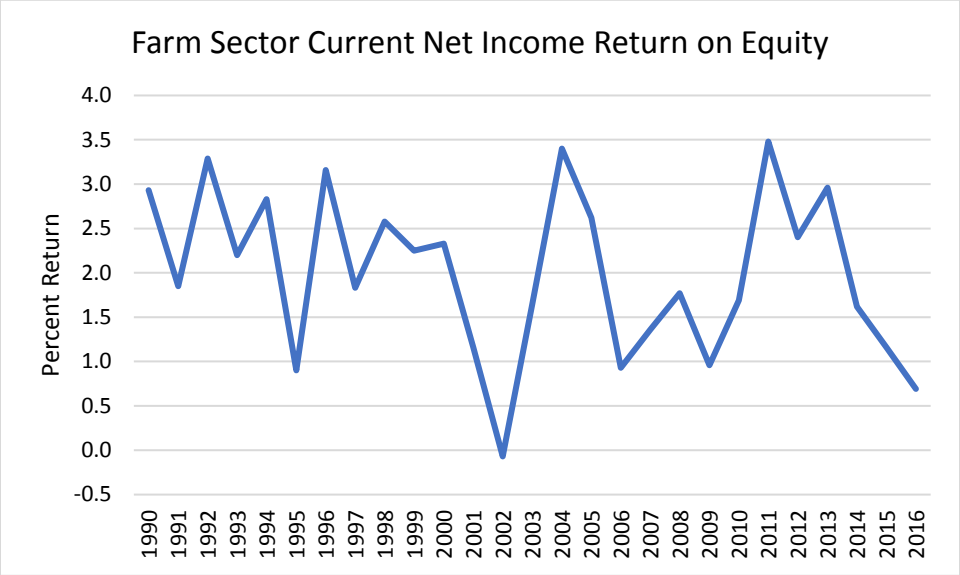
Sources: USDA Agricultural Resource Management Survey, 2011, version 4, and U.S. Census Bureau, Current Population Reports P-60, *Income Poverty and Health Insurance Coverage in the United States: 2011.*

To the extent that broiler grower household income is less than national averages for farms and all households it appears to be attributable to scale of operation and lack of additional farm and non-farm income sources. Growers with one or two houses had 20th percentile household incomes that were substantially less than national averages. However, even these small broiler operations had 80th percentile incomes that were greater than the national average, and almost as large as all farms. It appears that a diversified farming operation with 1-2 broilers houses and additional income sources can generate substantial household income.

Farming returns in general are meager and volatile. From 1990 to 2016 the current net income to equity ratio averaged only 2.0% [vi]. The maximum was 3.48% in 2012 and the minimum -0.07% in 2002. That there are some broiler growers with meager 20th percentile household incomes is to an extent the result of generally poor farm returns, not a differentiating feature of broiler production.

Volatility of broiler grower income is also a symptom of general farming returns volatility.

Figure 1



The MacDonald study breaks out 2011 broiler operations by number of houses. (page 16) Table 4 below shows this breakout. Farms with 1 or 2 broiler houses accounted for 23.7% of the total farms and 86.3% had 3 or more. Farms with 3 or more houses earned mean and median household incomes that exceeded the U.S. all household income.

Table 4

Size distribution of broiler operations, 2011

Item	Farms	Broilers removed	Pounds removed	Capacity (sq. ft.)
All farms	15,468	7,868 million	45,921 million	1,265 million
Houses on farm		*Percent of total*		
1-2	23.7	10.2	9.5	9.6
3-4	44.3	37.3	37.6	38.2
5-6	20.3	26.8	27.0	26.8
7-8	5.9	10.5	10.6	10.8
9-10	2.1	4.7	4.8	4.7
11-12	2.3	5.7	5.6	5.6
13-30	1.0	3.9	4.1	4.3
Refused	0.4	0.9	0.9	n.a.
All	100.0	100.0	100.0	100.0

Note: Contract growers only, with 2011 removals. The row labeled "refused" covers survey respondents who did not provide a response for housing features.

Source: 2011 Agricultural Resource Management Survey, version 4.

In summary, to the extent that there is an issue with broiler grower incomes it is clearly scale of operation and the general characteristics of farm net income. The small 1 to 2 house broiler grower operations on the lower end of their farm size gross income range earn very meager

household incomes. However, at the same, larger, more diversified 1 to 2 house 80th percentile broiler grower farms earn income comparable to all U.S. households and all U.S. farm households in the 80th percentile.

In summary, it would appear that there is no general issue with broiler grower household incomes other than small size of some operations. Even within the smallest size category in the MacDonald study the top 20% farms earned competitive incomes. The GIPSA rules proposals would do nothing to increase incomes of the smallest and least profitable grower farms.

Integrator Hold-Up of Flock Placement

Hold-up is defined as an integrator refusing to place a flock based on a grower's unwillingness to make a capital improvement upgrade. If an integrator engages in this practice the broiler flock that was to go to a grower would either need to be destroyed or placed in another grower's houses. Production could be interrupted, and the integrator would lose sales and profits.

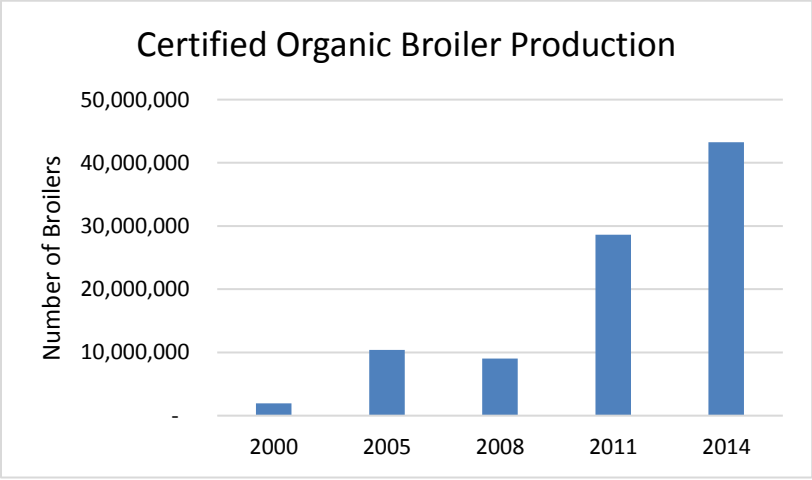
GIPSA has not supplied data on the actual prevalence of this practice, or its impact on growers. Rather, undocumented grower complaints are cited. To justify rules changes GIPSA should supply data to support the assertion that integrator hold-up is an economically significant issue.

Alternative Markets and Structural Change

In its Poultry Grower Ranking Systems proposed rules GIPSA alleges that alternative broiler markets, including organic production, are not a viable alternative for many growers. USDA periodically publishes data on organic production [vii] [viii]. The current available data cover selected years from 2000 to 2014. As shown in figure 2, there has was rapid growth in organic production in the available USDA data.

