September 11, 2024

S. Brett Offutt
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Packers and Stockyards Division
Fair Trade Practices Program
Agricultural Marketing Service
United States Department of Agriculture
1400 Independence Ave., SW
Washington, DC 20250

Re: Docket No. AMS–FTTP–21–0046; RIN 0581–AE04; Proposed Rule; *Fair and Competitive Livestock and Poultry*; 89 *Fed. Reg.* 53886 (June 28, 2024).

Dear Mr. Offutt:

The Meat Institute submits these comments regarding the above-referenced proposed rule (proposal or rule). The Meat Institute is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products and Meat Institute member companies account for more than 95 percent of United States output of these products. The Meat Institute provides regulatory, scientific, legislative, public relations, and educational services to the meat and poultry packing and processing industry.

Over the last several years the Agricultural Marketing Service (AMS or the agency) has published a "suite of major actions … to create fairer marketplaces for poultry, livestock and hog producers." The proposal is the most recent of that series of rules and it is just as flawed, legally and factually, as its predecessors. As in past rulemakings and contrary to longstanding judicial precedent, AMS stubbornly clings to the idea a plaintiff need not show injury to competition, or likelihood of injury to competition, to prevail in a Packers and Stockyards Act (PSA or the Act) 202(a) or (b) case. That position was wrong before and it is wrong now.

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If finalized as published, the rule will violate the Constitution and the Administrative Procedure Act because of its breadth and vagueness. The Due Process Clause requires laws to provide adequate notice of what they prohibit. Many of the proposed standards are so vague as to be unworkable and, as the Supreme Court has said, a "vague law is no law at all."[1]

In addition, the rule's economic analysis is wholly inadequate. The agency ignores the readily available economic research and literature, some agency funded, about the impact the sweeping changes to contractual relationships between packers and their livestock suppliers will have. And as the literature shows, adverse economic impact affects not just the marketing and contractual relationships between livestock suppliers and packers, but also consumers. Finally, the rule ignores the almost certain litigation costs regulated entities will incur if the proposal becomes final. Indeed, the Agricultural Marketing Service simply threw its hands up in the air with respect to litigation costs, saying:

> AMS believes that proposed § 201.308 may possibly reduce litigation due to the clarity provided by the proposed rule as to the unfair practices with respect to market participants and markets that violate the Act. However, the proposed rule possibly increases litigation to the extent that AMS or producers are better able to identify unfair practices and thus may be more likely to seek relief in courts. AMS is uncertain as to which of these offsetting effects will dominate and to what extent. Therefore, AMS does not estimate litigation costs in this analysis.[2] (Emphasis added)

The agency ignored these costs knowing full well the rule would be used as a litigation and enforcement tool. Indeed, Assistant Attorney General for Antitrust Jonathon Kanter captured it best at the Center for American Progress event at which the rule was unveiled when he said he hopes plaintiffs "will bring a PSA case, or two, or 20."

A more detailed discussion follows.

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[1] *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019)
[2] 89 *Fed. Reg.* 53905.

The Agency Continues to Ignore the Well-Established Judicial Precedent that Sections 202(a) and (b) Require an Adverse Effect on Competition – Precedent Congress Has Declined to Overturn Through Legislation.

As it has done in previous rulemakings, and in litigation before various courts of appeal, the agency stubbornly refuses to accept the longstanding precedent that to prevail in a PSA section 202(a) or (b) case a plaintiff must show injury, or likelihood of injury, to competition.[3] And by establishing criteria that would allow AMS to pursue a section 202(a) violation based on injury to a single market participant, the proposal directly violates the statute's injury to competition requirement.

In taking this position AMS asserts that the courts have been inconsistent in their rulings and that "this regulation to provide a clear interpretation and promote consistency and predictability in its application of the law."[4] Even a cursory review of the case law reveals that is not so.

A. **The case law holds the PSA requires showing harm or likely harm to competition.**

As the Supreme Court recently explained in *Loper Bright Enterprises v. Raimondo*

> Once more, the basic nature and meaning of a statute does not change when an agency happens to be involved. Nor does it change just because the agency has happened to offer its interpretation through the sort of procedures necessary to obtain deference, or because the other preconditions for *Chevron* happen to be satisfied. The statute still has a best meaning, necessarily discernible by a court deploying its full interpretive toolkit.[5]

No fewer than eight federal courts of appeals have considered the issue and decided the best meaning of PSA sections 202(a)-(b) requires a showing of injury, or likelihood of injury, to competition.

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[3] This approach suggests AMS believes simply saying something enough times is sufficient to overturn the precedent established by eight federal appellate circuit courts.
[4] 89 *Fed. Reg.* 52886
[5] 603 U.S. __ (2024)

In *Wheeler v. Pilgrim's Pride Corp*. the 5th Circuit, in an *en banc* decision, "deployed its full interpretive toolkit" and concluded injury to competition is a necessary element of a successful case. Writing for the majority, Judge Reavley rejected the agency's interpretation expressed in the proposal and in previous rulemakings, saying:

> Once more a federal court is called to say that the purpose of the Packers and Stockyards Act of 1921 is to protect competition and, therefore, only those practices that will likely affect competition adversely violate the Act. That is this holding.[6]

Judge Reavley went on to say:

> We conclude that an anti-competitive effect is necessary for an actionable claim under the PSA in light of the Act's history in Congress and its consistent interpretation by the other circuits. … Given the clear antitrust context in which the PSA was passed, the placement of §192(a) and (b) among other subsections that clearly require anticompetitive intent or effect, and the nearly ninety years of circuit precedent, we find too that a failure to include the likelihood of an anticompetitive effect as a factor actually goes against the meaning of the statute.[7]

The *Wheeler* court engaged in a step-by-step analysis of section 202(a) and (b), starting with the Supreme Court, which concluded the PSA was focused on preventing harm to competition: "The chief evil feared is 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."[8] The Supreme Court concluded: "It is manifest that Congress framed the Packers and Stockyards Act in keeping with the principles announced and applied in the opinion in the *Swift* case."[9] Congress enacted the statute "to combat restraints on trade" and to "promote healthy competition" in the livestock industry.[10]

The *Wheeler* court next conducted a circuit-by-circuit review of the case law, paying special attention to the Eleventh Circuit in *London v. Fieldale Farms Corp*. and *Pickett v. Tyson Fresh Meats, Inc.* In *London* the court concluded that "[e]liminating the competitive impact requirement would ignore the long-time

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[6] *Wheeler v. Pilgrim's Pride Corp*. 591 F3d 355, 357 (5th Cir. 2009).
[7] *Id.*
[8] *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922).
[9] *Id*. at 520.
[10] *Wheeler v. Pilgrim's Pride Corp*. 591 F.3d 355, 361 (5th Cir. 2009) (*en banc*); *see* H.R. Rep. No. 85-1048, at 1 (1957) (Act's purpose was to "assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry").

antitrust policies which formed the backbone of the PSA's creation."[11] Judge Reavley also found that the Eleventh Circuit "concluded that the PSA required a plaintiff to show that the defendant's deceptive or unfair practice adversely affects competition or is likely to adversely affect competition."[12] Likewise in *Pickett v. Tyson Fresh Meats, Inc.,* although a jury found Tyson's use of marketing agreements caused the plaintiff to suffer financial injury, the trial court rendered judgment for Tyson, and the Eleventh Circuit affirmed.[13] The Fifth Circuit concluded that affirmation was because "the purpose of the PSA was not to upset the traditional principles of freedom of contract. To which it could be added: despite an unfair effect on the plaintiffs."[14]

The PSA's judicial history confirms Congress knew, and intended to incorporate, the meanings of key terms, and the eight federal courts of appeals that have considered this issue have unanimously concluded that a plaintiff must show actual or likely harm to competition to prevail on a claim under Section 202(a) or (b) of the PSA.[15] Only a year after *Wheeler*, the Sixth Circuit said it best.

> The tide has now become a tidal wave, with the recent issuance of the Fifth Circuit Court of Appeals' *en banc* decision in *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (*en banc*), in which that court joined the ranks of all other federal appellate courts that have addressed this precise issue when it held that "the purpose of the Packers and Stockyards Act of 1921 is to protect competition and, therefore, only those practices that will likely affect competition adversely violate the Act." *Wheeler*, 591 F.3d at 357. All told, seven circuits – the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits – have now weighed in on this issue, <u>with unanimous results</u>. *See Wheeler*, 591 F.3d 355; *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. 2005), *cert. denied*, 546 U.S. 1034 (2005); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *Philson v. Goldsboro Milling Co.*, Nos. 96-2542, 96-2631, 164 F.3d 625, 1998 WL 709324, at *4-5 (4th Cir. Oct. 5, 1998) (unpublished table decision); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *Farrow v.*

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[11] 410 F.3d 1295, 1304 (11th Cir. 2005).
[12] Wheeler at 360.
[13] 420 F.3d 1272 (11th Cir. 2005).
[14] Wheeler at 360.
[15] *Wheeler,* 591 F.3d at 369-70 (explaining that the House Report, H.R. Rep. No. 67-77, at 2-10 (1921), included a "detailed exposition of Supreme Court decisions on the meaning and constitutionality of those earlier acts").

