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DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

9 CFR Part 201

RIN: 0580-AB07

Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act Of 2008; Conduct in Violation of the Act

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA

ACTION: Proposed rule.

SUMMARY: The Department of Agriculture (USDA), Grain Inspection, Packers and Stockyards Administration (GIPSA) is proposing to add several new sections to the regulations under the Packers and Stockyards Act, 1921, as amended and supplemented (P&S Act).

The new regulations that GIPSA is proposing would describe and clarify conduct that violates the P&S Act and allow for more effective and efficient enforcement by GIPSA. The proposed regulations would clarify conditions for industry compliance with the P&S Act and provide for a fairer market place.

DATES: We will consider comments we receive by [Insert date 60 days from date of publication in the *Federal Register*].

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

- E-mail: comments.gipsa@usda.gov.
- Mail: Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW., Room 1643-S, Washington, DC 20250-3604.

- Fax: (202) 690-2173.
- Hand Delivery or Courier: Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW., Room 1643-S, Washington, DC 20250-3604.
- Federal e-Rulemaking Portal: <http://www.regulation.gov>. Follow the on-line instructions for submitting comments.

Instructions: All comments will become a matter of public record and should be identified as “Farm Bill Comments,” making reference to the date and page number of this issue of the *Federal Register*. Comments will be available for public inspection at <http://www.regulations.gov> and in the above office during regular business hours (7 CFR 1.27(b)). Please call GIPSA Management Support Services staff at (202) 720-7486 to arrange a public inspection of comments.

FOR FURTHER INFORMATION CONTACT: S. Brett Offutt, Director, Policy and Litigation Division, P&SP, GIPSA, 1400 Independence Ave., SW., Washington, DC 20250, (202) 720-7363, s.brett.offutt@usda.gov.

SUPPLEMENTARY INFORMATION:

Background

The P&S Act sets forth broad prohibitions on the conduct of entities operating subject to its jurisdiction. These broad provisions make enforcement difficult and create uncertainty among industry participants regarding compliance. In enacting Title XI of the Food, Conservation and Energy Act of 2008 (Farm Bill) (P.L. 110-246), Congress recognized the nature of problems encountered in the livestock and poultry industries and amended the P&S Act. These amendments established new requirements for participants in the livestock and poultry industries

and required the Secretary of Agriculture (Secretary) to establish criteria to consider when determining whether the P&S Act has been violated.

In accordance with the Farm Bill, GIPSA is proposing regulations under the P&S Act that would clarify when certain conduct in the livestock and poultry industries represents the making or giving of an undue or unreasonable preference or advantage or subjects a person or locality to an undue or unreasonable prejudice or disadvantage. These proposed regulations also establish criteria that GIPSA would consider in determining whether a live poultry dealer has provided reasonable notice to poultry growers of a suspension of the delivery of birds under a poultry growing arrangement; when a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of the P&S Act; and whether a packer, swine contractor or live poultry dealer has provided a reasonable period of time for a grower or a swine producer to remedy a breach of contract that could lead to termination of the growing arrangement or production contract.

The Farm Bill also instructed the Secretary to promulgate regulations to ensure that poultry growers, swine production contract growers and livestock producers are afforded the opportunity to fully participate in the arbitration process, if they so choose. We are proposing a required format for providing poultry growers, swine production contract growers and livestock producers the opportunity to decline the use of arbitration in those contracts that have an arbitration provision. We are also proposing criteria that we would consider in finding that poultry growers, swine production contract growers and livestock producers have a meaningful opportunity to participate fully in the arbitration process if they voluntarily agree to do so. We would use these criteria to assess the overall fairness of the arbitration process.

In addition to proposing regulations in accordance with the Farm Bill, GIPSA is proposing regulations that would prohibit certain conduct because it is unfair, unjustly discriminatory or deceptive, in violation of the P&S Act. These additional proposed regulations are promulgated under the authority of section 407 of the P&S Act, and complement those required by the Farm Bill to help ensure fair trade and competition in the livestock and poultry industries.

In recent years, there has been an increased use of contracting in the marketing and production of livestock and poultry by entities under the jurisdiction of the P&S Act. This increased contracting coupled with the market concentration has significantly changed the industry and the rural economy as a whole, making proposed regulations necessary, especially in those situations in which packers, live poultry dealers or swine contractors use their market power to harm producers or impair private property rights of growers and producers.

Transparency, competition and financial integrity of the marketplace have also diminished.

Section 407 of the P&S Act (7 U.S.C. 228) provides that the Secretary “may make such rules, regulations, and orders as may be necessary to carry out the provisions of this Act.” Pursuant to this authority, the Secretary has issued regulations, published as Part 201 of Title 9 of the Code of Federal Regulations (CFR). Sections 11005 and 11006 of the Farm Bill became effective June 18, 2008, and instruct the Secretary to promulgate additional regulations as described in this notice of proposed rulemaking. These regulations, if finalized, are also proposed to be published in Part 201 of Title 9 of the CFR.

Section 202 of the P&S Act (7 U.S.C. 192) prohibits packers, swine contractors and live poultry dealers from engaging in unfair and deceptive practices, giving undue preferences to persons or localities, apportioning supply among packers, swine contractors and live poultry dealers in restraint of commerce, manipulating prices, creating a monopoly, or conspiring to aid

in unlawful acts. The Farm Bill requires promulgation of regulations under the P&S Act dealing with various industry behaviors. In addition, GIPSA has identified 11 terms requiring definition and three areas of concern in which regulations will be developed to address each of these behaviors. Definitions of the terms, tournament system, principal part of performance, capital investment, additional capital investment, suspension of delivery of birds, forward contract, marketing agreement, production contract, competitive injury, and likelihood of competitive injury would be added to § 201.2 of the regulations. The proposed regulations are grouped under the general headings of (1) undue or unreasonable preference or advantage, (2) unfair, unjustly discriminatory and deceptive practices, and (3) arbitration.

In preparing to issue these proposed regulations, GIPSA held three public meetings in October 2008, in Arkansas, Iowa, and Georgia to gather comments, information, and recommendations from interested parties. Attendees at these meetings were asked to give input on the Farm Bill requirements for production contracts, arbitration, and the four following topics included in Farm Bill section 11006: (1) undue or unreasonable preferences or advantages, (2) adequate notice to poultry growers of suspension of delivery of birds, (3) criteria for determining when requiring additional capital investment over the life of a contract constitutes a violation, and (4) criteria for determining when packers, swine contractors and live poultry dealers have provided a reasonable period of time to remedy a breach of contract that could lead to contract termination. Attendees provided comments on these topics as well as other issues of concern under the P&S Act, including packer livestock procurement practices believed to unjustly discriminate against producers based on the volume of livestock they sell.

GIPSA also gathered data concerning market participants. There are roughly 30,000 swine producers and poultry growers operating under production contracts. More than 85 percent of

these producers and growers will be contracted to one of the five largest slaughtering firms. The average gross sales revenue of the three largest of these slaughtering firms is 23,000 times that of a small grower or producer.

The proposed regulations are based on comments, information, and recommendations received in those meetings along with GIPSA's expertise, experience, and interactions in the livestock and poultry industries.

The P&S Act

The P&S Act was enacted in 1921 "to comprehensively regulate packers, stockyards, marketing agents and dealers."¹ The P&S Act "was framed in language designed to permit the fullest control of packers and stockyards which the Constitution permits, and its coverage was to encompass the complete chain of commerce and give the Secretary of Agriculture complete regulatory power over packers and all activities connected therewith."² It was hailed as a "far-reaching measure and extend[ing] further than any previous law into the regulation of private business."³

The scope of the P&S Act is broad. Section 202 of the P&S Act provides that "[i]t shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

¹ *Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co.*, 498 F.2d 925, 927 (10th Cir. 1974).

² *Bruhn's Freezer Meats of Chicago, Inc. v. USDA*, 438 F.2d 1332, 1339 (8th Cir. 1971) (citing H.R. Rep. No. 67-324 (1921); H.R. Rep. No. 67-77 (1921)).

³ 61 Cong. Rec. 1801 (1921) (statement of Rep. Haugen); *see also Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961) ("The legislative history shows Congress understood the sections of the [P&S Act] under consideration were broader in scope than the antecedent legislation.") (citing 61 Cong. Rec. 1805 (1921)).

- Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
- Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or
- Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or
- Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or
- Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or
- Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or
- Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section.”⁴

The P&S Act sets forth similar prohibitions on stockyard owners, market agencies, and dealers. Section 312 provides that “[i]t shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the

⁴ *See also* sections 2, 201 (defining the statutory terms). Section 202 originally applied only to the livestock and meat packing industries. Live poultry dealers were added in 1935, *see* Pub. L. No. 74-272, 49 Stat. 648 (1935), and swine contractors were added in 2002, Pub. L. No. 107-171, § 10502(b)(1), 116 Stat. 134, 509 (2002).

stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.”⁵

In addition, the P&S Act imposes a variety of more specific limitations and requirements. In particular, it specifies procedures for a poultry grower or swine production contract grower seeking to cancel a poultry growing arrangement or swine production contract;⁶ requires disclosure of additional capital investments in production contracts;⁷ establish procedures for the use of arbitration;⁸ imposes record-retention requirements;⁹ and requires that certain contracts and rates to be available to the Secretary and the public (without confidential information).¹⁰ The P&S Act further declares that “[a]ny delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock” or “[a]ny delay or attempt to delay, by a live poultry dealer which is a party to any such transaction, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending

⁵ *See* also section 301, 302 (providing additional definitions); section 304 (providing that “[a]ll stockyard services furnished pursuant to reasonable request made to a stockyard owner or market agency at such stockyard shall be reasonable and nondiscriminatory and stockyard services which are furnished shall not be refused on any basis that is unreasonable or unjustly discriminatory”); section 305 (providing that “[a]ll rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful”); section 307 (“It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.”).

⁶ *Id.* section 208.

⁷ *Id.* section 208.

⁸ *Id.* section 210.

⁹ *Id.* section 401.