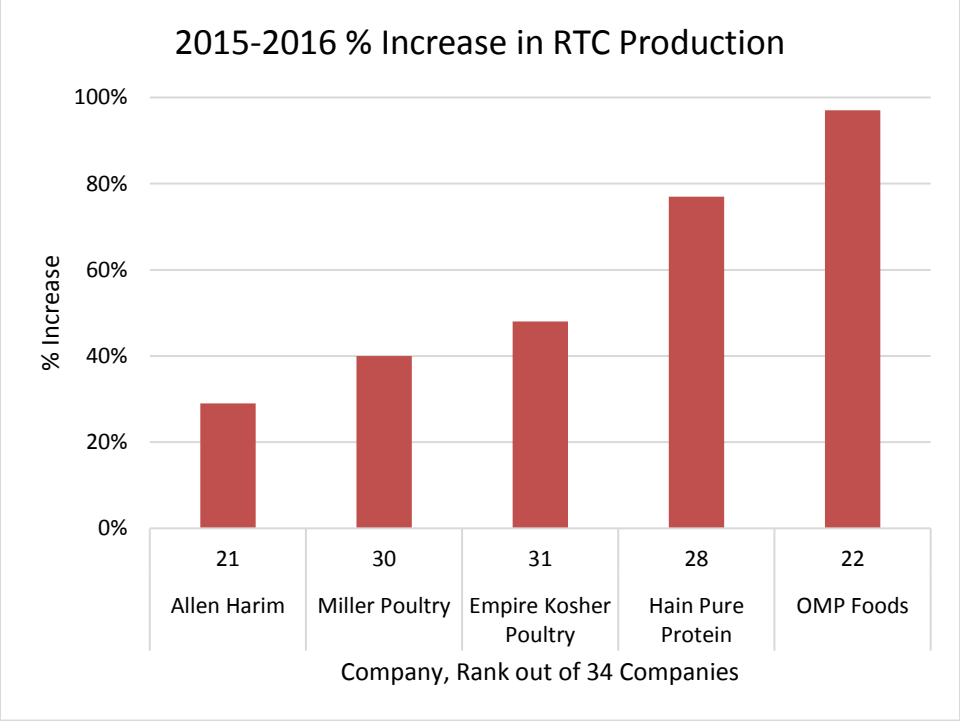
Since 2000 there has been increased interest in organic, antibiotic-free and free range broiler production. Antibiotic-free and free range production statistics are not available, but 2014 organic production accounted for 0.5% of total broiler production. While still small, this segment is growing more rapidly than overall broiler production.

Figure 2



Current growth of smaller companies taking advantage of rapid growth of organic, antibiotic-free, and other niche segments has been much faster than larger, less nimble, rivals. The five top 2016 fastest growing broilers producers in the Watt Publishing annual survey published in Poultry USA [ix] were all in the bottom 20 of the production rankings. The median growth rate in the 2016 Watt survey was +1%. Compare that to the growth of the five small companies shown below.

Figure 3



These small, innovative, companies are far outperforming their much larger competitors. They are demonstrating competitive behavior that does not depend on scale. They are innovating faster than larger companies, and producing products for rapidly growing niche markets. In the process they are creating opportunities for their contract grower partners.

Longer term, competition in the broiler sector has resulted in exits, mergers and market entry. From 1995 to 2016 the number of major producers tracked by Watt Publishing declined from 51 to 34. In most cases production assets of exiting companies were purchased by competitors. Many of the exits were smaller producers who merged with larger companies. However, size is no barrier to company failure. Of the 1995 top 10 companies, 5 are no longer in business, and #5 Pilgrim's Pride declared bankruptcy, but survives as a subsidiary of JBS.

There were also 10 companies in the 2016 Watt rankings that did not exist in 1995. In total, they accounted for 10% of 2016 broiler production. Two of these, Koch Foods and Keystone foods, are in the top 10 of 2016 U.S. broiler production. Except for Empire Kosher, all of the fast-growing companies shown in figure 3 have entered since 1995.

Growth rates over 1995 to 2016 for many small and mid-size companies far exceeded their larger competitors, and the sector average. Tyson Foods, the #1 producer, grew 51.6% versus the industry average 73%. (table 5)

Table 5

1995 Ranking	2016 Ranking	Company	2016 Average Weekly Production million pounds, ready-to-cook w eight basis	Market Share 2016 %	1995-2016 RTC Change % Growth
1	1	Tyson Foods	174.29	20.0	51.6
2		Gold Kist			
3	4	Perdue Farms	62.40	7.2	48.6
4		ConAgra			
5	2	Pilgrim's Pride	142.20	16.3	468.8
6	6	Wayne Poultry	47.22	5.4	136.1
7		Hudson Foods			
8		Seaboard			
9	13	Foster Farms	19.75	2.3	64.6
10		Townsends			
11		Cagle's			
12	15	Fieldale Corporation	16.00	1.8	45.5
13		Wampler-Longacre			
14		Marshall Durbin Companies			
15	3	Sanderson Farms	72.40	8.3	704.4
16	21	Allen Family Foods	8.57	1.0	7.1
17	17	O. K. Foods	13.59	1.6	81.2
18	18	Simmons Industries	13.32	1.5	122.0
19		Choctaw Maid Farms			
20		Campbell Soup/Herider Farms			
21		B. C. Rogers Poultry			
22	12	George's	21.49	2.5	329.8
23	7	Mountaire Corporation	46.63	5.3	832.6
24	16	Mar-Jac/Piedmont Poultry	15.40	1.8	242.2
25		Green Acre			
26	8	Peco Foods	29.21	3.3	549.1
27		Columbia Farms			
28		Zacky Foods			
29		Peterson Industries			
30		Rocco Foods			
31	19	Gold'n Plump Poultry	8.62	1.0	115.5
32	14	Case Foods	18.90	2.2	440.0
33	23	Harrison Poultry	5.10	0.6	45.7
34	31	Empire Kosher Poultry	1.23	0.1	-59.0
35	25	Golden Rod Broilers	3.49	0.4	16.3
36	20	Claxton Poultry	8.61	1.0	187.0
37	11	Amick Farms	21.80	2.5	772.0
38		Sylvest Poultry			
39		Burnett Produce			
40	9	House of Raeford	27.35	3.1	1267.5
41		Pennfield Farms			
42	24	Farmer's Pride	3.50	0.4	133.3
43		Lady Forest Farms			
44		Pederson's Fryers			
45		Draper Valley			
46		Park Farms			
47	32	Gentry Poultry	1.00	0.1	0.0
48		College Hill Poultry			
49		Lynden Farms			
50		Acme Poultry			
51		Dawn Poultry/Zartic			
		Not Present in 1995			
	5	Koch Foods	50.00	5.7	NA
	10	Keystone Foods	23.60	2.7	NA
	22	OMP Foods	6.30	0.7	NA
	26	MBA Poultry	2.62	0.3	NA
	27	Holmes Foods	2.39	0.3	NA
	28	Hain Pure Protein	1.77	0.2	NA
	29	Gerber's Poultry	1.50	0.2	NA
	30	Miller Poultry	1.34	0.2	NA
	33	Murray's Chickens	0.83	0.1	NA
	34	Agri Star Meat and Poultry	0.27	0.0	NA
		Total	**872.69**	**100.0**	73.0

In summary, broiler production is a highly competitive growth industry. There are winners, losers, and new entrants. Company growth rates vary widely. All of these dynamics are typical of an industry where companies compete keenly for the business.