> *United States Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985); *DeJong Packing Co. v. United States Dep't of Agric.*, 618 F.2d 1329, 1336-37 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980); and *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir. 1976).[16] (Emphasis added.)

No appellate courts have disagreed with this interpretation of the PSA.

The agency, however, clings to another view and participated in the *Terry* appeal as an *amicus curiae,* advocating that a showing of injury is not required for a section 202(a) or (b) violation. The *Terry* court expressly recognized the agency's involvement, noted its argument, and pointedly concluded, "We decline to do so."[17]

The agency offers no credible analysis in the proposal undermining any of these court decisions, nor could it. As with *Terry*, in several of the appellate cases holding that competitive injury is a necessary element of a section 202(a) or (b) violation, the agency participated in some capacity, either as a party or an *amicus*. Considering this record of litigation futility, AMS is not free to ignore the prevailing judicial authority or seek to undo it through the rulemaking process.

B. The PSA's history supports the conclusion that the best reading requires proving injury to competition.

The PSA built on existing antitrust statutes by providing a special statute for the meatpacking industry.[18] In enacting this special statute, Congress "incorporate[d] the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation."[19] That "general outline of long-time antitrust policy" incorporated in the PSA "distinguish[es] between fair and vigorous competition on the one hand and predatory or controlled competition on the other."[20] And that understanding follows the settled principle that an antitrust plaintiff must show antitrust injury – a harm that the antitrust laws were designed to prevent.[21] To prove an antitrust injury, it is not enough for the plaintiff to show it was harmed by the defendant's conduct; rather, the plaintiff must prove that competition was harmed from the defendant's conduct.[22] Interpreting Section 202(a) and (b) to

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[16] *Terry v. Tyson Farms, Inc.,* 604 F.3d 272, 277 (6th Cir. 2010)
[17] *Id.* at 278.
[18] *Armour* & Co. v. United States, 402 F.2d 712, 721 (7th Cir. 1968).
[19] *De Jong* Packing Co. v. United States Dep't of Agric., 618 F.2d 1329, 1335 n.7. (9th Cir. 1980), cert. denied, 449 U.S. 1061 (1980).
[20] *Armour & Co.*, 402 F.2d at 717, 722.
[21] *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).
[22] *See, e.g.*, *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 83 (3d Cir. 2010); *see also Brunswick*, 429 U.S. at 488 ("[A]ntitrust laws …were enacted for 'the protection of competition not competitors.").

require proof of actual or likely harm to competition furthers the statute's key purpose, which is to protect competition in the meat packing industry.

Although Congress was spurred to action by the conditions in the meat packing industry, it did not intend to discourage regular, healthy business competition. During Congressional debate on the Act, "everyone from the Secretary of Agriculture to Members of Congress testif[ied] to the need of this statute to promote healthy competition."[23] And the Senate Report expressed "caution . . . against stifling the initiative of the industry."

As the *Wheeler* court pointed out, between 1921 and 2002, Congress amended section 202 seven times "without making any changes that would affect the many court interpretations cited above."[24] The court went on to say it is "reasonable to conclude that Congress accepts the meaning of § 192(a) to require an effect on competition to be actionable because congressional silence in response to circuit unanimity 'after years of judicial interpretation supports adherence to the traditional view'."[25]

C. **The agency's position was wrong pre-*Loper Bright* and remains wrong in the wake of *Loper Bright*.**

Near the end of the *Wheeler* opinion Judge Reavley addressed the fact that the Secretary of Agriculture has at times, as it does here, "interpreted the PSA to prohibit the forbidden practices regardless of whether competitive injury is caused" and he pointed out that the "Seventh Circuit has had to correct that interpretation in the cases discussed above."[26] Specifically, in *Armour and Company v. the United States* the court said that "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."[27]

In *Wheeler*, as it has done in other cases and the most recent case to address the issue, *Terry v. Tyson*, the agency participated as *amicus* to "contend that the courts have had the PSA wrong and that it should be construed to make unfair

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[23] *Wheeler*, 591 F.3d at 361.
[24] *Id*. at 362. Citing Pub.L. 74-272, 49 Stat. 649 (1935); Pub.L. 85-909, § 1, 72 Stat. 1749 (1958); Pub.L. 94-410, § 3, 90 Stat. 1249 (1976); Poultry Producers Financial Protection Act of 1987, Pub.L. 100-173, § 3, 101 Stat. 917 (1987); Food, Agriculture, Conservation, and Trade Act Amendments of 1991, Pub.L. 102-237, § 1008, 105 Stat. 1818, 1898 (1991); Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act of 2000, Pub.L. 106-78, § 912, 113 Stat. 1135, 1205 (1999); Farm Security and Rural Investment Act of 2002, Pub.L. 107-171, § 10502, 116 Stat. 134, 509 (2002).
[25] *Id*. citing *General Dynamics Land Sys., Inc. v. Cline,* 540 U.S. 581, 593-94 (2004).
[26] *Wheeler* at 362.
[27] *Armour and Company v. the United States,* 402 F.2d at 722.

practices unlawful without regard to competition."[28] Although *Chevron* is no more, the court rejected the agency's deference argument concluding it was "unwarranted where Congress has delegated no authority to change the meaning the courts have given to the statutory terms, as the Eleventh and Tenth Circuits have held."[29]

The *Wheeler* court concluded "that an anti-competitive effect is necessary for an actionable claim under the PSA in light of the Act's history in Congress and its consistent interpretation by the other circuits."[30] The agency contends it is proposing "this regulation to provide a clear interpretation and promote consistency and predictability in its application of the law."[31] But that issue has been asked and answered.

> Given the clear antitrust context in which the PSA was passed, the placement of § 192(a) and (b) among other subsections that clearly require anticompetitive intent or effect, and the nearly ninety years of circuit precedent, we find too that a failure to include the likelihood of an anticompetitive effect as a factor actually goes against the meaning of the statute.[32]

Judge Jones in her concurrence highlighted why the agency's approach is wrong.

> "Unfair," "unjustly discriminatory," "undue or unreasonable preference": Read literally, they establish no standard at all. … (The Act's bar on "deceptive practice[s]," by contrast, is clearer.) Does this mean that each court and jury must determine, in its unique estimation, what is unfair, unjust, undue, or unreasonable? If so, the law — what is allowed, what prohibited — would essentially become a matter of fact. Any contract within the Act's ambit would be subject to challenge as putatively "unfair."[33]

Judge Jones went on to say

> "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.

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[28] *Wheeler* at 362.
[29] *Id*.
[30] *Id*.
[31] 89 *Fed. Reg*. 53886
[32] *Wheeler* at 363.
[33] *Id*. at 365.

The agency attempts to obscure the issue, suggesting the courts have been "inconsistent." But in a 2017 notification, AMS's predecessor agency, the Grain Inspection, Packers and Stockyards Administration (GIPSA), acknowledged the great weight of judicial precedent against the agency's position when it said:

> First, the interpretation of 7 U.S.C. 192(a)–(b) embodied in the IFR [Interim Final Rule] is inconsistent with court decisions in several U.S. Courts of Appeals, and those circuits are unlikely to give GIPSA's proposed interpretation deference.[34]

And in its 2020 rulemaking the agency indirectly addresses the legal standard issue by saying the following.