¹⁰ *Id.* sections 222, 306.

the normal period of payment for poultry obtained by poultry growing arrangement or purchased in a cash sale,” is “an ‘unfair practice’ in violation of this chapter.”¹¹

The P&S Act provides that “[t]he Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter.”¹² The P&S Act also sets forth procedures for enforcement actions before the Secretary¹³ and private litigation.¹⁴

The Supreme Court upheld the constitutionality of the P&S Act shortly after its enactment in *Stafford v. Wallace*.¹⁵ The Court concluded that the P&S Act reflected a permissible exercise of Congress’ powers under the Commerce Clause because of the interstate nature of the livestock industry.¹⁶ The Supreme Court emphasized that the P&S Act was “remedial legislation,” whose “object [was] the free and unburdened flow of live stock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still, as live stock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market.”¹⁷ The Court explained that there were multiple “evils” that the P&S Act sought to remedy:

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. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil, which it sought to provide against by the act, was exorbitant charges, duplication of commissions, deceptive

¹¹ *Id.* sections 409, 410.

¹² *Id.* section 408.

¹³ *Id.* section 408. The [S]ecretary cannot proceed against section 202 violations by live poultry dealers by adjudications under this section. Payment and trust violations that would constitute unfair practices under section 202 may be administratively adjudicated under section 411 only as violations of sections 410 and 207. *Id.* sections 410, 411.

¹⁴ *Id.* sections 308, 404.

¹⁵ 258 U.S. 495 (1922).

¹⁶ *Id.* at 516.

¹⁷ *Id.* at 513, 514, 521.

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.¹⁸

Sections 202(a) and (b) of the P&S Act

Section 202(a) of the P&S Act prohibits “any unfair, unjustly discriminatory, or deceptive practice.” Section 202(b) prohibits “any undue or unreasonable preference or advantage [or] prejudice or disadvantage.” USDA has consistently taken the position that, in some cases, a violation of section 202(a) or (b) can be proven without proof of predatory intent, competitive injury, or likelihood of injury.¹⁹ At the same time, USDA has always understood that an act or practice’s effect on competition can be relevant²⁰ and, in certain circumstances, even dispositive²¹ with respect to whether that act or practice violates section 202(a) and/or (b).

The longstanding agency position that, in some cases, a violation of section 202(a) or (b) can be proven without proof of likelihood of competitive injury is consistent with the language and structure of the P&S Act, as well as its legislative history and purposes. Neither section 202(a) nor section 202(b) contains any language limiting its application to acts or practices that have an adverse effect on competition, such as acts “restraining commerce.” Instead, these provisions use terms including “deceptive,” “unfair,” “unjust,” “undue,” and “unreasonable” -- which are

¹⁸ *Id.* at 514-15.

¹⁹ *In re Ozark county Cattle Co.*, 49 Agric. Dec. 336, 365 (1990); 1 John H. Davidson et al., *Agricultural Law* section 3.47, at 244 (1981).

²⁰ *See In re Sterling Colo. Beef Co.*, 39 Agric. Dec. 184, 235 (1980) (considering and rejecting respondent packer's business justification for challenged conduct).

²¹ *See Armour & Co. v. United States*, 402 F.2d 712, 717 (7th Cir. 1968) (a coupon promotion plan (here coupons for fifty cents off specified packages of bacon) is not per se unfair and violates section 202(a) if it is implemented with some predatory intent or carries some likelihood of competitive injury); *In re IBP, Inc.*, 57 Agric. Dec. 1353, 1356 (1998) (contractual right of first refusal at issue violated section 202 “because it has the effect or potential of reducing competition”).

commonly understood to encompass more than anticompetitive conduct.²² This is in direct contrast to sections (c)-(e), which expressly prohibit only those acts that have the effect of “restraining commerce,” “creating a monopoly,” or producing another type of antitrust injury. The fact that Congress expressly included these limitations in sections (c)-(e) but not in sections (a) and (b) is a strong indication that Congress did not intend sections (a) and (b) to be limited to harm to competition. And Congress confirmed the agency’s position by amending the P&S Act to specify specific instances of conduct prohibited as unfair that do not involve any inherent likelihood of competitive injury.²³

USDA’s interpretation of sections 202(a) and (b) is also consistent with the interpretation of other sections of the P&S Act using similar language – sections 307 and 312. Courts have recognized that the proper analysis under these provisions depends on “the facts of each case,”²⁴ and that these sections may apply in the absence of harm to competition or competitors.²⁵

Although proof of harm to competition is not necessary to satisfy the statutory language, it is sufficient to do so. Any act that harms competition is necessarily also “unfair” and therefore violates section 202(a).

²² When the P&S Act was enacted, *Webster’s New International Dictionary* defined “deceptive” as “[t]ending to deceive; having power to mislead, or impress with false opinions”; “unfair” as “[n]ot fair in act or character; disingenuous; using or involving trick or artifice; dishonest; unjust; inequitable” (2d. definition); “unjust” as “[c]haracterized by injustice; contrary to justice and right; wrongful”; “undue” as “[n]ot right; not lawful or legal; violating legal or equitable rights; improper” (2d. definition); and “unreasonable” as “[n]ot conformable to reason; irrational” or “immoderate; exorbitant.” *Webster’s New International Dictionary* 578, 2237, 2238, 2245, 2248 (1st ed. 1917). This is the same understanding of the terms today.

²³ *See* sections 409, 410.

²⁴ *Capitol Packing Company v. United States*, 350 F.2d 67, 76 (10th Cir. 1965); *see also Spencer Livestock Comm’n Co. v USDA*, 841 F.2d 1451, 1454 (9th Cir. 1988).

²⁵ *See, e.g., Spencer*, 841 F.2d at 1455 (Section 312 covers “a deceptive practice, whether or not it harmed consumers or competitors.”).

The legislative history and purposes of the P&S Act also support USDA’s position. The Act “is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.”²⁶

In amending the P&S Act, Congress made clear that its goals for the statute extended beyond the protection of competition. In 1935, for instance, when Congress first subjected live poultry dealers to sections 202(a) and (b), Congress explained in the statute itself that “[t]he handling of the great volume of live poultry . . . is attendant with various unfair, deceptive, and fraudulent practices and devices, resulting in the producers sustaining sundry losses and receiving prices far below the reasonable value of their live poultry. . . .”²⁷ Similarly, the House Committee Report regarding 1958 amendments stated that “[t]he primary purpose of [the P&S Act] is to assure fair competition *and fair trade practices*” and “to safeguard farmers . . . against receiving less than the true market value of their livestock.”²⁸ The Report further observed that protection extends to “unfair, deceptive, unjustly discriminatory” practices by “small” companies in addition to “monopolistic practices.”²⁹ In accordance with this legislative history, courts and commentators have, over a span exceeding 70 years, recognized that the purposes of the P&S Act are not limited to protecting competition.³⁰

²⁶ H.R. Rep. 67-77, at 2 (1921); *see also Swift & Co. v. United States*, 308 F.2d 849, 853 (7th Cir. 1962) (“The legislative history showed Congress understood the sections of the [P&S Act] under consideration were broader in scope than antecedent legislation such as the Sherman Antitrust Act, sec. 2 of the Clayton Act, 15 U.S.C. 13, sec. 5 of the Federal Trade Commission Act, 15 U.S.C. 45 and sec. 3 of the Interstate Commerce Act, 49 U.S.C. 3.”).

²⁷ Pub. L. No. 74-272, 49 Stat. 648, 648 (1935).

²⁸ H.R. Rep. No. 85-1048 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5212, 5213 (emphasis added).

²⁹ *Id.* at 5213.

³⁰ *See, e.g., Stafford*, 258 U.S. at 513-14; *Spencer Livestock Comm’n Co. v. USDA*, 841 F.2d 1451, 1455 (9th Cir. 1988); *United States v. Perdue Farms, Inc.*, 680 F.2d 277, 280 (2d Cir. 1982); *Bruhn’s Freezer Meats*, 438 F.2d at 1336-37; *Bowman v. USDA*, 363 F.2d 81, 85 (5th Cir. 1966); *United States v. Donahue Bros.*, 59 F.2d 1019, 1023 (8th Cir. 1932).

Recently, three courts of appeals have disagreed with the USDA's interpretation of the P&S Act and have concluded (in cases to which the United States was not a party) that plaintiffs could not prove their claims under section 202(a) and/or (b) without proving harm to competition or likely harm to competition.³¹ After carefully considering the analysis in these opinions, USDA continues to believe that its longstanding interpretation of the P&S Act is correct. These court of appeals opinions (two of which were issued over vigorous dissents)³² are inconsistent with the plain language of the statute; they incorrectly assume that harm to competition was the only evil Congress sought to prevent by enacting the P&S Act; and they fail to defer to the Secretary of Agriculture's longstanding and consistent interpretation of a statute administered by the Secretary. To the extent that these courts failed to defer to the USDA's interpretation of the statute because that interpretation had not previously been enshrined in a regulation,³³ the new regulations constitute a material change in circumstances that warrants judicial reexamination of the issue.³⁴

Competitive Injury

Although it is not necessary in every case to demonstrate competitive injury in order to show a violation of section 202(a) and/or (b), any act that harms competition or is likely to harm

³¹ *Wheeler*, ___ F.3d ___, 2009 WL 4823002, No. 07-40651 (5th Cir. 2009) (en banc) (no violation of section 202(a) or (b) without a likely effect on competition); *Been v. O.K. Indus., Inc.*, 495 F.3d 1217 (10th Cir. 2007) ("unfair practice" is one that injures or is likely to injure competition); *London v. Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir. 2005) (P&S Act prohibits only those unfair, discriminatory, or deceptive practices that adversely affect or are likely to adversely affect competition). The issue is currently pending before one other court of appeals. *Terry v. Tyson Farms, Inc.*, No. 08-5577 (6th Cir., argued March 3, 2009).

³² *Wheeler*, 2009 WL 4823002, at 14-28 (Garza, J., dissenting); *Been*, 495 F.3d at 1238-43 (Hartz, J., concurring in part and dissenting in part).

³³ See *London*, 410 F.3d at 1226-27,

³⁴ See *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-84 (2005).

competition necessarily violates the statute. Accordingly, proposed new § 201.2(t) defines competitive injury and proposed new § 201.2(u) defines likelihood of competitive injury. Competitive injury occurs when an act or practice distorts competition in the market channel or marketplace. How a competitive injury manifests itself depends critically on whether the target of the act or practice is a competitor (*e.g.*, a packer harms other packers), or operates at a different level of the livestock or poultry production process (*e.g.*, a packer harms a producer). The likelihood of competitive injury occurs when an act or practice raises rivals' costs, improperly forecloses competition in a large share of the market through exclusive dealing, restrains competition among packers, live poultry dealers or swine contractors or otherwise represents a misuse of market power to distort competition.³⁵ The likelihood of competitive injury also occurs when a packer, swine contractor, or live poultry dealer wrongfully depresses prices paid to a producer or grower below market value or impairs the producer or grower's ability to compete with other producers or growers or to impair a producer's or grower's ability to receive the reasonable expected full economic value from a transaction in the market channel or marketplace.