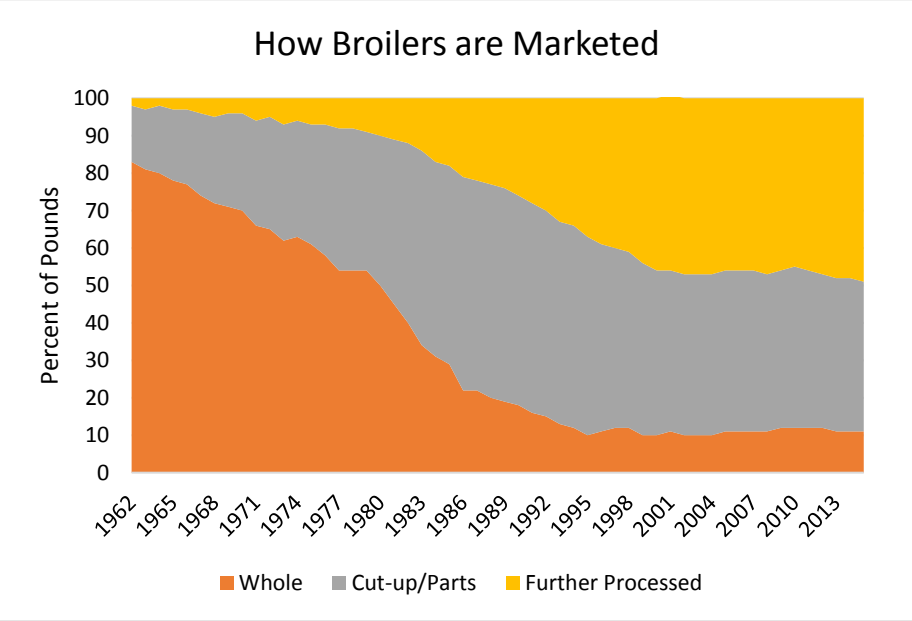
Broiler Production, Prices, and the Value of Innovation

Among all U.S. meat producers, the broiler sector has been the leader in innovation, production growth and export growth since at least 1960. At the same time, retail broiler prices have been much lower than, and decreased relative to, beef and pork.

The key to the industry's success has been innovation in every dimension of the business. The vertically integrated nature of the business has given management the ability to take advantage of synergistic innovation spanning foundation genetics to end product research and development. Over time the sector has transformed itself from a supplier of a limited range of fresh and frozen chicken to a value-added supplier of thousands of value-added chicken products,

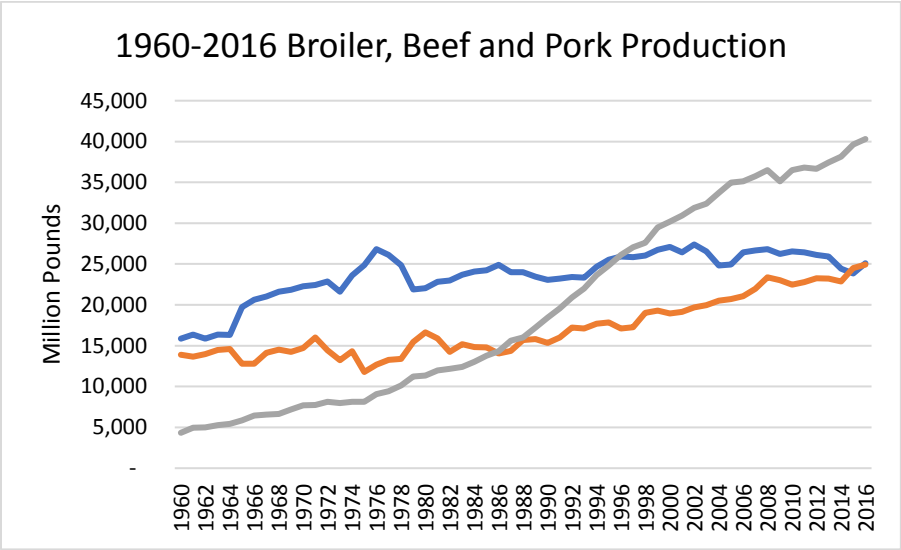
In 1962 broiler production trailed far behind beef and pork. (figure 5) Whole chicken sales were 80% of retail and foodservice volume [x]. In recent decades whole bird sales have declined to only a 10-12% share, parts sales are about 40%, and further processed almost 50%. The evolution in product sales in the three major categories is evidence of product innovation that has created thousands of chicken products that have found widespread consumer acceptance. (figure 4)

Figure 4



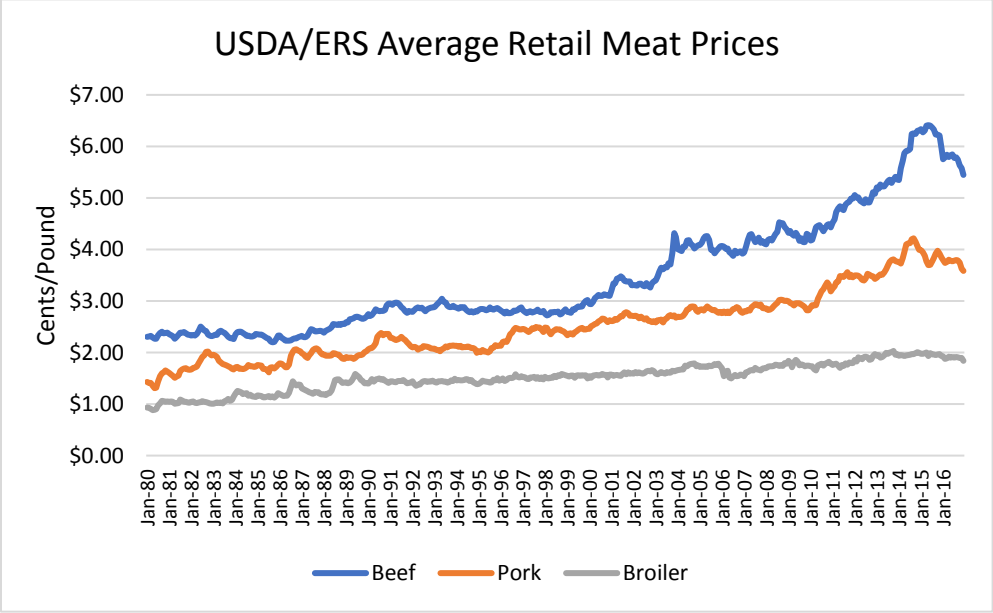
Rapid production, product and processing innovation has driven broiler production increases that have far outpaced beef and pork. In 1960 broiler production was a distant 3rd place behind the leaders, beef, and pork. (figure 5) In the mid-1990's broilers passed beef to become the leading animal producing source in the U.S. [xi] Recent years have seen broiler production continue to grow faster than either beef or pork.