> In past cases, courts have considered whether a specific preference or advantage would be a violation of the Act if the preference or advantage did not harm competition. However, AMS does not intend to create criteria that conflict with case precedent, so PSD expects that court precedents relating to competitive harm are likely to remain unchanged.[35]

Rather than accept what the courts and Congress have said, instead, the agency embraces the opinions of judges who *dissented* from the majority holdings of the federal appellate courts and nonbinding district court decisions in federal circuits that have not yet weighed in on this question.[36] AMS claims that courts applying "a standard with a competitive-injury component" are "far from unanimous in their interpretation of the [PSA]'s prohibitions, generally, and of competitive injury, specifically," an argument articulated in Judge Garza's dissent in *Wheeler*.[37] But the *Wheeler* majority made clear that its holding that "an anti-competitive effect is necessary for an actionable claim under the PSA" was necessary to avoid creating a "circuit split."[38] Even if AMS has concerns about the appellate courts' "interpretation" of the PSA, the agency cannot solve any such "problem" through a rulemaking. Only Congress can rewrite a statute; the Executive Branch is bound to follow the statutory interpretations announced by

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[34] 82 *Fed. Reg*. at 48596 (Oct. 18, 2017).
[35] 85 *Fed. Reg*. at 1774 (Jan. 13, 2020).
[36] 89 *Fed. Reg*. at 53892 n.73 (citing *M & M Poultry* v. *Pilgrim's Pride Corp.,* No. 2:15-CV-32, 2015 WL 13841400, at *8 (N.D.W. Va. Oct. 26, 2015); *Triple R Ranch, LLC* v. *Pilgrim's Pride Corp.,* 456 F. Supp. 3d 775, 778 (N.D.W. Va. 2019); *Hedrick* v. *S. Bonaccurso & Sons, Inc.,* 466 F. Supp. 1025, 1031 (E.D. Pa. 1978)).
[37] 89 Fed. Reg. at 53891/3.
[38] *See Wheeler*, 591 F.3d at 381 (Garza, J., dissenting) (claiming the majority opinion misconstrued Circuit precedents on the PSA's competitive injury requirement); *see also id.* at 384 ("If the same language under the FTC Act does not require an adverse impact on competition, then it should not be construed differently under the PSA."). See 362-363.

federal courts whether it agrees with them or not.[39] Whether directly in failed previously proposed rules, or in this proposal, regardless of how often AMS or its predecessor agency makes this assertion, it cannot change the well-established, unanimous precedent that a plaintiff in a PSA case must show harm, or likelihood of harm, to competition.[40]

D. The Federal Trade Commission Act does not support the agency's position.

The agency attempts to support its position by referring to the Federal Trade Commission Act (FTCA) and a new Federal Trade Commission (FTC) policy statement. AMS contends it "has found the framework of the FTC Act and the FTC's policy statements useful in understanding the past century of USDA's administrative and Federal caselaw."[41]

Neither the FTCA nor that agency's policy statement, however, support AMS's position. To the contrary, the FTC's history highlights that agencies must enforce their statutory authority consistent with the statutory design, congressional intent, and judicial decisions.

In 1914, Congress enacted the FTCA, which created the FTC. Section 5 of that act authorized the FTC to attack "unfair methods of competition." Congress did not define that term and there has never been a consistent authoritative definition. In the late 1970s and early 1980s, the FTC filed cases relying on an expansive view of Section 5, but the courts consistently rejected those efforts because the agency failed to define "unfair methods" according to acceptable criteria. As a result, the FTC and courts largely treated Section 5 in concert with the other significant antitrust statutes, the Sherman and Clayton Acts -- just as the PSA has been interpreted and enforced consistent with those statutes.

In 2015, the Commission issued a "Statement of Enforcement Principles" consistent with this coherent and stable view of Section 5. Although recognizing that Section 5 could encompass acts that "contravene the spirit of the antitrust laws," the Statement tied enforcement to two pillars of traditional antitrust enforcement, the consumer welfare standard and the rule of reason. In 2021, this Statement was withdrawn by a new Commission that believed Congress intended for Section 5 to cover much more business conduct than that encompassed by the Sherman and Clayton Acts. In a new statement issued in 2022, the FTC asserts

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[39] *See Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2261, 2267 (2024).
[40] The agency's citation to an Executive Order that cannot amend the law also is unavailing. See 87 *Fed. Reg*. 60014.
[41] 89 *Fed. Reg*. 53893.

that Section 5 extends far beyond the other antitrust statutes, with no need to show anticompetitive intent or effects.

Courts are likely to reject the FTC's expansive view of Section 5 because the statement "abandons the rule of reason, which provides a structured analysis of both the harms and benefits of challenged conduct."[42] The new statement also "repudiates the consumer welfare standard and ignores the Supreme Court's admonition that antitrust 'protects competition, not competitors'."[43] Similarly, the statement "rejects a vast body of relevant precedent that requires the agency to demonstrate a likelihood of anticompetitive effects, consider business justifications, and assess the potential for procompetitive effects before condemning conduct."[44]

The statement also has internal inconsistencies. For instance, the FTC says that it can be unfair to "impair the opportunities of market participants" or to "reduce competition between rivals." But vigorous competition necessarily impairs the opportunities available to one's rivals. Likewise, the statement asserts it is unfair to negatively affect "consumers, workers, or other market participants," but higher labor and other input costs can result in higher prices for consumers and neither the statement nor the FTC provide guidance as to how these competing factors are weighed.

The agency's reliance on the FTC's new statement fails because the statement fails to provide a viable framework that could result in credible enforcement. In the 1970s and 1980s, courts rejected the FTC's expansive view of Section 5 for these same reasons. With AMS's attempt to follow the FTC's path, and with courts regularly forcing agencies to adhere closely to statutory language, the proposal almost certainly will suffer the same fate in court as we have seen recently.

E. The Major Questions Doctrine confirms proving harm to competition is necessary.

Changing the harm to competition standard requires Congressional action and that fact is highlighted by the Supreme Court's decision in *West Virginia v. EPA*.[45] In that decision the Supreme Court invoked explicitly the "major questions

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[42] Dissenting Statement of Commissioner Christine S. Wilson, Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" Nov. 10, 2022, at 3. https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf
[43] *Id.*
[44] *Id.*
[45] West Virginia v. EPA, 142 S. Ct. 2587 (2022); see also NFIB v. OSHA, 142 S. Ct. 661 (2022) (*per curiam*); Alabama Association of Realtors v. HHS, 141 S. Ct. 2485 (2021)

doctrine," which requires Congress to speak clearly when authorizing agency action in certain cases.

The "major questions doctrine" turns on several considerations, including whether: the agency discovered in a "long-extant statute an unheralded power" that significantly expands or even "transform[s]" its regulatory authority; the claimed authority derives from an "ancillary," "gap-filler," or otherwise "rarely used" provision of the statute; or the agency adopted a regulatory program Congress had "conspicuously and repeatedly declined to enact itself." [46] The Court is particularly skeptical where an agency seeks to promulgate a rule "that Congress has conspicuously and repeatedly declined to enact itself."[47]

Section 202 has long been understood as a statute grounded in principles of antitrust law. AMS cannot use its rulemaking authority to remake the statute into a broad prohibition on whatever AMS views to be unfair. And Congress has considered and rejected attempts to remove the competitive-harm requirement from the statute. Congress has similarly declined to adopt a general prohibition on discrimination in contracting, other than for race discrimination under Section 1981. AMS cannot use this rulemaking to implement a "legislative work-around."

Where an agency has long administered a statute, the "lack of historical precedent, coupled with the breadth of authority that the [agency] now claims, is a telling indication that the mandate extends beyond the agency's legitimate reach."[48] Section 202 of the Act can hardly be called an ancillary or rarely used provision of the statute and given that Congress has amended section 202 multiple times over the decades, when it considered amending the statute to articulate the standard AMS promotes, Congress declined to do so.

Specifically, in the very Farm Bill that led to this rulemaking Congress considered and rejected a proposal to amend section 202(a) to state that a business practice can be found to be "unfair, unjustly discriminatory or deceptive" "regardless of whether the practice or device causes a competitive injury or otherwise adversely affects competition and regardless of any alleged business justification for the practice or device."[49] Senator Harkin, who sponsored the bill in the Senate, explained that the legislation would overturn court rulings that "producers need to prove an impact on competition in the market in order to prevail" in cases alleging that packers or dealers engaged in "unfair" or "unjustly discriminatory" practices.[50]

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[46] *West Virginia v. EPA*.
[47] *West Virginia v. EPA* at 2610.
[48] NFIB, 142 S. Ct. at 666 (quotation marks omitted).
[49] See Competitive and Fair Agricultural Markets Act of 2007, S. 622, 110th Cong. § 202 (2007); see also H.R. 2135, 110th Cong. § 202 (same).
[50] 153 Cong. Rec. S2053 (daily ed. Feb. 15, 2007).

But the legislation did not pass in either the Senate or the House. The Harkin Amendment is one example, but similar legislation was put forward in 2021 and failed to move in the House or the Senate.[51] The failure of Congress to amend section 202 "after years of judicial interpretation supports adherence to the traditional view" that a finding of harm or likely harm to competition is required.[52] This conclusion is particularly true given Senator Harkin's efforts were part of the Congressional consideration of the bill that ultimately, when enacted, directed the Secretary to promulgate the regulations regarding undue preferences.

And 2007 was not the only instance Congress rejected efforts to change the harm to competition standard. Between 1921 and 2002, Congress amended section 202 of the PSA seven times, but it never disrupted the appellate courts' statutory interpretation.[53] Congressional inaction in the face of the decisions of the appellate courts suggests that it has accepted that settled understanding.