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

Unfair, Unjustly Discriminatory and Deceptive Practices

³⁵ *See, e.g.*, Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L.J. 209 (1986); 11 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* 1821 (2d ed. 2005).

GIPSA is proposing to add to the regulations a new § 201.210(c) that reiterates the Secretary's position that the appropriate analysis under section 202(a) depends on the nature and circumstances of the challenged conduct. A finding of harm or likely harm to competition is always sufficient, but not always necessary, to establish a violation of sections 202(a) and/or (b) of the P&S Act.

In the Farm Bill, Congress required criteria to be established to determine: (1) whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement; (2) when a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of the P&S Act; and (3) if a packer, swine contractor, or live poultry dealer has provided a reasonable period of time for a poultry grower or swine production contract grower to remedy a breach of contract that could lead to termination of the growing arrangement or production contract. Regulation in these areas (and other areas in which GIPSA is proposing regulation) is important to preserve the rights of poultry growers, swine production contract growers and livestock producers and maintain trust and integrity in the marketplace. GIPSA has been informed by growers and producers, particularly where contracts for the production or sale of livestock or poultry are involved, that poultry growers, swine production contract growers and livestock producers are sometimes at a distinct disadvantage in negotiating the terms of an agreement. These reports indicate that packers, swine contractors and live poultry dealers have exhibited a tendency to exert their disproportionate positions of power by misleading or retaliating against poultry growers, swine production contract growers or livestock producers, and that some growers or producers may have no choice but to acquiesce to the

packer's, swine contractor's, or live poultry dealer's terms for entering into a contract or growing arrangement, or acquiesce to unfair conduct in order to continue in business.

Proposed new § 201.210(a) would first provide a statement of the broad coverage of section 202(a). It would then provide the following eight specific examples of conduct deemed unfair:

- An unjustified material breach of a contractual duty, express or implied, or an action or omission that a reasonable person would consider unscrupulous, deceitful or in bad faith in connection with any transaction in or contract involving the production, maintenance, marketing or sale of livestock or poultry.
- A retaliatory action or omission by a packer, swine contractor, or live poultry dealer in response to the lawful expression, spoken or written, association, or action of a poultry grower, livestock producer or swine production contract grower; a retaliatory action includes but is not limited to coercion, intimidation, or disadvantage to any producer or grower in an execution, termination, extension or renewal of a contract involving livestock or poultry;
- A refusal to provide to a contract poultry grower or swine production contract grower, upon request, the statistical information and data used to determine compensation paid to the contract grower or producer under a production contract, including, but not limited to, feed conversion rates, feed analysis, origination and breeder history;

An action or attempt to limit by contract a poultry grower's, swine production contract grower's, or livestock producer's legal rights and remedies afforded by law, including, but not limited to the following:

- i. The right of a trial by jury (except when arbitration has been voluntarily agreed to);

- ii. The right to all damages available under the law;
 - iii. Rights available under bankruptcy law;
 - iv. The authority of the judge or jury to award attorney fees to the appropriate party;
or
 - v. A requirement that a trial or arbitration be held in a location other than the location where the principal part of the performance of the arrangement or contract occurs;
- Paying a premium or applying a discount on the swine production contract grower's payment or the purchase price received by the livestock producer from the sale of livestock without documenting the reason(s) and substantiating the revenue and cost justification associated with the premium or discount;
 - Termination of a poultry growing arrangement or swine production contract with no basis other than the allegation by the packer, swine contractor, live poultry dealer or other person that the poultry grower or swine production contract grower failed to comply with an applicable law, rule or regulation. If the live poultry dealer or swine contractor believes that a poultry grower or swine producer is in violation, the live poultry dealer or swine contractor must immediately report the alleged violation to the relevant law enforcement authorities if they wish to use this alleged violation as grounds for termination.
 - A representation, omission, or practice that is fraudulent or likely to mislead a reasonable poultry grower, swine production contract grower, swine contract producer or livestock producer regarding a material condition or a term in a contract or business transaction.
Any act that causes competitive injury or creates a likelihood of competitive injury.

Proposed new § 201.212 would not be part of the definition of “unfair,” but rather a separate and distinct regulation. It proposes to address various situations where a packer (or group of packers) is able to manipulate prices paid for livestock, such as where a packer-to-packer sale signals the price that packers will pay producers or where a packer purchases cattle through exclusive arrangements with dealers and is able to depress the price paid to producers through that conduct.³⁶ Proposed new § 201.212(c) would prohibit bonded packers from purchasing livestock from other packers or other packer-affiliated companies, but allows waivers in emergency situations such as a catastrophe or natural disaster that may severely impact operations at a particular packing company or plant. The proposed regulation is intended to limit the ability of packers to manipulate prices.

Congress recognized, and GIPSA has been informed by poultry growers and industry organizations, that the disproportionate negotiating power of a live poultry dealer may sometimes infringe on poultry grower’s rights. Under a poultry growing arrangement, a live poultry dealer has discretion on whether it will perform under the agreement; *i.e.*, whether it will place poultry on a poultry grower’s farm. The poultry grower does not have the same discretion and must raise and care for poultry placed on his or her farm by the live poultry dealer. There have been instances in which a live poultry dealer has failed to place poultry on a poultry grower’s farm for an extended period of time without notifying the poultry grower of the reasons for or the anticipated length of delay in placing additional poultry. Without sufficient information, a poultry grower is unable to protect his or her financial interests and make informed business decisions. GIPSA is proposing to add a new § 201.215 that would require a live poultry dealer to give adequate notice of any suspension of delivery of poultry. In proposed

³⁶ Chapter 6 “Dynamic Price Competition and Tacit Collusion” in Jean Tirole’s *The Theory of Industrial Organization* (1988) provides a general discussion of price signaling and competition.

new § 201.215, live poultry dealers would be required to provide notice of any suspension of delivery of birds at least 90 days prior to the suspension taking effect. This 90-day period would allow the poultry grower time to consider options for utilizing his or her poultry houses and for keeping up with any loan payments, some of which are government guaranteed loans. Live poultry dealers may request a waiver from the GIPSA Administrator of the 90-day notice requirement in emergency situations such as a catastrophic or natural disaster where the dealer could not have foreseen the reduction in delivery of poultry.

Capital investments required by a packer, swine contractor, or live poultry dealer during the life of a growing arrangement or production contract may violate the P&S Act. Congress required the Secretary to develop criteria to consider when determining if such a requirement is a violation of the P&S Act. Proposed new §§ 201.216 and 201.217 would provide several requirements designed to preserve trust between the parties and limit the risk incurred by poultry growers or swine production contract growers. Some contracts are multiyear and provide long-term security while others are short term and could terminate at the end of a single growing period. Among the proposed requirements is that a contract be of sufficient length to allow the poultry growers or swine production contract growers to recoup 80 percent of investment costs related to the capital investment. For example, in situations where a poultry grower or swine production contract grower is required to make capital investments as a condition to enter into or continue a contract, that requirement may be considered unfair if the packer, swine contractor, or live poultry dealer did not offer a contract duration that would allow the poultry grower or swine production contract grower to recover 80 percent of its investment cost, at a repayment rate based on a percentage of the grower's yearly compensation. The term "investment cost" includes any balance due on the initial capital investment and any additional capital investments,

plus accrued loan interest, if any, at the legal rate of interest where the principal part of the performance takes place under the contract. We are proposing that 80 percent of the investment costs represent the portion of the overall value of the poultry grower's or swine production contract grower's property that the growing or raising facilities represent with a poultry growing arrangement or swine production contract in place.

Proposed new § 201.216 that would establish criteria the Secretary may consider when determining whether a requirement that a poultry grower or swine production contract grower make additional capital investments over the life of a swine production contract or poultry growing arrangement constitutes an unfair practice in violation of the P&S Act. Establishing these criteria is expected to deter or reduce unfair conduct and help preserve the value of the poultry grower's or swine production contract grower's property rights and protect against financial loss by the grower. Allowing for grower discretion to accept or reject proposed capital investments made by the live poultry dealer provides for increased flexibility to accommodate mutually advantageous investment opportunities.

Congress recognized the need for poultry growers or swine production contract growers to have reasonable time to remedy a breach of contract that could lead to termination of that contract. GIPSA's proposed new § 201.218 would include criteria that the Secretary will consider when determining whether a poultry grower or swine production contract grower has been given sufficient time to remedy a breach of contract. Proposed new § 201.218 would set forth procedures that a packer, swine contractor, or live poultry dealer must follow before it can terminate a contract or poultry growing arrangement based on a breach by the poultry grower or swine production contract grower.

Undue or Unreasonable Preference or Advantage

In enacting the 2008 Farm Bill, Congress required the Secretary to establish criteria to be considered in determining whether conduct constitutes an undue or unreasonable preference or advantage in violation of the P&S Act. Through telephone calls received from producers and poultry growers, complaints received by its field agents, and comments made at meetings, conferences and conventions, GIPSA has learned that packers, swine contractors and live poultry dealers sometimes treat similarly situated poultry growers and livestock producers differently. Disparate treatment of similarly situated growers and producers can be a violation of the P&S Act when that disparate treatment is undue or unreasonable. According to producer comments made at public meetings, as well as comments and complaints from individual producers, a packer may offer better price terms to producers that can provide larger volumes of livestock than the packer offers to a group of producers that collectively can provide the same volume of livestock of equal quality, without a legitimate justification for the disparity. In one case, a Midwestern packer was offering a higher price to an individual producer who could deliver full truck loads of cattle. A group of producers approached the same packer and offered collectively to provide a full truck load of like cattle, but the packer refused to offer the same price terms to the group of producers. GIPSA is therefore proposing a new § 201.211 to address undue or unreasonably preferential treatment of poultry growers, swine production contract growers or livestock producers.