Figure 5



One major factor in broiler share of U.S. meat production has been the fact that broiler retail prices have been much lower than beef or pork, and have increased at a slower pace. Figure 6 shows USDA's Economic Research Service retail price statistics for the three major U.S. meats[xii]. Innovation is the key factor enabling broiler integrators to offer low priced and increasingly less expensive meat relative to beef and pork. This competitive advantage would be harmed by regulations that slow innovation.

Figure 6



Part of the demand that led to rapid broiler production growth also came from outside the U.S. Until the 1990's U.S. meat exports played a very minor role in overall demand. Since then

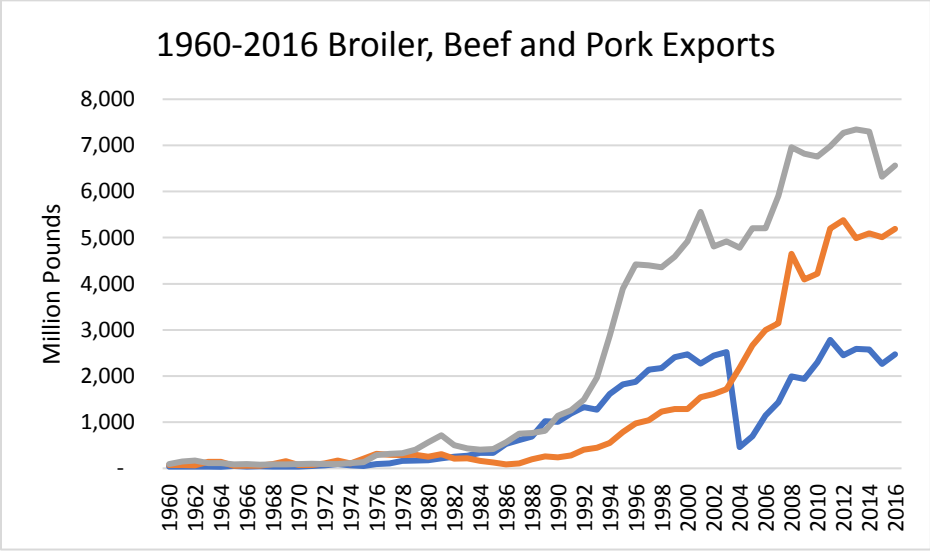
exports have increased more rapidly than production, and played a major role demand growth. (figure 7)

The 2003 drop in beef exports and the 2015 drop in broilers were both due to disease issues. For beef is was BSE and broilers Avian Flu. Despite the Avian Flu setback further long term export growth is expected, but at a slower rate than over the last 20 years.

A major driver for the rapid growth of U.S. broiler exports relative to beef and pork has been the price competitiveness shown above. Broiler exports are largely commodity dark meat parts that face intense price competition from other major broiler producers in Latin America and Europe. In a more general sense, broiler exports also compete with all other meats as well. Any slowing of U.S. broiler sector innovation would put our broiler exports at risk.

Given the competitive costs of producers such as Brazil, slowing innovation could also cause what have been very small U.S. import volumes to increase.

Figure 7



U.S. Broiler Sector Innovation Record

Basic statistics on major broiler production efficiency metrics are shown in table 6 [xiii]. Over time broilers have grown to heavier weights, on less feed per pound, and with lower death loss.

Table 6

Year	Average Days to Market	Market Weight, Pounds, Live	ADG, Grams	FCR	Feed/Bird, Pounds	Mortality, Percent
1925	112	2.50	10.12	4.70	11.75	18.0
1935	98	2.86	13.24	4.40	12.58	14.0
1940	85	2.89	15.42	4.00	11.56	12.0
1945	84	3.03	16.36	4.00	12.12	10.0
1950	70	3.08	19.96	3.00	9.24	8.0
1955	70	3.07	19.89	3.00	9.21	7.0
1960	63	3.35	24.12	2.50	8.38	6.0
1965	63	3.48	25.06	2.40	8.35	6.0
1970	56	3.62	29.32	2.25	8.15	5.0
1975	56	3.76	30.46	2.10	7.90	5.0
1980	53	3.93	33.63	2.05	8.06	5.0
1985	49	4.19	38.79	2.00	8.38	5.0
1990	48	4.37	41.30	2.00	8.74	5.2
1995	47	4.67	45.07	1.95	9.11	4.8
2000	47	5.03	48.54	1.95	9.81	4.6
2005	48	5.37	50.75	1.97	10.58	4.7
2010	47	5.70	55.01	1.95	11.12	4.0
2011	47	5.82	56.17	1.96	11.41	3.9
2012	47	5.95	57.42	1.91	11.36	3.7
2013	47	6.01	58.00	1.88	11.30	3.7
2014	47	6.12	59.06	1.89	11.57	4.3
2015	48	6.24	58.97	1.89	11.79	4.8
2016	47	6.22	60.03	1.86	11.57	4.5
%1925-2016	-58%	149%	493%	-60%	-2%	-75%

Compared to 1925, today's broiler consumes the same amount of feed, but produces 149% more live weight in 58% fewer days, and death loss is 75% lower. Innovations in genetics, feed, grower housing and medications have all made significant contributions to this record. Daily gain has increased from 10 to 60 grams. Faster gains improve the financial performance of grower houses by increasing production per day and per square foot. These efficiency gains are the fundamental drivers of the long-term price and market share trends shown earlier.

Implications for Grower Pay and Housing Performance

Table 7 [xiv] [xv] [xvi] translates performance improvements into what innovation means for broiler grower income. In current dollars, average grower payments per live pound increased in all but three years from 1990 to 2016. In total, average payment per pound increased by 57.4%. Grower payments per live pound, in 2009 constant dollars, have decreased slightly since 1990. However, the increase in broiler growth rates shown above in table 6 has improved housing efficiency from 33.12 live pounds produced per square foot per year to 39.93 in 2016, or 20.6%. That increase

more than offsets the decline in $2009 payments per pound. Grower payments per square foot, in constant $2009, increased from $2.02 in 1990 to $2.30 in 2016, or 13.8%. In current dollars, these payments increased from $1.35 in 1990 to $2.56 in 2016, an 89.7% increase.