Indeed, if anything, Congressional action supports the conclusion that the standard set by the appellate courts is the proper one. Proposed section 201.3(c) of the failed 2010 rulemaking would have attempted to overrule the standard established by the courts, *i.e.*, "[c]onduct can be found to violate § 202(a) and/or (b) of the Act without a finding of harm or likely harm to competition."[54] But appropriations bills passed for fiscal years 2012 through 2015 all included language prohibiting the agency from expending any funds to "publish a final or interim final rule in furtherance of, or otherwise implement, proposed sections 201.2(l), 201.2(t), 201.2(u), <u>201.3(c)</u>, 201.210, 201.211, 201.213, or 201.214 of 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))." (Emphasis added). These bills provide further evidence that Congress thought proposed section 201.3(c), along with other proposed sections, was not the proper standard.

The ultimate question is one of Congressional intent, and here, all signs point toward Congressional acceptance of the judicial consensus requiring proof of actual or likely harm to competition under sections 202(a) and (b).[55] The agency's attempt to get around this standard through a preamble conversation and a proposed rule that allows for PSA violations upon proving a substantial injury to an

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[51] H.R. 1393 § 502, 117th Cong. (2021); S. 300 § 502, 117th Cong. (2021).
[52] Wheeler, 591 F.3d at 362 (quoting Gen. Dynamics v. Cline, 540 U.S. 581, 593-94 (2004)).
[53] *See Wheeler*, 591 F.3d at 361-62; *see also General Dynamics Land Sys., Inc. v. Cline*, 594, 599 (2004) explaining that "congressional silence" in the face of "years of judicial interpretation" suggests that Congress has accepted the judicial consensus.
[54] 75 *Fed. Reg*. 35338 (June 22, 2010).
[55] *See Wheeler*, 491 F.3d at 361–62 ("congressional silence in response to circuit unanimity after years of judicial interpretation supports adherence to the traditional view").

individual market participant flatly contravenes Congress' intent and exceeds the authority granted by the PSA.[56] The agency cannot use this rulemaking to implement a "legislative work-around."[57]

The Proposal Would Establish Broad and Vague Unfair Practice Provisions for Individual Market Participants and the Market Generally, which are Unworkable and Unconstitutional.

A "vague law is no law at all."[58] The Due Process Clause requires laws to provide adequate notice of what they prohibit and here the proposal cannot satisfy that standard. Indeed, the proposal includes standards so vague that, if adopted, it would be impossible for a regulated entity to know how to comply.[59]

In this novel approach to the PSA, subsections (a) and (b) of the proposal focus on "market participants," without defining that term. AMS asserts the test under subsection (a), "whether a practice unfairly injures market participants is similar to the FTC's test for consumer protection injuries" and that "Harm to competition is not part of the test."[60] Particularly problematic are the standards identified in subsection (b). Specifically, the proposal says "when assessing whether a practice … causes or is likely to cause substantial injury" the agency may consider how much the practice may

- impede or restrict the ability to participate in a market;
- interfere with decision-making by market participants;
- tend to subvert the operation of competitive market forces;
- deny a covered producer the full value of their products or services; or
- or violates traditional doctrines of law or equity.[61]

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[56] See Louisiana PSC v. FCC, 476 U.S. 355, 375 (1986) ("an agency literally has no power to act . . . unless and until Congress confers power on it").
[57] *NFIB*, 142 S. Ct. at 668 (Gorsuch, J., concurring) (quotation marks omitted); *see also West Virginia v. EPA*, 142 S. Ct. at 2614 (rejecting agency rule that "conveniently enabled it to enact a program that . . . Congress considered and rejected multiple times") (quotation marks omitted).
[58] *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019)
[59] *Timpinaro v. SEC*, 2 F.3d 453, 460 (D.C. Cir. 1993). Indeed, the vagueness and ambiguity throughout the proposal cause it to fail an important element of Executive Order 12866 (EO). In that regard, subsection 1(b)(12) of the EO requires an agency to "draft its regulations and guidance documents to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty." The proposal satisfies neither of these requirements.
[60] 89 *Fed. Reg.* 53894
[61] *Id.* at 53910.

Likewise, the proposal includes standards for unfair practices in the market. Specifically, the agency contends an action is unfair if it:

- tends to foreclose or impair opportunities for market participants; reduces competition between rivals;
- limits choice;
- distorts or impedes the process of competition; or
- denies a market participant the full value of their products or services.

Several of these standards are so broad and vague, such that they are unworkable. For example, seven times in the preamble and the proposed rule the agency refers to denying a covered producer or market participant the "full value of their products or services."[62] Nowhere, however, does AMS provide any guidance or instruction about what that phrase means or how "full value" might be measured. Markets change day to day, hour to hour, sometimes minute by minute. The price available at 9 a.m. may not be the price available at 2 p.m. that same day. Has a covered producer or market participant who sells for $1/cwt. less at 2 p.m. rather than at 9 a.m. received the full value for his or her livestock and who decides? That the agency provides no guidance or instruction about how it would apply that standard suggests the question is unanswerable.

Similarly, the agency provides no guidance or instruction about what phrases such as "tends to foreclose or impair opportunities for market participants" mean. For that particular standard, a practice need not foreclose or impair opportunities, but only "tend" to do so. Yet, that is a standard proposed with no need to show harm to competition. The broad qualifying phrases open the door for an unhappy plaintiff to identify countless circumstances that allegedly constitute an unfair practice, making it virtually impossible for packers and processors to know what they can and cannot do to comply with the rules and for that reason are arbitrary and capricious. These scenarios are exactly what Judge Jones warned of in *Wheeler*.

The agency does not explain why in subsection (a) it affords a regulated entity to justify an act "by establishing countervailing benefits to the market participant or participants or to competition in the market that outweighs the substantial injury or likelihood of substantial injury" but does not include that same opportunity in subsection (c) regarding markets. As subsection (a) recognizes, there may be countervailing benefits "to competition in the market" associated with an act. The same opportunity should be incorporated into subsection (c).

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[62] Presumably the agency means "covered producer" as that term is defined in 9 CFR 201.302. Market participant is not defined.

The Agency's Economic Rationale Lacks Support and is Flawed.

The proposal's economic analysis is littered with holes and misstatements. As an initial point, however, the agency's refusal to provide sufficient time for stakeholders to conduct the comprehensive economic review this proposal warrants is, in and of itself, sufficient to justify withdrawing the proposal. AMS has been working on this proposal for at least two years, allowing the agency plenty of time to conduct a thorough cost-benefit analysis – which it failed to do. Stakeholders, on the other hand, were given a mere 60 days to review the proposal, analyze it, conduct an economic review, and submit comments, including the 16 open-ended questions posed. When industry requested an extension of the comment period of 180 days to allow it to conduct a comprehensive economic analysis, the agency granted an extension of a mere 15 days.

AMS seems to think the fact that conducting an analysis is hard means the agency need not do one. AMS is certainly correct when it said, "Applying a quantified dollar value to the improvement would be a difficult task."[63] And as Derrell S. Peel, PhD, the Charles Breedlove Professor of Agribusiness in the Department of Agricultural Economics at Oklahoma State University, correctly noted:

> … the U.S. cattle and beef industry may well be the most complex set of markets in existence. In its entirety, the cattle and beef industry represents an extraordinarily complicated set of cattle production and marketing activities which provide the source of a massive set of beef products marketed through a diverse set of final markets and all coordinated by a multitude of inter-related market transactions.[64]

This complexity, however, highlights why AMS is obligated to analyze comprehensively the proposal's potential impact on producers, regulated entities, and consumers.

Instead, AMS simply ignored that obligation.

- "For either proposed §201.308 or the limited scope alternative, AMS was not able to estimate indirect costs or indirect benefits that might accrue from the proposed rule."[65]

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[63] 89 *Fed. Reg.* 53901

[64] The U.S. Beef Supply Chain: Issues and Challenges, papers from the Proceedings of Workshop on Cattle Markets, Kansas City, Missouri, June 2021 (Bart L. Fischer, Joe Outlaw, David P. Anderson, eds), Texas A&M Agricultural and Food Policy Center, chapter 1, p.3

[65] 89 *Fed. Reg.* 53901.

- "AMS is not able to make quantified estimates of indirect costs or benefits associated with proposed §201.308."[66]

- "AMS is unable to quantify any costs or benefits that would arise from changing business practices due to proposed §201.308."[67]

Instead, AMS offers only speculation.