New proposed § 201.211 establishes criteria that the Secretary may consider in determining if differential treatment constitutes an undue or unreasonable preference or advantage, or an undue or unreasonable prejudice or disadvantage, under the P&S Act. The criteria include whether contract terms are offered to all producers that can provide the required volume, kind and quality of livestock, either individually or collectively. Other considerations include whether any price

premium based on a producer's or a group of producers' ability to deliver livestock meeting specified conditions is offered to other producers or groups of producers that can meet that condition. (For example, producers have reported to GIPSA that some packers will offer price premiums for early delivery to one producer that it does not offer to other producers or groups of producers that are willing and able to meet the same early morning delivery conditions at equal convenience to the packer). Finally, the Secretary may consider whether differences in price paid for livestock, based on the cost of acquiring or handling the livestock, are disclosed equally to all producers. GIPSA would consider the particular circumstances of any pricing disparity in determining whether to initiate an enforcement action alleging a violation of the P&S Act, including whether there is a legitimate justification for the disparity. This provision would not require packers to purchase livestock if their needs are already satisfied or impose a public utility duty to deal with all sellers.

In the course of its enforcement of the P&S Act, GIPSA has reviewed the records of many live poultry dealers and numerous poultry growing settlement documents. GIPSA has also received complaints from poultry growers regarding how settlements occur. These complaints indicate that some live poultry dealers have established pay schedules under which poultry growers that raise and care for the same type and kind of poultry receive different rates of pay; improperly grouped together those poultry growers who raise and care for live poultry in different types of poultry housing for settlement purposes; and, under a tournament system, paid some poultry growers less than the base pay amount in the poultry growing arrangement. These complaints also indicate that some poultry growers are not given the production information that is used in the compensation formula to determine their ranking in the tournament system. These practices, if not corrected, create a reasonable likelihood of competitive injury. GIPSA is

proposing a new § 201.214 that would require live poultry dealers that pay poultry growers on a tournament system to pay all poultry growers raising and caring for the same type of poultry the same base pay, and that would prohibit paying poultry growers less than the base pay amount. New proposed § 201.214 would also require that poultry growers be ranked in settlement groups with other poultry growers that raise and care for poultry in the same type of houses.

If a packer, swine contractor, or live poultry dealer believes it can justify disparate treatment of poultry growers, swine production contract growers or livestock producers, it must have a legitimate business reason for that differential treatment. GIPSA is proposing to add a new paragraph (b) to § 201.94 that would require packers, swine contractors or live poultry dealers to maintain records that justify their treatment of poultry growers, swine production contract growers, or livestock producers. This justification need not be extensive but should be enough to identify the benefit-cost basis of any pricing differentials received or paid, and may include increased or lower trucking costs; market price for meat; volume; labor, energy, or maintenance costs, etc. For example, a packer's participation in a branded program for a particular type of beef that returns a premium to the packer could be used to justify a higher price paid to producers that sell the type of cattle that meets the specifications of the branded program. In general, the data needed to justify a different treatment would identify those pecuniary costs and benefits associated with the treatment that demonstrate its decreased costs or increased revenues from a standard business practice. Therefore, GIPSA would consider the particular circumstances of any pricing disparity in determining whether a violation of the P&S Act occurred, including whether there is a legitimate justification for the disparity.

One of the common complaints that GIPSA has received regarding undue and unreasonable preferences or advantages is that packers, swine contractors and live poultry dealers offer

considerably better contract terms to select sellers/growers, which impedes other sellers/growers' ability to compete. GIPSA is proposing to add a new § 201.212(a) that would prohibit dealers operating as packer buyers from purchasing livestock for any packer other than the packer identifying that dealer as its packer buyer. A dealer is defined in the P&S Act as "any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser."³⁷ This section is proposed under the authority of section 303 of the P&S Act, requiring market agencies and dealers to register in such manner as the Secretary may prescribe. A packer buyer is any person regularly employed on salary, or other comparable method of compensation, by a packer to buy livestock for such packer. Proposed new § 201.212(b) would also prohibit packers from entering into exclusive purchase agreements with any dealer except those dealers the packer has identified as its packer buyers. This provision does not eliminate exclusive arrangements, but provides transparency by identifying the dealer as a packer buyer for a specific packer. Proposed new § 201.212(a) and (b) would work in conjunction to prevent apportioning territory by independent dealers and packers. This would open the market to other buyers, increasing participation in the cow and bull slaughter market and prevent collusion between multiple packers using one dealer as an exclusive agent to manipulate prices.

GIPSA has also been informed through discussion with livestock producers that most livestock sellers lack sufficient information on available contract terms. To increase the amount of information available that would allow sellers to make informed business decisions, GIPSA is proposing to add a new § 201.213, which would require packers, swine contractors, and live poultry dealers to submit copies of sample types of contracts to GIPSA and GIPSA to make those samples available for public viewing on its website.

³⁷ Section 301(d).

Arbitration

With the Farm Bill, Congress amended the P&S Act to add section 210, which addresses arbitration. The Farm Bill requires that livestock contracts and poultry growing arrangements contain an option for poultry growers and livestock producers to accept or reject arbitration to settle disputes. Many of these contracts unilaterally drafted by packers, swine contractors, or live poultry dealers contain provisions limiting the legal rights and remedies afforded by law to poultry growers, swine production contract growers, or livestock producers. Section 210 of the P&S Act requires that poultry growers, swine production contract growers, or livestock producers have the opportunity, prior to entering a contract or poultry growing arrangement, to decline to use arbitration to resolve disputes arising out of the contract or growing arrangement. In accordance with section 210 of the P&S Act, under the proposed regulation, the poultry grower, swine production contract grower, or livestock producer may decide later, after a dispute arises, to resolve the dispute using arbitration only if both parties voluntarily agree to the use of arbitration at that later time. Congress directed the Secretary to promulgate regulations to carry out section 210 of the P&S Act, and to establish criteria to consider when determining if the arbitration process provided in a contract provides a meaningful opportunity for the poultry growers, swine production contract growers, or livestock producers to participate fully in the arbitration process.

GIPSA has been informed by poultry growers, swine production contract growers, and livestock producers that often the cost of the arbitration process is prohibitive to resolving disputes between a packer, swine contractor, or live poultry dealer and a producer or grower. For example, fees for arbitration may need to be paid up front and can be substantial. A poultry grower, swine production contract grower, or livestock producer may not have sufficient

resources available to pay the fees for arbitration. Prior to enactment of the Farm Bill, producers and growers with contracts that required mandatory and binding arbitration were often left with no means available to resolve disputes if they lacked sufficient resources to pay arbitration fees. In proposing this new rule, GIPSA relied on established fee structures in employment arbitration rules to determine appropriate fees to be assessed to a producer or grower.

GIPSA also examined numerous contracts offered, modified, amended, renewed or extended after the effective date of the Farm Bill to see how the requirements of new section 210 of the P&S Act were being implemented by packers, swine contractors, or live poultry dealers. GIPSA found little consistency among the contracts. Some contracts were very clear and allowed the poultry growers, swine production contract growers, or livestock producers to easily recognize the choice regarding arbitration. Other contracts created a burdensome procedure for poultry growers, swine production contract growers, or livestock producers to make the choice.

GIPSA is proposing to add a new § 201.219(b) to the regulations under the P&S Act that would establish a uniform means by which poultry growers, swine production contract growers, or livestock producers are offered the option to decline use of arbitration to resolve disputes arising out of a contract. Proposed new § 201.219(a) would ensure that the poultry grower, swine production contract grower, or livestock producer has a meaningful opportunity to participate in the arbitration process. Proposed new § 201.219(a) would also provide criteria the Secretary may consider in evaluating the fairness of the arbitration process. Among these criteria are: overall fairness in the procedures, limits on costs to poultry growers, swine production contract growers, or livestock producers, reasonable time limits for completion of the process, reasonable access to discovery of information by the growers or producers, and a requirement that a reasoned written opinion be issued by the arbitrator.

Options Considered

The Farm Bill explicitly directs the Secretary to promulgate certain regulations. GIPSA also has exercised its discretion and proposed other regulations to further clarify the types of conduct that violate the P&S Act. With regard to both the mandatory and discretionary regulatory provisions, GIPSA considered alternative options.

Some of the alternatives considered may have been less restrictive on the regulated entity. For example, we considered not requiring that regulated entities maintain records that support differential pricing or any deviation from standard price or contract terms for actions taken by packers, swine contractors or live poultry dealers involving poultry growers, swine production contract growers, or livestock producers. We also considered requiring shorter notice periods for live poultry dealers that suspend the delivery of birds to poultry growers. We determined, however, that these alternatives would not improve fairness and transparency in the marketplace, nor would they foster trust and integrity among buyers and sellers in the livestock and poultry markets.

We considered proposing more restrictive options. For instance, we considered proposing prohibiting the use of arbitration to resolve disputes. That option, however, goes against a popular method of dispute resolution in other industries and is not in line with the spirit of the Farm Bill.

GIPSA believes that these proposed regulations best implement the purposes of the P&S Act and the Farm Bill, and will help protect producers and consumers. GIPSA welcomes and will consider comments with regard to all aspects of this proposed rulemaking.

Executive Order 12866 and Regulatory Flexibility Act

This proposed rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget. As required by the Farm Bill, GIPSA is proposing these regulations under the P&S Act. Also, we have prepared an economic analysis for this proposed rule. The cost-benefit analysis of the proposed regulations is initially conducted on a section-by-section analysis. Section 201.212, “Livestock Purchasing Practices,” is subdivided into two sub-section analyses. After the section-by-section analyses and the review of the Regulatory Flexibility Act (RFA), a summary cost-benefit analysis is presented.

Within the analysis, costs are aggregated into three major types: 1) administrative costs, which include items such as office work, postage, filing, and copying; 2) costs of analysis, such as a business conducting a financial review; and 3) adjustment costs, such as costs related to changing business behavior to achieve compliance with the proposed regulation. Where applicable, GIPSA also considered whether the regulations would prohibit or deter efficient conduct or significantly raise the costs of production for packers, swine contractors, live poultry dealers, producers, or growers. Potential benefits include gains from having market prices for commodities or grower services more accurately reflect supply-demand conditions; from making decisions based on more accurate price signals; and from remedying anticompetitive conduct and minimizing associated dead weight losses and other inefficiencies.

Proposed new § 201.2(l) through (t), “Terms Defined,” would contain definitions for eight terms used in the proposed regulations. These definitions are of commonly used terms in the industry and enter into the cost-benefit analysis through the proposed regulations.