Table 7

Year	Average Grower Payment, Cents/Lb., Current Dollars	Average Grower Payment, Cents/Lb., $2009	Live Young Chicken Production, 000 Pounds	Total Grower Payments, $2009, $000	% Change	Live Pounds Per Sq. Foot	Average Grower Payments, Per Sq. Foot, Current Dollars	Average Grower Payments, Per Sq. Foot, $2009
1990	4.08	6.10	25,549,696	$1,559,563	13.2%	33.12	$1.35	$2.02
1991	4.11	5.95	27,170,780	$1,617,098	3.7%	33.44	$1.37	$1.99
1992	4.14	5.86	28,997,878	$1,699,672	5.1%	33.77	$1.40	$1.98
1993	4.22	5.84	30,474,243	$1,778,349	4.6%	34.09	$1.44	$1.99
1994	4.23	5.73	32,765,941	$1,876,751	5.5%	34.77	$1.47	$1.99
1995	4.32	5.73	34,352,980	$1,968,417	4.9%	34.93	$1.51	$2.00
1996	4.30	5.60	36,034,815	$2,018,442	2.5%	34.75	$1.49	$1.95
1997	4.46	5.71	37,207,401	$2,125,103	5.3%	34.87	$1.56	$1.99
1998	4.53	5.74	38,054,849	$2,183,929	2.8%	35.26	$1.60	$2.02
1999	4.68	5.85	40,444,167	$2,364,063	8.2%	36.09	$1.69	$2.11
2000	4.78	5.84	41,293,525	$2,410,344	2.0%	36.23	$1.73	$2.11
2001	4.87	5.81	42,335,507	$2,461,631	2.1%	36.03	$1.75	$2.09
2002	4.81	5.66	43,715,247	$2,472,605	0.4%	34.64	$1.67	$1.96
2003	4.90	5.65	44,317,531	$2,503,671	1.3%	37.22	$1.82	$2.10
2004	5.04	5.66	46,109,201	$2,607,670	4.2%	38.56	$1.94	$2.18
2005	5.24	5.70	47,578,696	$2,710,359	3.9%	39.15	$2.05	$2.23
2006	5.39	5.68	48,332,516	$2,747,672	1.4%	38.97	$2.10	$2.22
2007	5.43	5.58	49,089,999	$2,738,429	-0.3%	38.56	$2.09	$2.15
2008	5.64	5.68	49,780,767	$2,829,764	3.3%	38.84	$2.19	$2.21
2009	5.62	5.62	47,613,466	$2,675,877	-5.4%	38.19	$2.15	$2.15
2010	5.67	5.60	49,314,757	$2,762,281	3.2%	38.48	$2.18	$2.16
2011	5.78	5.59	49,559,126	$2,772,606	0.4%	39.40	$2.28	$2.20
2012	5.85	5.56	49,350,169	$2,743,761	-1.0%	39.07	$2.29	$2.17
2013	5.93	5.55	50,357,463	$2,793,005	1.8%	39.12	$2.32	$2.17
2014	6.19	5.69	51,225,964	$2,913,401	4.3%	39.52	$2.45	$2.25
2015	6.27	5.70	53,166,030	$3,030,491	4.0%	40.03	$2.51	$2.28
2016	6.42	5.76	54,037,067	$3,112,907	2.7%	39.93	$2.56	$2.30
% Change	57.4%	-5.6%	111.5%	99.6%	NA	20.6%	89.7%	13.8%

The last 2 columns in table 7 are a much better overall indicator of grower returns than payment per live pound. There is a sharing of the gains from increased live broiler performance. The integrator, who furnishes the feed and medications to the grower at no cost, benefits from better feed efficiency. The live bird grower benefits faster growth rates resulting in increased pounds produced per square foot of the houses he furnishes the integrator. The innovation that makes these improvements possible is a joint effort of the integrator and the grower. For the grower's part, broiler housing must be adapted over time to take advantage of the evolving genetics and feed improvements furnished by integrators that make the growth in pounds produced per square

foot possible**.** If growers do not invest when potential efficiency gains outweigh costs, both the grower and the integrator suffer.

Another implication of the increase in grower housing efficiency is that fewer square feet of housing are required to produce any given amount of broiler meat. From 1990 to 2016 the increase in production per square foot reduced the amount of grower housing required by a cumulative 278 million square feet, or 6,387 acres. At the current $9.66 per square foot cost of these houses and related investments shown in the University of Maryland study cited earlier the avoided grower investment is $2.7 billion not required to produce the 2016 broiler supply.

In his analysis MacDonald did not mention housing productivity as a contributor to long term grower housing productivity and income growth. Nor does GIPSA acknowledge this factor as an important contributor to grower income and welfare. Rather, their focus was exclusively on payments per pound.

As will be discussed, the current GIPSA proposal on ranking systems could seriously impede grower-owned housing investment incentives. If grower investments are reduced, so is grower housing productivity, and long term grower income potential.

Neither McDonald or GIPSA also acknowledge the full degree to which growers are insulated from market risk by the current contracting system. The integrator supplies the grower with baby chicks, feed, and all medications. The integrator pays a contract fee to the grower and sells the finished chicken products into a highly competitive market. The integrator bears the full risk of volatile feed ingredient prices, production risks inherent in producing baby chicks, costs risks of medication requirements, and price risks in the finished chicken product market. The major grower financial risk is utilities and fuel costs for their operations.

In a 1995 journal article the authors concluded that chicken companies remove approximately 97% of the economic risk from growers, compared to independent growers who bear all risks on their own. [xvii] The fact that growers are insulated from significant price and production risks stabilizes their income stream and enables them to obtain credit on more favorable terms. Integrators established this system with the express purpose of creating live production based on low risk, financially stable farms that could supply a steady stream of high quality birds suitable for end products. Absent these arrangements, history showed that independent live producers bearing the full risks of feed and chicken price volatility was not as reliable a production source.

Consequences of Proposed Rule on Grower Ranking Systems

GIPSA has proposed implementation of a grower ranking system based on what they call a Consistency Management System, or CMS [ii]. This system would theoretically correct rankings within grower ranking cohorts for variations in feed, medications, chick quality, target end weights, bird density, and other possible factors, including grower housing quality. There are significant theoretical and practical issues with such a system.

GIPSA itself states that feed and medications are not an issue. The GIPSA proposed grower ranking rules document states [ii]: “The U.S. Food and Drug Administration (FDA) approves all medication that can be administered to broilers that are grown for human consumption. GIPSA believes that integrators would not alter medication to such an extent that inferior medicine is

consistently supplied to a grower and that this criterion would not be costly to the industry." (page 31)

"GIPSA also believes that feed provided by integrators would be consistent across a group of growers and that this criterion would not be costly to the industry. Feed is produced by integrators at a feedmill and the same batch of feed is distributed to growers until more feed is produced and then that feed is distributed. The process of the production and distribution of feed ensures consistency across the group of growers that receive the same batch of feed. Once a batch of feed is produced, integrators truck it to growers according to established routes and schedules. All growers on the same route should receive feed of similar quality." (page 32)

However, GIPSA still proposes to mandate measuring impact of chick quality, feed, medications, bird density, possibly housing type, and other factors on grower performance and pay.

Based on GIPSA's own proposed rule document, feed and medications should not be included as important factors in grower performance variation.

Bird density is a potential factor in bird performance. If birds are stocked at a density higher than optimal, performance will suffer. Like feed and medication, if bird performance suffers, so does the integrator's sales and profit.

In practice, growers receive chicks from breeder farm flocks that are scheduled years ahead of chick delivery to a grower. The chicks supplied to a grower often come hatcheries supplied by several breeder flocks. Even if an integrator wanted to segregate chick quality, the logistics would be difficult, and results undependable.