> As an example of potential benefits from improving competition, AMS estimated economic gains in losses for a range of hypothetical changes in market power in cattle and beef markets. **Estimated gains are not available for the other livestock, meat, and poultry markets**. These values are **not estimates of benefits of proposed §201.308. They are only examples that indicate possible benefits** of improving competitive conditions. (Emphasis added)[68]

Unlike some rulemaking exercises engaged in by federal agencies, AMS is under no court ordered deadline to publish a rule. In fact, there is no legal requirement for this proposal. Here, AMS has violated its proposed standard for an unfair practice in that denying stakeholders enough time to conduct a comprehensive economic analysis "violates traditional doctrines of law or equity."[69]

A. The proposal ignores almost certain litigation costs.

Conspicuous in its absence is a recognition of the almost certain litigation costs regulated entities will incur if the proposal becomes a final rule. Indeed, the Agricultural Marketing Service simply threw its hands up in the air with respect to litigation costs, saying:

> AMS believes that proposed § 201.308 may possibly reduce litigation due to the clarity provided by the proposed rule as to the unfair practices with respect to market participants and markets that violate the Act. However, the proposed rule possibly increases litigation to the extent that AMS or producers are better able to identify unfair practices and thus may be more likely to seek relief in courts. AMS is uncertain as to which of these offsetting effects will dominate and to what extent. Therefore, AMS does not estimate litigation costs in this analysis.[70] (Emphasis added)

[66] *Id.* at 53903.
[67] *Id.* at 53905.
[68] *Id.* at 53902.
[69] See proposed sections 9 CFR 201.308(b)(1), (d)(1).
[70] 89 *Fed. Reg.* 53905. The agency similarly failed to conduct an economic analysis for the recently published inclusive competition final rule. See 89 *Fed. Reg.* 16184 (March 6, 2024).

And yet, at the Center for American Progress event at which Secretary Vilsack and Assistant Attorney General for Antitrust Jonathon Kanter unveiled the rule, Mr. Kanter said in discussing the rule, he hopes plaintiffs "will bring a PSA case, or two, or 20." Mr. Kanter's comments reveal that not only are increased litigation costs the likely result of the rule, but they are part of the desired outcome.

The agency's failure to consider the costs of litigation that certainly would arise from its proposal is significant because even if packers and live poultry dealers prevail in cases that will be brought against them the costs of litigation would be considerable, affecting the structure of livestock markets.

Specifically, litigation costs are both direct, in terms of attorney fees, discovery, and other out of pocket expenses, and indirect in terms of lost productivity, and management resources devoted to litigation. By removing the need to show harm to competition, combined with unclear, undefined standards on what constitutes unfair practices, the proposal, as evidenced by Mr. Kanter's comments, invites litigation.

Instead, AMS simply assumes away the impact of the proposal.

> AMS does not expect that regulated packers, live poultry dealers, or swine contracts will need to make costly immediate changes in their current practices as a result of the proposed rule's implementation because the proposed rule serves as a framework for agency analysis and enforcement to address problematic practices as they may arise, rather than as a mandate to ameliorate specifically identified practices at present.[71] (Emphasis added)

That assumption, however, is false because the proposal presents significant litigation risks, which would result in changes in business practices, posing costs and loss of efficiencies across the livestock to meat supply chain. For example, when the proposal published, the National Pork Producers Council said

> … removing the requirement to show anticompetitive harm, combined with the proposal's vague and broad language, may increase frivolous litigation, and, as a result, negatively affect market innovation and contracts.[72]

And AMS contradicted itself saying

> While the intent of this proposed rule is to lower incidence of practices that are harmful to competition, one cannot discount the possibility that litigation spurred by the proposed rule could deter entry or cause firms to

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[71] 89 *Fed. Reg*. 53901.
[72] Capital Update - For the Week Ending June 28, 2024 | NPPC

> leave the market and hinder innovative or even practices that make the market more competitive or more efficient.[73] (Emphasis added)

The risks and costs of litigation under the rule primarily would limit the use of AMAs – which are precisely the innovative practices that make the market more competitive and efficient as AMS describes. As stated in its 2018 Report to Congress, AMS said "Stakeholders were in general agreement that formula-based purchases provide greater benefits, in terms of operational efficiency, for both packers and feedlots."[74]

In previous rulemakings involving the same issues, the agency attempted to engage in a more comprehensive economic analysis. For example, in December 2016 the agency published an Interim Final Rule (IFR), *Scope of Sections 202(a) and (b) of the Packers and Stockyards Act.*[75] In that Interim Final Rule GIPSA stated, as it has in this rulemaking,

> A finding that the challenged conduct or action adversely affects or is likely to adversely affect competition is not necessary in all cases. Certain conduct or action can be found to violate sections 202(a) and/or (b) of the Act without a finding of harm or likely harm to competition.[76]

Although the agency's cost estimates were unrealistically low, it at least engaged in such an analysis recognizing its position with respect to harm to competition would generate additional litigation.[77] Likewise, after withdrawing the IFR and publishing in January 2020 a proposed rule regarding the companion to section 202(a), the agency built on the 2016 analysis and again engaged in a litigation cost analysis.[78] And in publishing the final rule the agency engaged in a cost analysis.

> To estimate costs, PSD divided costs into two major categories, direct and indirect costs. In addition, PSD expects there are two direct costs: administrative costs and litigation costs.[79]

AMS went on to say

> Litigation costs for the livestock and poultry industries will initially increase until there is a body of case law interpreting the regulations.

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[73] 89 *Fed. Reg*. 53902.
[74] Report to Congress, Livestock Mandatory Reporting, USDA AMS, 2018
[75] 81 *Fed. Reg*. 92566 (Dec. 20, 2016).
[76] *Id*. at 92594.
[77] *Id*. at 92578-92580.
[78] "In considering the costs of the rules it proposed in 2016, GIPSA performed an in-depth analysis of litigation costs expected as a result of the package of four proposed new regulations." 85 *Fed. Reg*. 1776-1777 (Jan. 13, 2020).
[79] 85 *Fed. Reg*. 79793 (Dec. 11, 2020)

> Once the courts establish precedent, PSD expects additional litigation to decline.[80]

And the agency conducted that analysis.[81]

In short, AMS concluded an economic analysis of litigation costs for one of the most sweeping regulatory proposals affecting the meat and poultry industry in decades, was necessary in promulgating a regulation articulating criteria implementing 7 U.S.C. 202(b). That same agency has now concluded it need not conduct an analysis of almost sure to come litigation costs associated with that section's companion provision, 7 U.S.C. 202(a). For this reason alone, the economic analysis is inadequate and dictates the proposal be withdrawn.

B. The proposal would result in reduced use of alternative marketing agreements and ignores landmark economic analyses regarding their benefits.

The agency tries to justify the proposal citing concentration in the relevant livestock and poultry markets and a purported "imbalance" of bargaining power between packers and poultry dealers, on the one hand, and livestock producers and poultry growers on the other. AMS provides the following characterization of the livestock markets.

> The nature of livestock production compounds the market power problems. When livestock are ready for slaughter, whether they are cattle, hogs, or lambs, they must go to the packer within a few weeks, or the quality starts to decrease. As the quality of the livestock fades, producers pay the costs of continuing to feed livestock while the value decreases. As a result, livestock producers are relatively determined sellers who have a limited capacity to wait for market conditions to change.[82]

But the agency ignores the fact that livestock and poultry markets are competitive, and the consolidation and contractual arrangements cited by AMS have created substantial efficiencies that have reduced prices and expanded choices for American consumers.

As it did in ignoring litigation costs, the agency conspicuously and conveniently ignores the impact the proposal will have on the utilization of alternative marketing agreements in the industry if it becomes final. AMAs are the solution to what the agency describes above but if the proposal becomes final the use of AMAs will be significantly more limited to manage litigation risk. Stunningly, other than referencing their contribution to administrative costs, the

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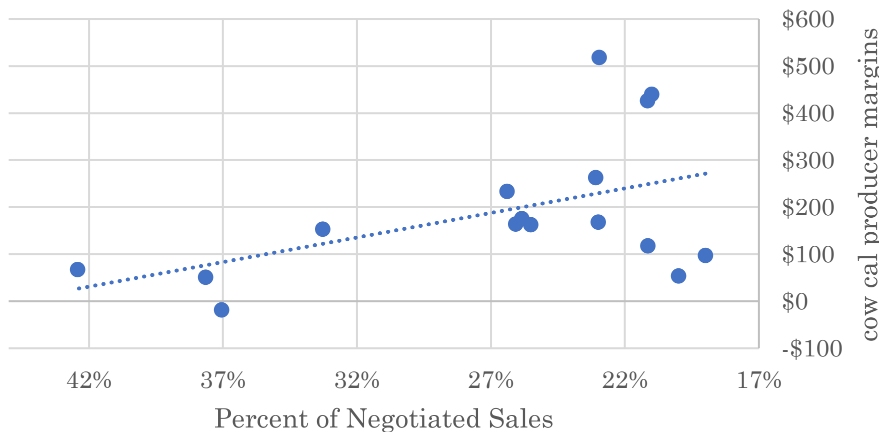
[80] *Id.*
[81] *Id.* at 79794-79797
[82] 89 *Fed. Reg.* 53901

proposal does not mention the importance of AMAs to producers, regulated entities, and consumers.