Proposed new § 201.3(a) through (c), “Applicability of regulations in this part,” would indicate that the proposed regulations serve the intent of Congress and similar to the previous section enter into the cost-benefit analysis through the proposed actionable regulations.

Proposed new § 201.94(b), would require a regulated entity to maintain records that support differential pricing or any deviation from standard price or contract terms by an entity subject to section 202 of the P&S Act and reflects the routine record requirements of section 401 of the P&S Act. The proposed specifications amount to prior indication of those circumstances in which a regulated entity may expect to maintain and make available specific documentation. Document maintenance and inspection would be required for GIPSA’s regulatory and investigative responsibilities and protected as confidential documents under the P&S Act. These business documents would not be available to the public, consistent with other current document maintenance requirements of section 401 of the P&S Act. Increased industry costs depend in part on the existing level of record keeping a firm currently maintains and the manner in which those documents are maintained. Most additional documents required under the proposed regulation would be related to the data used to complete standardized financial statements, such as income statements or balance sheet statements, which are used for yearly assessments of firm financial or managerial performance. Generally, the costs are of an administrative or of a financial review nature. For example, records supporting differential pricing or any deviation from standard price or contract terms may include projecting anticipated incomes or losses, and maintaining the documents presenting those results. GIPSA believes that potential benefits include ensuring that decisions and actions are made based on prices determined by supply-demand conditions. An additional benefit is that increased information transparency reduces decision-making costs of such transactions in the marketplace and identifies who would best

conduct these transactions. GIPSA invites specific comments on additional categories of cost and benefit items as well as their magnitudes.

Proposed new § 201.210(a) through (c), “Unfair, unjustly discriminatory and deceptive practices or devices,” would list specific conduct, acts, or practices that the agency believes to be unfair, or constitutes an unjustly discriminatory, or deceptive practice. The list is consistent with GIPSA’s past interpretations of section 202(a) of the P&S Act.

To the extent that firms are engaged in activity that GIPSA’s proposed regulations would identify as a violation of the P&S Act, firms will have adjustment costs in ceasing the activity. GIPSA, however, believes that these types of instances are not widespread and related costs are not anticipated as large. Because these regulations merely clarify existing requirements, any such costs must be incurred regardless of whether the regulations are issued, and are therefore not costs associated with the regulations themselves.

Benefits from the regulation include justifying and making known premium and discount payments to ensure transparent information to support efficient allocation of resources by better decision making. Two additional benefits to the market place in general are 1) establishing greater information parity to facilitate contract evaluation and negotiating power between the packer, swine contractor, or live poultry dealer and poultry growers, swine production contract growers, or livestock producers and 2) the definition of entitlement claims producers or growers have under contract terms. GIPSA invites specific comments on additional types of categories of cost and benefit items as well as their magnitudes.

Proposed new § 201.211, “Undue or unreasonable preferences or advantages; undue or unreasonable prejudice or disadvantages,” would provide general criteria that GIPSA would use to determine if an act or practice constitutes an undue or unreasonable preference or advantage

and undue or unreasonable prejudice or disadvantage. The proposed new regulation provides general criteria for interpretation of existing section 202(b) of the P&S Act. These criteria are not designed to prohibit instances where the circumstances justify a price differential to a poultry grower, swine production contract grower, or livestock producer.

To the extent that firms were engaged in activity that GIPSA may determine to be a violation of the P&S Act based on the criteria, firms will have an adjustment cost in ceasing or desisting in the activity. GIPSA, however, believes that these types of instances are not widespread and related costs are not anticipated as large because these regulations merely clarify existing requirements, any such costs must be incurred regardless of whether the regulations are issued and are therefore not costs associated with the regulations themselves.

Benefits to the industry and the market will arise from establishing parity of negotiating power between the packer, swine contractor, or live poultry dealer and poultry growers, swine production contract growers or livestock producers by reducing the use of monopsonistic power and the accompanying dead weight losses.³⁸ GIPSA believes that potential benefits are expected to exceed costs. GIPSA invites specific comments on additional categories of cost and benefit items as well as their magnitudes.

Proposed new § 201.212, “Livestock Purchasing Practices,” would identify specific instances of industry conduct or behavior that would constitute violations under the proposed §§ 201.210, “Unfair, unjustly discriminatory and deceptive practices or devices” and 201.211, “Undue or

³⁸ Nigel Key and Jim M. MacDonald discuss evidence for the effect of concentration on grower compensation in “Local Monopsony Power in the Market for Broilers? Evidence from a Farm Survey” selected paper American Agri. Economics Assn. meeting Orlando, FL, July 27-29, 2008.

unreasonable preferences or advantages; undue or unreasonable prejudice or disadvantages.”

The cost-benefits of these sections follow.³⁹

Proposed new § 201.212(a) and (b) would prohibit packers from limiting sellers’ choices by excluding sellers who meet the packers input needs, forming unjustifiable exclusive agreements with select sellers, and limiting packer-buyer ties to a single packer. In general, the prohibited behaviors are used to apportion territory or restrain commerce as a mechanism to exert market power to effect lower seller prices. There are about a dozen packers in the United States that slaughter more than 100,000 head of cows and bulls and that potentially could be affected by the regulation. In a recent procurement practice review, GIPSA identified 180 livestock auctions where one buyer bought cull cattle for more than one packer. Most of the packers reviewed would not accept cattle from more than one buyer at any one sale, regardless of whether the buyer was a dealer, commission agent, or employee.

To the extent that firms are engaged in activities that these regulations would specify as violations of the P&S Act, the adjustment cost in ceasing the activity will correspond to the inability (or reduced ability) to exercise monopsony power. GIPSA notes that many of these activities are currently considered violations of the P&S Act and as such, will not require additional cost to comply. To GIPSA’s knowledge, this activity is restricted to cull cattle procurement, and GIPSA does not believe that the costs associated with ceasing to exclude other sellers will result in a large cost to the industry. In markets that will support additional buyers, those new buyers will now be able to purchase and sell cattle to packers in situations where

³⁹ Marvin Hayenga, Ted Schroeder, and John Lawrence provide an overview of the type of concerns GIPSA has about the purchasing practices of large packers in: “Churning out the Links: Vertical Integration in the Beef and Pork Industries” <http://www.choicesmagazine.org/2002-4/2002-4-03.pdf>, accessed 7/1/2009. A similar article by Ted Schroeder, James Mintert, and Eric Berg is “Valuing Market Hogs: Information and Pricing Issues” <http://www.oznet.ksu.edu/library/agec2/samplers/mf2644.asp>, accessed 7/1/2009. An additional reference is the Interim Livestock Meat Marketing Study Report prepared for GIPSA by RTI, International at: <http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=lmp&topic=ir-mms>.

exclusive agreements previously prevented them from competing. Any cost of compliance to packers and existing buyers would thus be primarily due to increased prices they might have to pay due to more competitive markets. Benefits are the prevention of monopsonistic conduct and greater market access for producers.

Proposed new § 201.212(c) would prohibit packers from purchasing, acquiring, or receiving swine or livestock from another packer or packer-affiliated companies. Packer-to-packer acquisitions have historically been restricted to purchases from other packers of “off” animals that did not fit with the other packers’ specifications but were procured in a larger lot of animals. The practice was primarily restricted to hog packers. Since 2006, GIPSA has observed that the practice has been expanded considerably and GIPSA believes it to be contributing to significant price distortions. In one instance, the price distortion was almost 3 percent of the reported base price for hogs. These price distortions in the swine negotiated cash market have larger price effects than just the cash market as many contracts including formula pricing often refer to the reported base price. The cost of compliance with the proposed regulation would be localized to packing companies and their affiliates, which would be less able to exercise their market power and pay lower, non-competitive prices to producers. The benefits of a more fair and competitive market resulting from this rule are expected to exceed the compliance costs of the regulated entities. In § 201.212(c)(i), we are proposing that packers be afforded the opportunity to apply to the Administrator for a waiver from the requirements of § 201.212(c) in the event of catastrophic or natural disaster or an emergency. The recognition of exigent conditions (such as fire damaging a plant resulting in a packer needing to liquidate committed procurement) and waivers based on those conditions would minimize costs related to packer-to-packer sales based on efficiency reasons.

Proposed new § 201.213(a) through (d), “Livestock and poultry contracts,” would act to increase transparency in the marketplace regarding the value (fair compensation rate) of contracts. Total administrative costs are estimated at \$25,000 per year for the affected parties to submit contracts based on 0.25 hours to prepare contracts; a per hour rate of \$25; and 995 poultry contract types, 2,751 swine contract types and 100 types of cattle contracts. GIPSA believes the benefits to increased transparency are expected to exceed its costs.⁴⁰

Proposed new § 201.214, “Tournament system” would stipulate that the lowest ranked poultry grower for a live poultry dealer would receive the base contract pay and all others would receive premium(s) to allow for better assessment of contract values at the time of contract negotiation.⁴¹ As this primarily involves actuarial analysis and an adjustment in the formula used to compute compensation rates to poultry growers, it is not anticipated to have costs beyond administrative costs for changes to contracts. GIPSA believes the benefits would likely outweigh costs by providing poultry growers with a more consistent benchmark to compare different contracts and the evaluation of compensation terms for acceptability in a particular contract. GIPSA invites comments related to the cost of conducting the actuarial analysis and the benefits in allowing better evaluation by poultry growers and/or lenders of the expected income streams from entering a poultry growing contract.

Proposed new § 202.215(a) and (b), “Suspension of delivery of birds,” would indicate a time requirement for notifying a poultry grower prior to suspension of delivery of birds, including notification of the length of suspension and date delivery will resume. Proposed new § 201.215(c) would allow a live poultry dealer to apply for a waiver of the requirements in §

⁴⁰ Rachael E. Goodhue, Gordon C. Rausser, and Leo K. Simon discuss poultry contracts and grower compensation issues in: “Understanding Production Contracts: Testing an Agency Theory Model” selected paper American Agric. Economics meetings Salt Lake City, UT, May 15, 1998.

⁴¹ Armando Levy and Tomislav Vukina observe the benefit of a fixed standard for comparing grower performance within tournament systems in: “The League Composition Effect in Tournaments with Heterogeneous Players: An Empirical Analysis of Broiler Contracts” in *J. of Labor Economics*, 2004, pp. 353-377.