While not explicitly mentioned in the GIPSA proposed rule, correcting for housing type and quality would have potentially serious implications for future innovation, productivity gains, and investment. These issues go the heart of the broiler sector's competitive strengths.

Depending on construction date, maintenance and subsequent capital improvements, grower houses will vary in potential performance. Integrators often pay premiums for improved housing. Those premiums are paid in expectation of improved bird performance. The premiums are not discriminatory, they are based on an agreement between the grower and the integrator. If a grower is not willing to make improvements, and performance and pay suffers relative to those that have made improvements, the system is operating as intended. Not penalizing growers for operating obsolete housing would result in under-investment and slower efficiency gains.

The MacDonald paper (page 20) contains a 2011 snapshot of the state of broiler housing technology. (table 8) Table 8 shows that newer broiler houses are larger, and have higher levels of technology than older houses. The original 2010 GIPSA draft rules proposed to group ranking by growers with "like housing." The current § 201.214(d) proposal [ii] could be interpreted to include "like housing" as a possible basis for ranking growers. (pages 9-10)

Table 8

Broiler housing and technology, by vintage

Year house was built	Share of all houses	Mean size	Side curtains	Evapora-tive cooling	Tunnel ventilation	Integrated electronic controls	Static pressure-controlled vent boxes
	Percent	*Sq. Ft.*	*Percent of houses with technology*				
Pre-1970	1.3	11,930	77	52	56	37	43
1970-74	1.5	13,922	65	63	70	44	59
1975-79	4.6	14,950	65	58	63	53	65
1980-84	4.2	15,695	55	77	83	66	79
1985-89	15.5	16,019	48	82	86	77	83
1990-94	19.2	18,027	54	87	90	82	88
1995-99	19.7	18,797	59	88	92	87	89
2000-04	14.2	20,383	39	96	97	96	96
2005-09	13.9	22,786	22	97	99	98	98
2010-11	2.9	24,887	13	98	100	100	99
Refused	3.0	16,018	60	67	77	70	72
All	100.0	18,618	48	86	90	84	87

Source: USDA Agricultural Resource Management Survey, 2011, version 4. Contract growers only. The row labeled "refused" covers survey respondents who did not provide a response for housing attributes. There were 66,680 houses in total.

Under proposed rule § 201.214(d): "Proposed § 201.214(d) provides that the Secretary may consider whether the live poultry dealer has demonstrated a legitimate business justification for conduct that may otherwise be unfair, unjustly discriminatory, or deceptive, or 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. A legitimate business justification for certain conduct may be sufficient to find that the conduct does not violate the P&S Act. We request comment on the types of conduct that might be considered for a legitimate business justification, in order to give further context to this provision in the final rule."

"Concurrent with the publication of this proposed rule, GIPSA is also proposing another rule in this issue of the Federal Register that, among other things, would 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. Specifically, this proposed rule includes § 201.210, "Unfair, unjustly discriminatory, or deceptive practices or devices by packers, swine contractors, or live poultry dealers," which includes in paragraph (b) a non-exhaustive list of conduct or action that, 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 whether the conduct harms or is likely to harm competition. Currently, proposed § 201.210(b) contains nine examples. In this rule, GIPSA is

proposing to add to proposed § 201.210(b) a tenth example, § 201.210(b)(10) GIPSA also considers a live poultry dealer's failure to use a poultry grower ranking system in a fair manner after applying the criteria in § 201.214 to be an unfair, unjustly discriminatory, or deceptive practice or device and a violation of section 202(a) of the P&S Act regardless of whether it harms or is likely to harm competition."

Table 8 also shows that there is a very diverse population of broiler housing with a wide range of technology implementation. The wide range of housing equipment employed, size and age, would make ranking on housing type a difficult, if not impossible, task. Since rankings are typically made over a limited time period, often a week, it would be the case that there are frequently not enough similar houses to make meaningful comparisons within housing type.

A model of the number of flocks available for ranking in a week was constructed to show the extent of this issue. Three projections were made. The first two are based on a 2016 University of Maryland live broiler production publication [xviii]. This projection is for new construction, 33,000 square foot, broiler houses. Both large and small bird production was modeled based on these large, modern, houses.

Based on the Maryland publication, for large birds the following assumptions were made:

1. 8.5 pound end weight in 56 days [xix]
2. 14 days between flocks
3. All-in all-out flocks for all 4 houses per farm
4. .75 square feet/bird

The assumptions yielded the following results for integrator plants processing between 1,500,000 and 500,000 birds per week (table 9).

Table 9

Grower Operation Statistics							Integrator Statistics				
Birds/Week	Liveweight, Pounds	Age, Days	Total Days	Turns /Year	Birds/Flock /Turn	Total Birds/Year	Flocks Delivered /Week	Flocks Delivered /Year	Total Number of Houses	Houses /Farm	Farms
1,500,000	8.5	56	70	5.2	168,960	881,006	8.9	462	354	4	89
1,250,000	8.5	56	70	5.2	168,960	881,006	7.4	385	295	4	74
1,000,000	8.5	56	70	5.2	168,960	881,006	5.9	308	236	4	59
750,000	8.5	56	70	5.2	168,960	881,006	4.4	231	177	4	44
500,000	8.5	56	70	5.2	168,960	881,006	3.0	154	118	4	30

As can be seen in table 9, even with a large plant, only 8.9 flocks are required per week. As shown in table 10, if required to break out rankings by housing type, the number of flocks available is quickly reduced for all plant sizes as the number of housing types increase.

Table 10

	Number of Housing Types and Flocks per Type				
Birds/Week	1	2	3	4	5
1,500,000	8.9	4.4	3.0	2.2	1.8
1,250,000	7.4	3.7	2.5	1.8	1.5
1,000,000	5.9	3.0	2.0	1.5	1.2
750,000	4.4	2.2	1.5	1.1	0.9
500,000	3.0	1.5	1.0	0.7	0.6

If there are as many as 3 housing types, ranking becomes problematic for even a large processing plant, and impossible for smaller plants.

If we reduce the bird size to 4 pounds the number of flocks per year increases, age declines to 32 days [xx], days between flocks declines to 46, and stocking density increases to as high as .6 square feet/bird. Fewer flocks per week are required. As shown in table 11, that is because each flock will have more birds. The processing plant is limited by birds that can be processed per day, not pounds of meat produced.