Use of AMAs in the fed cattle markets has grown because these arrangements provide producers and feeders with an effective risk management tool, reduce feeders' marketing costs, and improve efficiency and capacity utilization of packing plants. There is a substantial body of economic literature on the role, benefits, and efficiencies from the use of AMAs, which the proposal ignores. Empirical data also provides insights.

The alternative to AMAs is negotiated cash transactions. Negotiated sales have an important and fundamental role in the cattle market; however, data show that increased negotiated cattle sales do not have a high correlation to cow-calf producers' profitability, with a coefficient of determination (R-squared) of 0.2387. Nonetheless, what correlation there has been over the past 15 years shows that as the percentage of negotiated transactions decreased, cow-calf producer margins were more often higher.



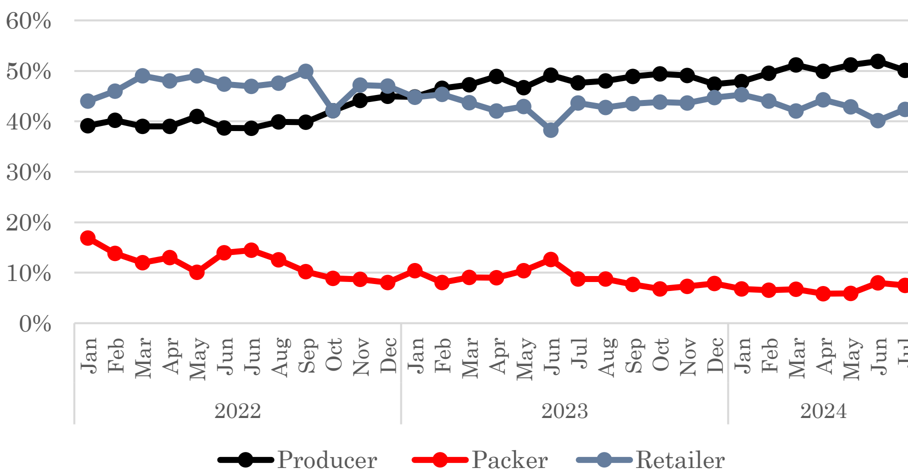
Source: Sterling Marketing, USDA AMS MPR, Meat Institute

There are three important economic effects of AMAs that the proposed rule overlooks and fails to consider. First, they lower marketing costs. If marketing costs increase due to reduced AMA use, then the effective net price of cattle, and feeding margins, decrease. Producers are the most harmed by policies that increase costs in the marketing system. From the USDA TAMU research, "On average, a 1% increase in AMA cattle is associated with $0.04 per hundredweight decrease in

transaction price."[83] Multiplied across millions of cattle at market weight, the savings are significant.

Second, AMAs improve packing capacity utilization, which in turn reduces per head operating costs for both packers and feeders. Ultimately, it is the supply and demand balance between available fed cattle supplies and the packers' ability to harvest and process them that determine cattle prices. Lost capacity use would result in less demand for live cattle. AMAs improve capacity for feedlots as well. From the USDA TAMU research, "Some feedlots reported close to a 20 percentage point increase in capacity utilization due to packer procurement relationships (AMAs), which spreads overhead costs over more cattle."[84] Additionally, the use of AMAs reduces marketing risk and helps feeder attract capital.

Third, they improve beef quality, which drives beef demand. Even as retail prices increased over the last two years, so has the producers' share of the retail value per USDA data. Notably, the packers' share has continued to decline and was 7.5 percent in July 2024, another benchmark challenging the assertion that packers exercise undue market power.



Source: USDA ERS Meat Price Spreads

AMS also should have used other research at its disposal in analyzing the rule. Specifically, in 2007, the Research Triangle Institute (RTI) conducted the definitive study, *Livestock and Meat Marketing Study* (LMMS) about using and benefits that flow to all sectors regarding AMAs.[85] The study was mandated and

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[83] cattle.pdf (tamu.edu) Chapter 5, p 107
[84] *Ibid*, Chapter 5, p. 110
[85] GIPSA Livestock and Meat Marketing Study Final Report 2007.pdf (lmic.info)

funded by Congress, published in six volumes, authored by 30 researchers in four teams, conducting nearly three years of research, and was peer reviewed. While the pricing data and percentage of market transaction that were under AMAs (much lower then) is dated, the basic market fundamentals are sound, and the model remains relevant. A simple update of this work would have provided a basis for AMS to analyze the impact of its proposed rule.

Some takeaways from the LMMS Executive Summary.

- The producers surveyed that used AMAs identified the ability to buy/sell higher quality cattle, improve supply management, and obtain better prices as the leading reasons for using AMAs.

- Feedlots identified cost savings of $1 to $17 per head from improved capacity utilization, more standardized feeding programs, and reduced financial commitments required to keep the feedlot at capacity.

- The producers and packers surveyed that use AMAs value them as a method of dealing with production, market access, and price risks. More specifically, feedlots believed that AMAs allow them to secure or sell better quality cattle and calves and improve operational management, efficiency, and capacity utilization.

- Hypothetical reductions in AMAs, as represented by formula arrangements (marketing agreements and forward contracts) and packer ownership, are found to have a negative effect on producer and consumer surplus measures.

- … feeder cattle producers lose more surplus relative to the other sectors

- The cost savings and quality improvements associated with the use of AMAs outweigh the effect of potential oligopsony market power that AMAs may provide packers. In the model simulations, even if the complete elimination of AMAs would eliminate market power that might currently exist, the net effect would be reductions in prices, quantities, and producer and consumer surplus in almost all sectors of the industry because of additional processing costs and reductions in beef quality. Collectively, this suggests that reducing the use of AMAs would result in economic losses for beef consumers and the beef industry.

The LMMS study quantifies the changes in producer and consumer surplus and its findings are contradictory to the Hadachek, *et al* resiliency study model used by AMS as an “example” of changing market power impacts in the cattle and beef market.

Change in Producer & Consumer Surplus from 25% Reduction in AMA Use ***in 2004 $USD billions***			
	1 Year	10 Year	% Change in Surplus
Industry Segment			
Consumer Surplus			
Retail Beef Consumer	($0.371)	($2.54)	-0.83%
Producer Surplus			
Retail Beef Producer	($0.098)	($1.50)	-0.36%
Wholesale Beef Producer	($0.143)	($2)	-0.86%
Slaughter Cattle Producer	($0.558)	($3.89)	-1.35%
Feeder Cattle Producer	($1.069)	($5.14)	-2.67%
Total of All Producers	($1.867)	($12.18)	-1.14%

In the USDA TAMU workshop research, Koontz quantifies these economic impacts from a potential loss of AMAs based on the LMMS study by RTI with updated costs.

> Limiting the use of AMAs by the cattle feeding and beef packing industries will decrease efficiency, increase processing and marketing costs, and has the potential to reduce beef product quality. In today's dollars, the impact is at least $10 per head for the packer and at least $25 per head for the cattle feeding industry.
>
> In today's dollars, the total direct impact on the marketing system ranges reasonably from at least $35 per head to more reasonably $65 per head. The larger amount is based on recent communications. The costs at the industry level would potentially be over $2.5 billion per year in today's dollars, with the industry making economic adjustments and reducing in size, so that over a 10-year horizon the cumulative costs would be over $16 billion. Much of the impact would be borne at the cow-calf producer level by farms and ranches.[86]

Koontz also notes:

> Even if all market power is due to AMAs and if there is no link between AMAs and improved beef quality – both of which are unlikely – limiting the use of AMAs does economic harm to producers and consumers.[87]

None of this work was unknown to the agency. As GIPSA recognized in its 2016 proposed rulemaking, *Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act,* (Emphasis added)

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[86] cattle.pdf (tamu.edu), Koontz, S. Chapter 5 at 124.
[87] *Id.* at 121.

> In 2007, RTI International conducted a comprehensive study of marketing practices in the livestock and red meat industries from farmers to retailers (the RTI Study). The RTI Study analyzed the extent of use, price relationships, and costs and benefits of contracting, including AMAs. The RTI Study found that AMAs increased the economic efficiency of the cattle and hog markets and yielded economic benefits to consumers, livestock producers and packers.[88] (Emphasis added)
>
> The RTI Study found that increased economic efficiencies came from less volatility in volume and more intensive use of production and processing facilities, meaning less capital, labor, and feed per pound of meat produced. Increased economic efficiencies also came from reduced transaction costs and from sending price signals to better match the meat attributes to consumer demand. Consumers benefit from lower meat prices and from getting meat with desired attributes. In turn, the consumer benefits increase livestock demand, which provides benefits to livestock producers.[89]

Likewise, the agency ignored the USDA TAMU Workshop.