201.215(a) and (b) in emergency or other extraordinary circumstances. For example, if a fire or other catastrophic event occurs an immediate suspension may be necessary. These provisions delineate the private property rights structure of a poultry grower by allowing a poultry grower to have adequate notice and make informed decisions on the future use of resources, which may include contract termination.⁴² Costs related to the regulation are related to potential prior planning on the part of live poultry dealers and actual notification. During the normal course of the broiler production cycle, GIPSA believes that a live poultry dealer should know 90 days ahead of time that they are going to suspend delivery, meaning that the regulations would not impose additional costs by constraining a dealer's operational flexibility. The benefits are related to allowing poultry growers to make early decisions that may include contract termination in the event of suspension of bird delivery prior to having to absorb costs related to being idle. This benefit is tied to ensuring that the live poultry dealer and poultry growers have parity in their contractual commitments. In general economic terms, providing parity of powers acts to reduce dead weight losses from asymmetric market positions. GIPSA invites comments on how pervasive the practice is in the industry and on the related magnitudes of expected costs and benefits.

Proposed new § 201.216(a) through (g), "Capital investments criteria," would provide a partial list of criteria that the Secretary would use when determining whether requiring capital investment in a poultry grower's operation is a violation of the P&S Act. These provisions delineate the private property rights structure of a grower or producer by allowing a poultry grower or swine production contract grower to obtain adequate notice and make informed

⁴² Paul Milgrom and John Roberts discuss property rights structures in "Economics, Organization, and Management", 1992, Chap. 9, Ownership and Property Rights. Note, for perfectly efficient property rights structures resources must be privately held and entitlements completely specified. All benefits and costs of ownership accrue to the owner. All property rights are transferable from one owner to another in voluntary exchange. And all rights from ownership are enforceable and secure from involuntary seizure.

decisions on the future use of resources, which may include contract termination. Costs related to the regulation are related to potential prior planning on the part of packers, live poultry dealers or swine contractors and actual notification. Additional costs would be related to potential added administrative costs of record keeping; however, sound business practice dictates that many of these incidents are currently being documented. A significant benefit is that the proposed rule would reduce the occurrence of “hold-up” costs, i.e., the costs a grower or producer is forced to absorb after having made an initial fixed cost investment.⁴³ GIPSA believes benefits are expected to be larger than costs, but recognizes that, in general, this may require a period of adjusting to a new contractual relationship between packers, swine contractors, and live poultry dealers and poultry growers or swine production contract growers. The regulations allow for investments that improve the cost of production or improve health or safety. To the extent the regulations prohibit investments that do not improve production performance; health or safety, there is an increase in overall benefits. GIPSA invites comments on the type and magnitude of the costs and benefits of this proposal.

Proposed new § 201.217(a), “Capital investments requirements and prohibitions,” would stipulate that required capital investments must be related to the effective life of the contract via the amount of investment recovered, designated at 80 percent of the investment. The proposed regulation protects poultry growers or swine production contract growers from opportunistic behavior by packers, swine contractors, and live poultry dealers by ensuring that the length of the contract is sufficiently long to allow the grower to recoup any capital investments that were made as a condition of entering into or continuing a poultry growing arrangement or swine

⁴³ The empirical evidence for hold-up costs is discussed by T. Vukina and P. Leegomonchai in “Oligopsony Power, Asset Specificity, and Hold-up: Evidence from the Broiler Industry”, *Amer. J. of Agri. Economics*, pp. 589-605, Aug., 2006. A general discussion of the hold-up problem by Paul Milgrom and John Roberts is found in “*Economics, Organization, and Management*” pg. 136, 1992.

production contract. GIPSA believes that the benefit is that better decisions on resource allocations that reduce waste would be made after an initial adjustment period by contractors. Overall, benefits are expected to exceed costs.

Proposed new regulation in § 201.217(b) would stipulate that a packer, swine contractor, or live poultry dealer cannot require additional capital investment from a poultry grower or swine production contract grower that has given to the packer, swine contractor, or live poultry dealer written notice of intent to sell the grower's or producer's farm, unless the requirement was provided 90 days prior to the notice of intent to sell the farm. The costs and benefits of this are similar to § 201.217(a). The proposed new regulations in § 201.217(c), (d) and (e) stipulate that a packer, swine contractor, or live poultry dealer cannot require equipment upgrades to properly working equipment without compensation incentives, that the density of poultry or swine cannot be changed in response to requirements to change equipment that is in good working order, and that capital investments cannot be obtained through threat or intimidation. The costs and benefits of this proposed regulation are similar to the benefits in § 201.217(a). GIPSA invites comments related to the cost-benefit categories identified above and the magnitudes of the costs and benefits.

Proposed new § 201.218(a) through (h), "Reasonable period of time to remedy a breach of contract," would delineate rules for contract termination to better delineate property rights by allowing a grower to have adequate notice for time to remedy and to make informed decisions on the future use of resources, which may include contract termination. Costs related to the regulation are related to potential prior planning on the part of a packer, live poultry dealer or swine contractor and actual notification. Additional costs would be related to potential added administrative costs of record keeping; however, sound business practice dictates many of these

incidents are documented currently. GIPSA believes that benefits are expected to be larger than costs, but recognizes that, in general, this may require a period of adjusting to a new contractual relationship between packers, swine contractors, or live poultry dealers and poultry growers or swine production contract growers. GIPSA invites comments on how pervasive potential violations in the industry may be under the proposed regulation and the related magnitudes of expected costs and benefits and if all types of cost-benefit categories have been considered.

Proposed new § 201.219, “Arbitration,” is expected to enhance property rights by establishing minimal standards for the arbitration process. These standards would provide a meaningful opportunity for poultry growers, swine production contract growers, or livestock producers to fully participate in arbitration; if that is the dispute resolution mechanism they have chosen in the agreement or contract. Industry participants have indicated that a benefit of GIPSA defining a bright line position on the boundary between appropriate and unfair as well as reasonable and unreasonable conduct is to help with the avoidance of costly litigation that may be required to discover that boundary on its own. Additional costs would be related to potential added administrative costs of changes in contracts that would need to be made to reflect the proposed regulation. GIPSA invites comments on potential unforeseen consequences of the proposed regulations, the related magnitudes of expected costs and benefits, and if all types of cost-benefit categories have been considered.

The Small Business Administration (SBA) defines small businesses by their North American Industry Classification System Codes.⁴⁴ The affected entities and corresponding size thresholds under the proposed rule that would be defined as a small business are as follows: NAICS 12111, cattle producers; NAICS 112210, hog producers and swine contractors; and NAICS 112320 and 112330, broiler and turkey producers if sales are less than \$750,000 per year. Live poultry

⁴⁴ See: http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf

dealers, NAICS 31165, and hog and cattle slaughterers are considered small businesses if they have fewer than 500 employees.

The Census of Agriculture (Census) indicates there are 727 swine contractors. The Census provides the number of head sold by size classes for these entities, but not value of sales. In order to estimate the size by the SBA classification, the average value per head for sales of all swine operations is multiplied by production values for firms in the Census size classes for swine contractors. The estimates reveal that about 300 entities had sales of less than \$750,000 in 2007 and would have been classified as small businesses. Additionally, there were 8,995 hog producers with swine contracts, almost all of these producers would have been classified as small businesses.

GIPSA maintains data on cattle, hogs, and sheep (collectively referred to as 'livestock') slaughterers and live poultry dealers from the annual reports these firms file with GIPSA. Currently, there are 418 livestock slaughter firms and 140 live poultry dealers (all but 16 are also poultry slaughterers and would be considered poultry integrators) that would be subject to the proposed regulation. According to U.S. Census data on County Business Patterns, there were 42 livestock (other than poultry) slaughter firms, and 64 poultry slaughter firms, that had more than 500 employees in 2006. The difference yields approximately 375 livestock slaughter firms and 75 poultry slaughter/integrators that have fewer than 500 employees and would be considered as small businesses that would be subject to the proposed regulation.

Another factor, however, that is important in determining the economic effect of the regulations is the number of contracts held by a firm. GIPSA records for 2007 indicated there were 20,637 poultry production contracts in effect, of which 13,216 or 64 percent were held by the largest 6 poultry integrators, and 95 percent (19,605) were held by the largest 21 firms.

These 21 firms are all in the large business SBA category, whereas the 19,605 poultry growers holding the other end of the contract are all small businesses by SBA's definitions. A similar situation exists in hog production where the large majority of hog producers hold contracts with the very largest of the swine contractors, which similar to poultry tend to also be slaughterers. For example, the 2007 Census indicates the 437 largest swine contractors (annual sales greater than 5,000 head at an average value of \$5.9 million) accounted for 99 percent of all sales by swine contractors. The situation in general for the nation's 29,632 combined swine producers and poultry growers operating under contract is that they are almost all small businesses with a contract held by one of the top five very large swine or poultry slaughterers. The SBA considers a grower or producer to be a large business if their gross income is \$750,000 per year. To illustrate the magnitude in size differences between a large grower/producer and a swine contractor/poultry dealer the gross sales revenue difference is 1:23,000. To the extent the proposed regulations impose costs; these costs are expected to be borne primarily by swine contractors, live poultry dealers, and slaughterers. The cost has two parts, a financial review component and an administrative cost. The costs of conducting a financial review such as projecting income or loss (to justify volume discounts on procurement for example) or an actuarial analysis (e.g., for tournament systems) are related to the type of contracts. These costs would increase with the number of contracts a firm has, and in the majority of cases, these are large business entities. For those small business entities, the proposed regulation is not expected to be a significant expense. This will be discussed in more detail below.

Five of the proposed regulations (§ 201.214 on tournament compensation, § 201.215 on suspension of delivery of birds, § 201.216 and § 201.217 dealing with capital investments, and § 201.218 on the time to remedy contract breaches) are specific to production contracts; and four

of the proposed regulations (§ 201.219 arbitration, § 201.210 on unfairness, § 201.211 on undue preferences, and § 201.213 on contract presentation) deal with both marketing and production contracts.