Table 11

Grower Operation Statistics							Integrator Statistics				
Birds/Week	Liveweight, Pounds	Age, Days	Total Days	Turns /Year	Birds/Flock /Turn	Total Birds/Year	Flocks Delivered /Week	Flocks Delivered /Year	Total Number of Houses	Houses /Farm	Farms
1,500,000	4.0	32	46	7.9	211,200	1,675,826	7.1	369	186	4	47
1,250,000	4.0	32	46	7.9	211,200	1,675,826	5.9	308	155	4	39
1,000,000	4.0	32	46	7.9	211,200	1,675,826	4.7	246	124	4	31
750,000	4.0	32	46	7.9	211,200	1,675,826	3.6	185	93	4	23
500,000	4.0	32	46	7.9	211,200	1,675,826	2.4	123	62	4	16

The ranking by house type issue for small bird plants is more severe than for big birds. (table 12)

Table 12

	Number of Housing Types and Flocks per Type				
Birds/Week	1	2	3	4	5
1,500,000	7.1	3.6	2.4	1.8	1.4
1,250,000	5.9	3.0	2.0	1.5	1.2
1,000,000	4.7	2.4	1.6	1.2	0.9
750,000	3.6	1.8	1.2	0.9	0.7
500,000	2.4	1.2	0.8	0.6	0.5

As bird size decreases, the feasibility of ranking by house type becomes even more critical.

The third scenario is based on national average statistics from the MacDonald study [v]. The major assumptions were:

1. A much smaller 18,618 average square feet per house
2. 6.1 pound end weight in 49.5 days (current standard is 43 days [xviii])

3. 17 days between flocks
4. All-in all-out for all 4.3 average houses on a farm
5. .70 square feet/bird

The smaller houses produce fewer birds per flock, and more flocks are required per day. The houses per farm is almost the same as the first two scenarios. The averages are a blend of large and small birds.

Table 13

Grower Operation Statistics							Integrator Statistics				
Birds/Week	Liveweight, Pounds	Age, Days	Total Days	Turns /Year	Birds/Flock /Turn	Total Birds/Year	Flocks Delivered /Week	Flocks Delivered /Year	Total Number of Houses	Houses /Farm	Farms
1,500,000	6.1	49.5	66.5	5.5	109,793	602,764	13.7	710	556	4.3	129
1,250,000	6.1	49.5	66.5	5.5	109,793	602,764	11.4	592	464	4.3	108
1,000,000	6.1	49.5	66.5	5.5	109,793	602,764	9.1	474	371	4.3	86
750,000	6.1	49.5	66.5	5.5	109,793	602,764	6.8	355	278	4.3	65
500,000	6.1	49.5	66.5	5.5	109,793	602,764	4.6	237	185	4.3	43

Even with the higher number of flocks delivered per day, as the number of housing types quickly decreases the ability to make meaningful rankings, and is severely compromised for smaller plants. (table 14)

Table 14

	Number of Housing Types and Flocks per Type				
Birds/Week	1	2	3	4	5
1,500,000	13.7	6.8	4.6	3.4	2.7
1,250,000	11.4	5.7	3.8	2.8	2.3
1,000,000	9.1	4.6	3.0	2.3	1.8
750,000	6.8	3.4	2.3	1.7	1.4
500,000	4.6	2.3	1.5	1.1	0.9

At the current state of the industry the ability to make valid comparisons by housing type that would not result in grower complaints is questionable. With the trend to fewer grower operations and larger houses, over time the number of flocks delivered per week will decline for any given plant capacity, and the issue will become even more severe.

A related factor in the feasibility of using housing type as a grouping criteria is the increasing complexity of live production requirements based on fragmentation that is inherent in the trend to increasing organic and antibiotic-free practices. To the extent that these requirements also demand ranking segmentation the population of like houses in any given time period is also reduced.

Another aspect of chicken production that is very dynamic, and has affected performance grouping, is trends in bird weights. Over the past decade there has been a dramatic shift to heavier birds in the production mix. Heavier birds are on feed longer, and have use more feed per pound of end weight, compared to lighter birds.

In 2005 birds weighing 7.76 pounds and more accounted for very little production [xxi]. (table 15, figure 8, figure 9) By 2016 those heavy birds were the single largest category in pounds, and had grown at the expense of birds weighing under 6.26 pounds. The production mix that was dominated by bird weights under 6.26 pounds in 2005 is now much more diverse, making comparisons increasingly difficult over time. Adding housing type to this more diverse weight mix could further reduce the flock numbers that can be used for comparisons.

Table 15: Young Chicken Slaughter, 000 Head and 000,000 Live Pounds - Categories in Pounds

Year	Head 4.25 & Down	Pounds 4.25 & Down	Head 4.26 - 6.25	Pounds 4.26 - 6.25	Head 6.26 - 7.75	Pounds 6.26 - 7.75	Head 7.76 & up	Pounds 7.76 & up
2005	2,441,171	9,130	3,997,751	21,348	1,397,172	9,668	507,102	4,270
2006	2,355,406	8,903	4,147,947	22,440	1,163,904	8,089	683,922	5,636
2007	2,222,059	8,399	4,158,652	22,457	1,364,973	9,487	656,891	5,485
2008	2,138,506	8,169	4,073,657	21,998	1,261,007	8,587	923,799	7,649
2009	2,047,148	7,861	4,161,213	22,512	1,150,016	7,878	884,603	7,378
2010	2,005,002	7,679	3,936,970	21,338	1,367,565	9,231	1,025,357	8,603
2011	1,856,928	7,038	3,469,804	18,772	1,541,869	10,408	1,217,099	10,199
2012	1,922,297	7,266	3,202,051	17,291	1,522,143	10,335	1,228,014	10,438
2013	2,140,619	8,027	2,826,338	15,347	1,546,918	10,457	1,455,038	12,499
2014	2,077,788	7,688	2,784,010	15,006	1,534,545	10,450	1,566,181	13,735
2015	2,070,131	7,680	2,617,731	14,240	1,701,255	11,841	1,732,642	15,767
2016	2,089,759	7,732	2,573,455	14,128	1,858,391	12,990	1,722,453	15,847
% Change	-14%	-15%	-36%	-34%	33%	34%	240%	271%