As Peel, *et al* (2020), observed in a paper, *Fed Cattle Price Discovery Issues and Considerations*, commissioned by the National Cattlemen's Beef Association (NCBA)

> … business practices that predominate today occur for strong economic reasons ….[90]

These economic factors include efficiency, quality, and innovation to meet demand trends in the beef sector. In that regard, when the proposal published, NCBA issued the following statement.[91]

> USDA's newly proposed rule is a direct attack on cattle producer profitability. By creating criteria that effectively deems any innovation or differentiation in the marketplace improper, USDA is sending a clear message that cattle producers should not derive any benefit from the free market but instead be paid one low price regardless of quality, all in the name of so-called fairness.

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[88] 81 *Fed. Reg.* 92709 (Dec. 20, 2016).
[89] *Id.*
[90] fed-cattle-price-discovery-issues-and-considerations-e-1053.pdf (okstate.edu)
[91] NCBA Statement on Latest USDA Packers & Stockyards Rule

AMS also misrepresents the economic fundamentals, stating:

> Livestock and poultry markets are characterized by atomistic livestock producers and poultry growers numbering in the tens of thousands that deal with a much smaller number of downstream packers and poultry processors that may possess some oligopolistic characteristics.[92]

The economic definition of oligopoly distinguishes between a *homogenous* and *differentiated* oligopoly. In a homogeneous oligopoly a few firms all produce the same product and could "exert a disproportionate influence." The livestock and poultry industry, however, like many U.S. manufacturing industries, is a differentiated oligopoly, where firms produce slightly differentiated products to build product identification and brand loyalty in order to compete in the market and meet consumer demands. In the cattle and beef market, AMAs in particular are used to support brands, label claims, and other differentiating characteristics. In short, the industry is competitive, especially for high quality cattle in part because of AMAs. A reduction in their use would lessen this competition, as would potentially the impact of the rule on negotiated cattle.

Although the proposal would not require reduced use of AMAs, the agency's position regarding proving harm to competition, coupled with the unworkably vague standards proposed, would almost certainly drive regulated entities to utilize fewer AMAs as a litigation risk mitigation mechanism, to the detriment of producers, packers, and consumers. In short, by creating criteria that effectively create risk that innovation or differentiation in the marketplace is improper, AMS is sending the message that cattle producers should not derive any benefit from the free market, but instead be paid one low price regardless of quality, all in the name of so-called fairness.

C. The agency ignores its prior economic analyses associated with the same section of the PSA.

AMS discusses concentration in the cattle, hog, and poultry industries and cites concerns about market power to try to justify the proposal. Indeed, AMS cites investigations more than a century old from 1880 to 1920 regarding the meat packing industry's exercise of market power, asserting that

> Market power in livestock, meat, and poultry markets has not gone away. Academic and government sponsored research has consistently found that meat packers have some measure of market power, especially as livestock buyers.[93]

[92] 89 *Fed. Reg*. 53900.
[93] 89 *Fed. Reg*. 53900

First, as an economic term, "market power" does not include or imply unfair practices, *i.e.*, those that are a "collusive, coercive, predatory, restrictive, deceitful or exclusionary method of competition" prohibited the Packers and Stockyards Act.[94] Second, AMS says that "addressing the exercise of market power is one purpose of proposed §201.308, although it potentially addresses other issues concerning 'unfairness' under the Act as well."[95] This assertion leads to the conclusion that the intent of the proposal is to restructure the overall system of business practices and market transactions. Given that, the absence of a diligent economic analysis is conspicuous and troubling and the fact the agency ignored considerable research highlights that fact.

For example, the USDA TAMU workshop research concluded, "Research indicates that there is market power, but its effect has been small" and further noting that "most economic research confirms that the benefits to cattle producers due to economies of size in packing largely offset the costs associated with any market power exerted by packers."[96]

More specifically, the paper *Fed Cattle Price Discovery Issues and Considerations* provides the following quantification

> … the cost savings due to size economies are <u>at least 10 times greater than the negative market power impacts</u>. Cattle producers and beef consumers receive net benefits from the cost efficiencies of the current market structure in the form of higher cattle prices and lower beef prices than would exist in a less efficient industry. (Emphasis added)

These findings contradict AMS's broad assertion that

> Economic models of market power involve a deadweight loss to society as well as transfers from producers, consumers, or both to the firms exerting market power.[97]

In providing what AMS characterizes as "examples that indicate possible benefits of improving competitive conditions" the agency relies on the study *Market Structure and Resilience of Food Supply Chains Under Extreme Events.*[98] As indicated by its title, this paper is focused on policies specifically that address food

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[94] *Id*. at 53910.
[95] *Id*. at 53907.
[96] cattle.pdf (tamu.edu) Key Findings.
[97] 89 *Fed. Reg*. 53902
[98] Hadachek, Jeffery, Meilin Ma, and Richard Sexton. 2024. "Market Structure and Resilience of Food Supply Chains under Extreme Events." American Journal of Agricultural Economics 106((1): 21-44.

industry resiliency in times of market shocks, including "pandemics, geopolitical conflicts, and natural disasters."[99] In that paper, the authors note that "… strategies to enhance resilience may reduce efficiency of supply chain operations during normal times." Supply chain efficiencies, including efficiencies of size and scale of the packing sector, have been demonstrated by the academic research cited above to avoid the economic deadweight loss asserted by AMS. In this case, AMS selected a particularly poorly suited model to illustrate "examples" of "possible benefits" of the proposal and AMS acknowledges that by disclaiming "these values are not estimates of benefits of proposed §201.308."[100]

The cited work does not model the beef packing industry specifically but rather is structured to "represent prototype supply chains for key staples."[101] Thus the model includes certain assumptions that are not reflective of the cattle and beef market, which underscore its disconnection to current business practices and cattle market transactions.

- → First, it is assumed that all processors have access to the same technologies and thus the cost function is common.[102]
- → Second, the processing-retailing sector is assumed to be integrated.[103]
- → Third, exports were excluded resulting in a closed-economy model, based on the likelihood that extreme events would curtail trade.[104]

This last assumption is significant because assuming away exports in "times of extreme shock" is not applicable to "normal times." According to the U.S. Meat Export Federation, beef exports in 2023 equated to $397 per head of cattle slaughtered, and $64 per head slaughtered for pork. Export sales of red meat are significant contributors to economic returns to livestock production.

Finally, the cited model omits processors' fixed costs as they are assumed to be irrelevant to production decisions.[105] While this assumption is applicable in a short run scenario, such as that defined by a market shock and the subject of the study, it is not applicable in the longer term for capital intensive industries such as meat packing, especially with market changes resulting from implementation of the proposal.

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[99] *Id*. p. 2.
[100] 89 *Fed. Reg*. 53902.
[101] Hadachek, p. 2.
[102] *Id*. p. 5.
[103] *Id*.
[104] *Id*. p. 4.
[105] *Id*. p. 5.

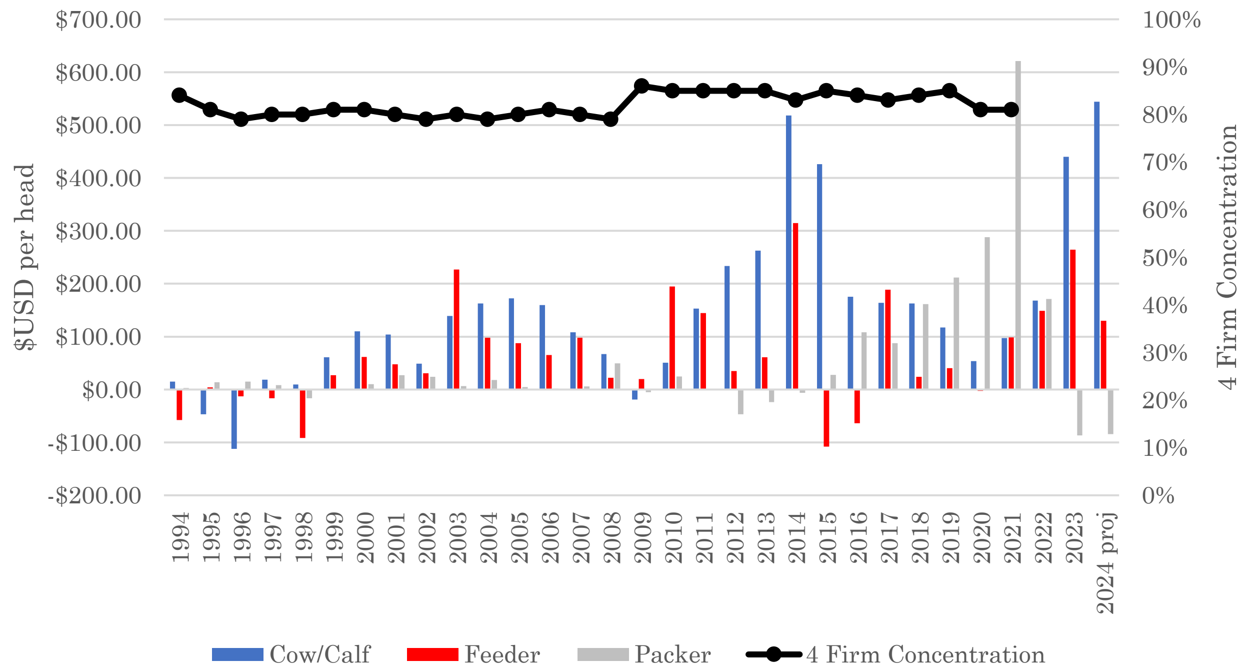
In short, by focusing on "examples" from an ill-suited model, AMS fails to demonstrate its assertion that