Summarizing the costs that the proposed regulations related to production contracts entail, these costs are substantively borne by packers, swine contractors, and live poultry dealers. Those entities that are small businesses in this group tend to have few (1-3) production contracts, and costs of submitting contracts to GIPSA is estimated to be roughly \$6.25 per contract type, hence the costs to smaller businesses would be minimal. In cases involving records retention, the larger costs tend to relate to the analysis in instances where the firm will seek to engage in an activity that requires additional records retention. The instances include where price differentials or deviations from standard price or contract terms are offered by packers, live poultry dealers or swine contractors. An average fee for this type of analysis was estimated at \$2,190. GIPSA believes there will be an estimated 70 analyses conducted per year. The other administrative costs are related to producer or grower notification or potential contract revisions and are also not expected to be large for the small live poultry dealers or swine contractor, or for the larger firms with multiple contract types.

Although the marketing contracts are not nearly as concentrated with producers as production contracts, the proposed regulations that relate to both production and marketing contracts are expected to have similar cost distributions between producers/growers and contractors/live poultry dealers. That is, there are a larger number of overall marketing contracts in place as opposed to production contracts for the affected entities. In part, this is because marketing contracts are widely used within the cattle and swine markets, whereas production contracts are used to a lesser degree. Summarizing the costs that these regulations would entail to the

industry, the entities affected would primarily be live poultry dealers and cattle and hog slaughterers. The costs related from compliance with the records retention (when needed), notification costs, and contract revisions, also if applicable, are similar to the sections related to the production contracts for similar reasons and also are not expected to be large to the entities that are small businesses subject to these sections of the proposed regulations.

Proposed new § 201.212(a) through (c) on livestock purchasing patterns entail costs borne by packers that are not related to production or marketing contracts. Proposed new § 201.212(a) through (c) would likely apply only to cow-bull slaughterers; to the extent they are engaged in practices that would require costs for them to alter purchasing behavior. The costs from changing behavior, if required, would likely be the difference between any lower price from reduced competition in the input market purchases price and the competitive market valued price. The firms likely to be affected by the increased costs are in the category of larger packers and are considered to be large businesses. For example, bonds that these firms carry to cover a 2-day period of livestock purchases are in excess of \$1 million. Proposed new § 201.212(c) would relate to packer-to-packer purchases with costs primarily borne by hog packers. Sales of hogs either in substantive numbers or for occasional “off-hogs,” which are hogs purchased that may not fit a packer’s specifications, are activities only the larger packers are engaged in. The effect of the proposed regulations on all small businesses described in the analysis is expected not to have a significant economic impact on a substantial number of small business entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. These actions are not intended to have retroactive effect, although in some instances they merely

reiterate GIPSA's previous interpretation of the P&S Act. This rule would not pre-empt state or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule.

There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this rule. Nothing in this proposed rule is intended to interfere with a person's right to enforce liability against any person subject to the P&S Act under authority granted in section 308 of the P&S Act.

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this rule announces that GIPSA is seeking approval for a new information collection.

Upon OMB approval this package will be merged with 0580-0015.

Title: Implementation of Regulation Required Under Title XI of the Food, Conservation and Energy Act of 2008; Undue and Unreasonable Preferences; Unfair, Unjustly Discriminatory and Deceptive Practices; Dispute Resolution under the Packers and Stockyards Act, 1921

OMB Number: 0580-NEW

Type of Request: New

Methodology Used for Calculating Time and Cost Estimates

Personnel costs were obtained from the U.S. Bureau of Labor Statistics, Table B-4 "Average Hourly Earnings" (August 7, 2009). Burden hour estimates are based on previous GIPSA experience with time required to maintain records, complete forms, submit required information, management review, and a legal review for possible changes in contracts or business practices. Estimates are based on average data situations of similar type and complexity required during the course of investigations conducted by GIPSA. The estimates also reflect GIPSA's experience in assembling large amounts of data.

Time Burden and Cost Estimate for Records Retention (§ 201.94(b))

There is not expected to be a cost and time burden on swine contractors as their contracts are set based on a production facility square footage basis. Livestock packers have the largest number of differentiating agreements and these are almost exclusively with the larger packers. Using the top 10 packers as the group affected, they have an estimated average of 10 alternative agreements, yielding a required 100 analyses for the packers. A per firm cost of \$2,190 per analysis is estimated based on 30 hours preparation time at \$25 per hour administrative wages plus 40 hours at \$36 per hour analyst wage. This yields a total packer cost of \$219,000. The live poultry dealers affected are estimated to number 14 (10 percent of non processing live poultry dealers) with an average number of differentiating agreements of five per firm to yield 70 poultry industry analyses. This provides a cost of \$153,300 for the poultry industry or a combined industry costs of \$372,300 per year

Contract Submission Time Burden and Cost Estimate (§ 201.213 Livestock and Poultry Contracts)

The live poultry dealer business costs are based on an estimated 199 live poultry dealers. The estimated number of poultry production agreements is 20,637 and the estimated number of types of contracts is 995 (an average of 5 per entity). The total burden is 249 hours (995 x 0.25 hours committed). This yields a total cost to the poultry industry of \$6,219 (249 hours x \$25 per hour wage). The swine industry costs are based on an estimate of 727 swine contractors and 35 swine packers with 55 plants. The estimated number of swine contractor production agreements is 2,181 (3 per contractor). The estimated number of types of marketing agreements is 570 (an average of 10.3 per packing plant). Together this is 2,751 swine reportable contracts. This yields a total burden of 666 hours (2,751 x 0.25 committed hours). Yielding a total swine

industry cost of \$17,194 (688 hours x \$25 per hour wage). The cattle industry costs are based on 4,157 markets and dealers, 259 packers, but an estimate of only 100 written marketing agreements types across all the entities. This yields an hourly industry burden of 25 hours (100 x 0.25 committed hours). For a total cattle industry cost of \$626 (25 hours committed x \$25 hour wage rate). The combined poultry, swine, and cattle industry costs for contract submission are estimated at \$24,038 per year.

Time Burden and Cost Estimate for Suspension of Delivery of Birds (§ 201.215)

The number of grower contracts is approximately 20,000. Taking 10 percent of the contracts as the annual rate of delivered notices yields 2,000 notices delivered per year. Multiplying the 2,000 notices by an average time burden of 0.25 hours to provide notice at a wage rate of \$25 per hour yields a cost of \$12,500 per year to meet this requirement.

Time Burden and Cost Estimate for Reasonable Period of Time to Remedy a Contract Breach (§ 201.218)

The number of poultry grower and swine contracts affected is approximately 24,000. Using one percent of the contracts as the annual rate of contract breaches needing notification yields 240 notices per year. Applying an average time burden of 1 hour to provide notice at a wage rate of \$25 per hour yields a cost of \$6,000 per year to meet this requirement.

As required by the Paperwork Reduction Act (44 U.S.C. 350(c)(2)(A)) and its implementing regulations (5 CFR 1320.8(d)(1)(i)), we specifically request comments on the following:

1. Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Ways to enhance the quality, utility, and clarity of the information to be collected;
4. Ways to minimize the burden on the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology; and
5. The cost to small businesses for records retention (i.e. number of price differentials offered) and submitting different types of contracts.

All responses to this rule will be summarized and included in the request for the Office of Management and Budget approval. All comments will also become a matter of public record.

E-Government Act Compliance

GIPSA is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects in 9 CFR Part 201

Confidential business information, Reporting and recordkeeping requirements, Stockyards, Surety bonds, Trade practices.

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

PART 201—REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

1. The authority citation for part 201 is revised to read as follows:

Authority: 7 U.S.C. 181 – 229, 229c.

2. Section 201.2 is amended by adding new paragraphs (l) through (u) to read as follows:

§ 201.2 Terms defined.

* * * * *

(l) Tournament system means any method used by a live poultry dealer to calculate some portion of the payment made to poultry growers based on a comparison of one poultry grower's performance with that of one or more other poultry grower's performance.

(m) Principal part of performance means the raising of, and caring for livestock or poultry, when used in connection with a livestock or poultry contract.

(n) Capital investment means any initial capital investment of \$25,000 or more paid by a grower for growing and raising facilities. Such term includes the total cost of equipment, goods, professional services and labor utilized, plus any interest incurred and any increased labor and operating costs that are directly attributable to the capital investment.

(o) Additional capital investment means a combined amount of \$25,000 or more paid by a poultry grower or swine production contract grower beyond the initial investment for growing and raising facilities by the grower to make a capital improvement to the raising or growing facility. Such term includes the total cost of equipment, goods, professional services and labor utilized, plus any interest incurred and any increased labor and operating costs that are directly attributable to the capital investment. The term does not include costs of maintenance or repair.

(p) Suspension of delivery of birds means the failure of a live poultry dealer to deliver a new poultry flock before the date payment is due for a poultry grower's previous flock under section 410 of the Act.

(q) Forward contract means fixed price or basis contract, oral or written, for the purchase of a specified quantity, or a lot or lots of livestock, where delivery will occur more than 14 days after the agreement is entered. Price may be determined when an agreement is entered (fixed price), or provisions may be made for the price to be determined at a later date, for example, based on prices on the futures market (basis contract) or a publicly reported price.

(r) Marketing agreement means an agreement to purchase livestock at a future date with the price to be determined at or after the time of slaughter, where delivery will occur more than 14 days after the agreement is entered. A marketing agreement (also known as a marketing contract) is an ongoing (open-ended or for a fixed period of time) oral or written agreement in which a seller agrees to sell all or part of its slaughter livestock to a packer when the livestock are ready for slaughter, and the packer agrees to purchase the livestock, with price determined by an agreed formula. Terms of sale are not negotiated for individual lots of livestock within the agreement when livestock are purchased through a marketing agreement. A marketing agreement may include a commitment for the seller to deliver a specified number of livestock each week, month, etc., or may allow the seller considerable discretion in the number of livestock delivered under the agreement.

(s) Production contract means a contract that details specific poultry grower or swine production contract grower and packer, swine contractor or live poultry dealer responsibilities for production inputs and practices, as well as a mechanism for determining payment.

(t) A competitive injury occurs when conduct distorts competition in the market channel or marketplace.

(u) Likelihood of competitive injury means there is a reasonable basis to believe that a competitive injury is likely to occur in the market channel or marketplace. It includes but is not limited to situations in which a packer, swine contractor, or live poultry dealer raises rivals' costs; improperly forecloses competition in a large share of the market through exclusive dealing; restrains competition among packers, swine contractors, or live poultry dealers; or

represents a misuse of market power to distort competition among other packers, swine contractors, or live poultry dealers. It also includes situations in which a packer, swine contractor, or live poultry dealer wrongfully depresses prices paid to a producer or grower below market value, or impairs a producer's or grower's ability to compete with other producers or growers or to impair a producer's or grower's ability to receive the reasonable expected full economic value from a transaction in the market channel or marketplace.