Figure 8

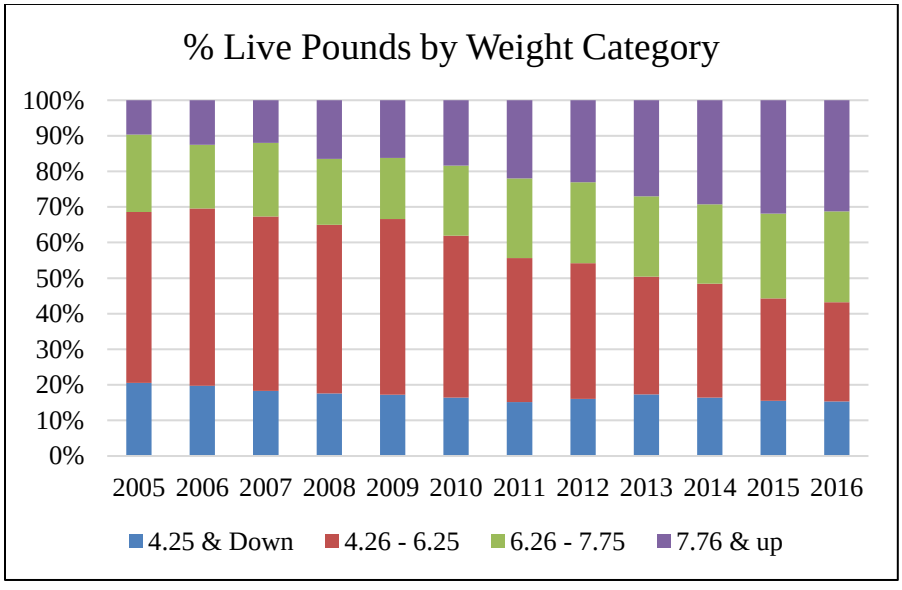
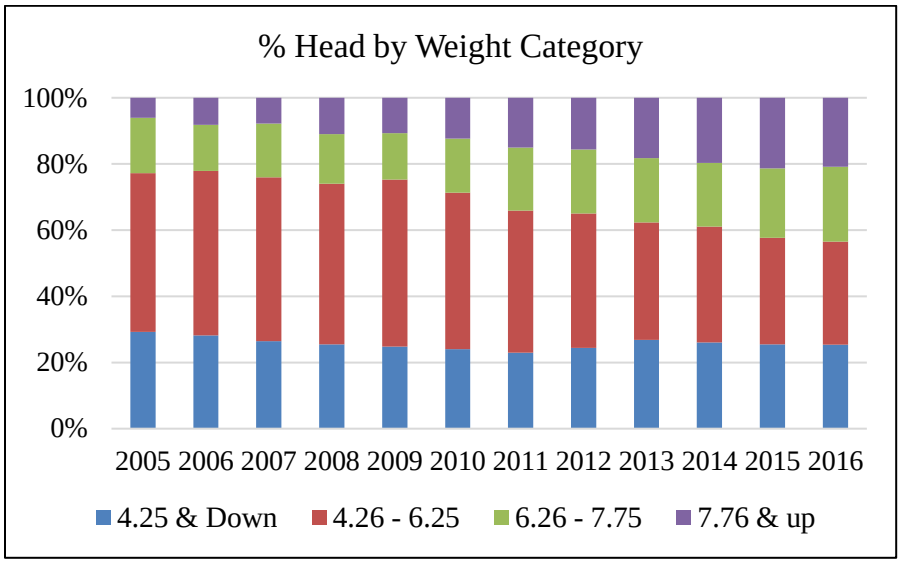


Figure 9



Even if meaningful housing type comparisons could be made, there is a much more serious issue. To the extent that growers are ranked within housing type they are not compared to growers with other housing types. Growers with older, outdated, low productivity housing would be grouped together and ranked. As a group, these growers might not be penalized compared to growers with newer or updated housing.

One remedy would allow the integrator to set significantly different payment scales by housing type group. Unless different payment scales are allowed, correcting grower rankings for housing type could reduce, or even eliminate, incentives for investments in existing housing. Such a ranking system would tend to lock in housing technology as of the date of its implementation. Long term gains in broiler production efficiency could be seriously compromised if housing investment incentives are reduced by holding growers harmless for less productive housing types. Grower income could also suffer if gains in broiler pounds produced per square foot are reduced.

However, if integrators are allowed to differentiate payment terms by housing type, this would not be materially different from the current system of pooling all growers, regardless of housing conditions.

GIPSA did not account for potential reduction in grower investment incentives flowing from the implementation of a CMS in its evaluation of costs. If housing type were to become a basis for discrimination, and GIPSA were to insist on similar payment scales by housing type, the results could be similar to those estimated for the original 2010 GIPSA proposed rules by this author [xxii]. In that study just the feed cost consequences of reduced productivity gains were estimated at $644 million over the first five years.

In summary, if housing type is eventually included in the CMS, that factor could hold producers harmless for housing that is less productive than it could be with further investments. It could also penalize producers who have made investments, and as a result have the most productive

housing. Over the long term, all growers would be penalized if gains in productivity and income per square foot of their housing slows.

By pooling all broiler houses for ranking purposes the producers who have made investments to increase productivity are rewarded, and those who have not are penalized. The current system provides incentives to maintain and improve housing quality that promotes the interests of both the grower and the integrator. Any CMS with housing type included could severely reduce investment incentives, and could discriminate against those producers who have made past investments.

Lack of Factual Justification for CMS

Finally, the CMS mandate is being proposed without regard to whether there is factually undue discrimination by integrators among their growers. In justifying its ranking system proposal GIPSA frequently cites "complaints" and "comments [ii]" The proposed rule does not cite any factual studies or data to demonstrate that ranking systems in fact discriminate against individual growers or groups of growers.

GIPSA has the authority to obtain the necessary production records history from integrators to construct a statistical model to test the hypothesis that discrimination based on the factors that would be included in the proposed CMS exists. Prior to mandating such a system GIPSA should determine if the proposed regulation is required, or is only the result of hearing unsubstantiated grower allegations that GIPSA, or an independent third party, has not investigated to determine their validity.

Costs of Proposed CMS Rule on Grower Ranking Systems

GIPSA has not specified how the proposed CMS is to be constructed, implemented or monitored by GIPSA. Also, GIPSA has ignored the possibility that such a system could result in a re-ordering of historical grower rankings, leading to litigation if historically high-ranking growers decline in rank and bonus payments. If housing type is included as a grower ranking correction factor, producers who have invested in improvements could perceive that the value of those investments has been impinged. This could also lead to litigation based on alleged integrator discrimination against the best and most productive growers.

GIPSA has made estimates of the specific administrative costs of establishing the CMS system, revising contracts and preparing grower revenue projections for investment decisions. In this process GIPSA has made numerous assumptions about time requirements and compensation rates. No data other than national average wage rates are presented to validate the assumptions. No estimate of ongoing costs for operating and monitoring a CMS is estimated. No estimate of potential litigation if grower rankings shift is presented.

Implementation, administration and litigation costs could be significantly more than those in the GIPSA. Even so, they will be small compared to the potential costs to integrators and growers of reduced incentives for investments in existing broiler housing.

Economy-Wide Impact

The broiler sector is a major contributor to the U.S. economy. The industry directly employs 355 thousand workers, pays about $20 billion in wages, and contributes about $126 billion of product end value. Including the indirect supply chain economic impact adds another $187 billion of economic activity [xxiii] [xxiv] [xxv].

Broiler integrators directly support about 16,000 live broiler production farmers [v], and many more who grow the feed the broilers consume. All the companies and farmers supplying broiler integrators are responsible for an additional 429 thousand jobs and $27 billion in wages. The industry pays about $24 billion in annual taxes, $16 billion federal and about $8 billion state and local.

The current scale and impact of the broiler sector is largely based on a long record of successful productivity gains and product innovation that has taken chicken from a minor protein source to by far the most widely consumed U.S. protein. The proposed GIPSA rule, especially the possibility of segregation of grower rankings by housing type, represents a significant threat to the future growth and success of this major portion of the U.S. meat protein supply.

As currently structured, the GIPSA proposal could slow live production innovation, increase costs, and thus harm the sector's competitive advantage over other protein sources in the U.S. and globally. Both integrators, and their farmer live production partners, would suffer as a result. Consumers would see increases in broiler prices, direct and indirect job creation would slow, and the economy would be worse off, not better.

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