> With the assumed decreases and base levels of market power, production increases, retail prices decrease, and the producers' price of cattle increases with a decrease in market power.[106]

This is especially the case in light of the findings of Peel, *et al* (2020) that efficiencies of size provide net benefits to cattle producers and beef consumers that offset the deadweight loss effects of market power.

AMS leaves unanalyzed the actual financial performance of producer and packer segments in the cattle and beef value chain with regard to the agency's assertions of "… increased industry concentration" and exercise of market power.[107] As the proposal's Table 1 shows, *Four Firm Concentration Ratio in Livestock and Poultry Slaughter from 2010 to 2019,* "The concentration ratios were relatively stable over this period."[108] In fact, examining a longer timeline shows concentration ratios in the fed beef market have not changed appreciably for nearly 30 years, per the following chart, which is based on AMS Packers and Stockyards Division annual reporting.

[106] 89 *Fed. Reg*. 53902.
[107] *Id.* at 53891.
[108] *Id.* at 53900.



Note: USDA AMS PSD annual reports on 4 Firm Concentration have not been published for 2022-23

Source: Sterling Marketing, USDA AMS PSD, Meat Institute

The chart also shows per head margins by sector, which highlights the fallacy that the four-firm concentration in the fed cattle industry leads to undue market power that precludes any segment other than packers from making money. For example, the four-firm concentration ratio in 2014, when cow-calf and feedlot margins were at record highs and packer margins were negative, was the same as in 2017 when all three sectors showed positive margins.

As the chart shows, the cattle sector is notoriously cyclical. No sector – cow-calf, feedlot, or packer – has had positive margins every year. Moreover, through this 31-year window on sector-by-sector margins packers incurred negative margins most often. The agency's assertions and assumption upon which the proposal was developed ignores the empirical evidence of actual market conditions and fails to explain how they illustrate undue market power.

The agency does not even try to show packers or dealers have suppressed market prices—the most important evidence for exploitation of a commanding market position. The data illustrate that, for the vast majority of years, packer margins were tight, with the exception of the extreme disruptions from COVID in 2020 and 2021, notably when the four firm concentration ratio decreased to 81 percent from 85 percent in 2019. The irony of the proposal is that AMS published it at a time of record high cattle prices. Beef packers are forecast to experience their third consecutive year of negative margins in 2025, while the cow-calf sector is forecast to reach record margins, surpassing what is estimated to be a record for 2024.[109] The agency's failure means AMS has not demonstrated a "rational connection between the facts found"— *i.e.*, that the market is concentrated — "and the choice made."[110]

Not only did the agency ignore the readily available research discussed above, AMS ignored research it cited in the past. For example, in its 2016 rulemaking on this same topic GIPSA discussed at length the 2009 Government Accountability Office (GAO) report.

> For example, in 2009, the Government Accountability Office (GAO) reviewed 33 studies published since 1990 that were relevant for assessing the effect of concentration on commodity or food prices in the beef, pork, or dairy sectors. Most of the studies found no evidence of market power, or found that the efficiency gains from concentration were larger than the market power effects. … For example, with respect to beef processing, the GAO report concluded that concentration in the beef processing sector has been, overall, beneficial because the efficiency effects dominated the market power effects, thereby reducing farm-to-wholesale beef margins.[111]

The agency also seems to try to justify the proposal on the grounds there are many more producers than packers or integrators, a fact obvious on its face. Implicit in the agency's recitation of the data is that somehow these differences provide a market advantage to the packers or integrators. But the agency's market power theory is at odds with facts regarding new competition. Several new plants have been built over the last few years and more are in the pipeline. Indeed, USDA has doled out more than $1 billion to help underwrite new processing capacity.[112]

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[109] BeefTR 61224.pdf (farmjournal.com)
[110] *State Farm*, 463 U.S. at 43.
[111] 81 *Fed. Reg*. 92711 (Dec. 20, 2016). Citing United States Government Accountability Office. Concentration in Agriculture. GAO–09–746R. Enclosure II: Potential Effects of Concentration on Agricultural Commodity and Retail Food Prices.

[112] Meat and Poultry Supply Chain | USDA

D. The economic analysis is flawed because the "benefits" it identifies are speculative at best.

Imposing significant costs on businesses without corresponding benefits is arbitrary, yet that is precisely what adopting the proposal would do.[113] AMS concedes it "was unable to quantify the benefits" of the proposal.[114] The agency's failure to show the rules will do more good than harm renders them arbitrary and capricious. The Supreme Court instructed EPA when that agency "refused to consider whether the costs of its decision outweighed the benefits," the relation of costs to benefits is "an important aspect of the problem when deciding whether regulation is appropriate," and an agency's failure to do so, absent special statutory authorization, is arbitrary and capricious.[115] "One would not say that it is even rational … to impose billions of dollars in economic costs in return for a few dollars in … benefits."[116]

To save itself, the agency engages in speculation.

> If AMS's enforcement of proposed § 201.308 has the effect of improving competitive conditions in the markets, then the changing market conditions would likely result in a reduction in welfare for packers and live poultry dealers and an increase for producers and consumers. These would be costs to packers and live poultry dealers, and would be offset by gains for consumers, growers, and producers.[117] (Emphasis added)

But the proposal should not and cannot be based on speculation. And as the RTI and Workshop studies showed, a reduction in the use of AMAs, which will occur due to the threat of litigation, will adversely affect producers and consumers. Indeed, the agency continues its speculation and concedes the proposal could result in higher production costs per unit, hardly a benefit to consumers.

> Changing competitive conditions could have production efficiency effects, which may or may not be larger than market power effects, e.g., decreasing market power could result in more smaller packers with higher production costs per unit. Hence, a full accounting of net benefits would involve analysis of demand and supply changes.[118] (Emphasis added)

Simply put, what the agency seeks to do is strengthen the bargaining hand of producers and growers and diminish the lawfully-acquired bargaining power of

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[113] *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).
[114] 89 *Fed. Reg*. at 53909.
[115] *Michigan*, 135 S. Ct. at 2707.
[116] *Id.*
[117] 89 *Fed. Reg*. at 53905.
[118] *Id.*

packers and dealers. Absent a showing of unlawful monopsonist conduct, which AMS has not shown, the agency has no basis for placing a thumb on one side of the scale and distorting the competitive bargaining process that naturally occurs.[119]

E. The proposal also would affect negotiated cash transactions.

Although the proposal would have its greatest impact on AMAs, it covers any interaction or transaction between producers and packers, which would include negotiated sales. Markets and prices change daily and hourly within a trading day based on the supplies purchased and offered, weather conditions, and other factors. The risk of frivolous litigation resulting from buyers responding to these market supply and demand signals would also exist in negotiated transactions, leading to adverse effects on livestock prices.

Summary

The inefficiencies and litigation that will result from implementing the proposal will increase the costs of domestic beef, pork, and poultry production. Such a result would harm American consumers who would pay more for meat, and it would harm domestic livestock producers, poultry growers, packers, and dealers by decreasing demand for domestic products and hurting exports. And the uncertainty inherent in the proposal would leave AMS, and plaintiffs' lawyers, with an unfettered ability to outlaw or challenge a practice or contract provision in the fed cattle, hog, and live poultry markets. Courts do not permit agencies to promulgate rules without "some limiting standard, rationally related to the goals of the Act."[120]

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[119] *Cf. SBC Commc'ns, Inc. v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) (agency not at liberty to "subordinate the public interest to the interest of equalizing competition among competitors").
[120] *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999).

The Meat Institute appreciates the opportunity to submit these comments regarding the proposal and welcomes the opportunity to meet with the agency to discuss possible ramifications of any regulatory changes. If you have questions or would like to discuss the issues or points presented, please contact me.

Respectfully submitted,

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