§§ 201.3 and 201.4 [Redesignated as §§ 201.4 and 201.5]

3. Sections 201.3 and 201.4 are redesignated as §§ 201.4 and 201.5 respectively.

4. A new § 201.3 is added to read as follows:

§ 201.3 Applicability of regulations in this part.

(a) Applicability to live poultry dealers. The regulations in this part when applicable to live poultry dealers shall apply to all stages of a live poultry dealer's poultry production, including pullets, laying hens, breeders and broilers, excluding hens that only produce table eggs.

(b) Applicability to contracts. The regulations in this part, when referencing contracts or agreements generally, apply to all swine production contracts, poultry growing arrangements and livestock production and marketing contracts, including but not limited to, formula and forward contracts.

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

(d) Effective dates. The regulations in this part, when governing or affecting contracts, shall apply to any poultry growing arrangement, swine production contract or livestock marketing or production contract entered into, amended, altered, modified, renewed or extended after [EFFECTIVE DATE OF FINAL RULE].

5. Section 201.94 is amended by redesignating the existing undesignated text as paragraph (a) and by adding a new paragraph (b) to read as follows::

§ 201.94 Information as to business; furnishing of by packers, swine contractors, live poultry dealers, stockyard owners, market agencies, and dealers; records retention.

* * * * *

(b) A packer, swine contractor or live poultry dealer must maintain written records that provide justification for differential pricing or any deviation from standard price or contract terms offered to poultry growers, swine production contract growers, or livestock producers.

6. New §§ 201.210 through 201.219 are added to read as follows:

* * * * *

Sec.

201.210 Unfair, unjustly discriminatory and deceptive practices or devices.

201.211 Undue or unreasonable preferences or advantages; undue or unreasonable prejudice or disadvantages.

201.212 Livestock purchasing practices.

201.213 Livestock and poultry contracts.

201.214 Tournament systems.

201.215 Suspension of delivery of birds.

201.216 Capital investments criteria.

201.217 Capital investments requirements and prohibitions.

201.218 Reasonable period of time to remedy a breach of contract.

201.219 Arbitration.

* * * * *

§ 201.210 Unfair, unjustly discriminatory and deceptive practices or devices.

(a) The term “unfair, unjustly discriminatory and deceptive practice or device” as it is used in § 202 of the Act, includes, but is not limited to:

(1) An unjustified material breach of a contractual duty, express or implied, or an action or omission that a reasonable person would consider unscrupulous, deceitful or in bad faith in connection with any transaction in or contract involving the production, maintenance, marketing or sale of livestock or poultry.

(2) A retaliatory action or omission by a packer, swine contractor, or live poultry dealer in response to the lawful expression, spoken or written, association, or action of a poultry grower, livestock producer or swine production contract grower; a retaliatory action includes but is not limited to coercion, intimidation, or disadvantage to any producer or grower in an execution, termination, extension or renewal of a contract involving livestock or poultry;

(3) A refusal to provide to a contract poultry grower or swine production contract grower, upon request, the statistical information and data used to determine compensation paid to the contract grower or producer under a production contract, including, but not limited to, feed conversion rates, feed analysis, origination and breeder history;

(4) An action or attempt to limit by contract a poultry grower’s, swine production contract grower’s, or livestock producer’s legal rights and remedies afforded by law, including, but not limited to the following:

- (i) The right of a trial by jury (except when arbitration has been voluntarily agreed to);
- (ii) The right to all damages available under the law;
- (iii) Rights available under bankruptcy law;
- (iv) The authority of the judge or jury to award attorney fees to the appropriate party; or

(v) A requirement that a trial or arbitration be held in a location other than the location where the principal part of the performance of the arrangement or contract occurs;

(5) Paying a premium or applying a discount on the swine production contract grower's payment or the purchase price received by the livestock producer from the sale of livestock without documenting the reason(s) and substantiating the revenue and cost justification associated with the premium or discount;

(6) Termination of a poultry growing arrangement or swine production contract with no basis other than the allegation by the packer, swine contractor, live poultry dealer or other person that the poultry grower or swine production contract grower failed to comply with an applicable law, rule or regulation. If the live poultry dealer or swine contractor believes that a poultry grower or swine producer is in violation, the live poultry dealer or swine contractor must immediately report the alleged violation to the relevant law enforcement authorities if they wish to use this alleged violation as grounds for termination.

(7) A representation, omission, or practice that is fraudulent or likely to mislead a reasonable poultry grower, swine production contract grower, or livestock producer, swine contract producer or livestock producer regarding a material condition or a term in a contract or business transaction.

(8) Any act that causes competitive injury or creates a likelihood of competitive injury.

§ 201.211 Undue or unreasonable preferences or advantages; undue or unreasonable prejudice or disadvantages.

The Secretary may consider the following criteria, among others, in determining if an undue or unreasonable preference or advantage, or an undue or unreasonable prejudice or disadvantage, has occurred in violation of the Act:

(a) Whether contract terms based on number, volume or other condition, or contracts with price determined in whole or in part by the volume of livestock sold are made available to all poultry growers, livestock producers or swine production contract growers who individually or collectively meet the conditions set by the contract.

(b) Whether price premiums based on standards for product quality, time of delivery and production methods are offered in a manner that does not discriminate against a producer or group of producers that can meet the same standards.

(c) Whether information regarding acquiring, handling, processing, and quality of livestock is disclosed to all producers when it is disclosed to one or more producers.

§ 201.212 Livestock purchasing practices.

(a) Dealers who operate as packer buyers must purchase livestock only for the packer that identifies that dealer as its packer buyer.

(b) A packer may not enter into an exclusive arrangement with a dealer except those dealers the packer has identified as its packer buyers and reported to the Secretary on approved forms.

(c) A packer shall not purchase, acquire, or receive livestock from another packer or another packer's affiliated companies, including but not limited to, the other packer's parent company and wholly owned subsidiaries of the packer or its parent company.

(d) A packer may apply to the Administrator for a waiver of § 201.212(c) in case of a catastrophic or natural disaster, or other emergency.

§ 201.213 Livestock and poultry contracts.

(a) Packers and swine contractors purchasing livestock under a marketing arrangement including, but not limited to, forward contracts, formula contracts, production contracts or other marketing agreements, and live poultry dealers obtaining poultry by purchase or under a poultry

growing arrangement must submit a sample copy of each unique type of contract or agreement to GIPSA.

(b) Sample copies of marketing arrangements and poultry growing arrangements must be submitted within 10 business days of entering into the agreement.

(c) Packers, swine contractors and live poultry dealers must notify GIPSA within 10 business days when a sample contract submitted to GIPSA is no longer in use.

(d) Because it is in the public interest that sample copies of each unique contract be made public, except for provisions containing trade secrets, confidential business information and personally identifiable information, GIPSA may post on its website a copy of each unique contract it receives. Provisions containing trade secrets, confidential business information and personally identifiable information will not be made public.

(e) Packers, swine contractors and live poultry dealers must identify confidential business information when submitting contracts to GIPSA.

§ 201.214 Tournament systems.

(a) If a live poultry dealer is paying growers on a tournament system, all growers raising the same type and kind of poultry must receive the same base pay. No live poultry dealer shall offer a poultry growing arrangement containing provisions that decrease or reduce grower compensation below the base pay amount.

(b) Live poultry dealers must rank growers in settlement groups with other growers with like house types.

§ 201.215 Suspension of delivery of birds.

The criteria the Secretary may consider when determining whether or not reasonable notice has been given for suspension of delivery of birds include, but are not limited to:

(a) Whether a live poultry dealer has provided to a poultry grower written notice of its intent to suspend the delivery of birds under a poultry growing arrangement at least 90 days prior to the date it intends to suspend delivery of birds;

(b) Whether written notice under paragraph (a) in this section has stated the reason for the suspension of delivery, the length of the suspension of delivery, and the date the delivery of birds will resume.

(c) A live poultry dealer may apply to the Administrator for a waiver of § 201.215(a) in case of a catastrophic or natural disaster, or other emergency.

§ 201.216 Capital investments criteria.

The criteria the Secretary may consider when determining whether a requirement that a poultry grower or swine production contract grower make additional capital investments over the life of a production contract or growing arrangement constitutes an unfair practice in violation of the Act include, but are not limited to:

(a) Whether a poultry grower or swine production contract grower is provided discretion to decide against the capital investment requirement;

___(b) Whether the investment is the result of coercion, retaliation or threats of coercion or retaliation by the packer, swine contractor or live poultry dealer;

(c) Whether the packer, swine contractor or live poultry dealer intends to substantially reduce or end operations at the slaughter plant or processing facility that processes the poultry grower's or swine production contract grower's poultry or swine, or if the packer, swine contractor or live poultry dealer in fact substantially reduces or ends operations at the slaughter plant or processing facility within 12 months of requiring the additional capital investment;

(d) A live poultry dealer may apply to the Administrator for a waiver of § 201.216(c) in case of a catastrophic or natural disaster, or other emergency;

(e) Whether the packer, swine contractor, or live poultry dealer required some poultry growers or swine production contract growers to make additional capital investments, but did not require other similarly situated poultry growers or swine production contract growers to make the same additional capital investments;

(f) The age of, and recent upgrades to or capital investments in, the poultry grower's or swine production contract grower's operations;

(g) Whether the cost of the required capital investments can reasonably be expected to be recouped by the poultry grower or swine production contract grower; and

(h) Whether the poultry grower or swine production contract grower was given a reasonable time period to implement the required capital investments.

§ 201.217 Capital investments requirements and prohibitions.

(a) Any requirement that a poultry grower or swine production contract grower make initial or additional capital investments as a condition to enter into or continue a growing arrangement or production contract must be accompanied by a contract duration of a sufficient period of time for the poultry grower or swine production contract grower to recoup 80 percent of the cost of the required capital investment. These contracts would still be subject to the contractual rights dealing with growers and producer misconduct.

(b) No packer, swine contractor, or live poultry dealer may require an additional capital investment from a poultry grower or swine production contract grower who has given to the packer, swine contractor, or live poultry dealer written notice of intent to sell the grower's or

producer's farm and facilities, unless notice of such additional capital investment was given at least 90 days prior to the producer's or grower's notice of intent to sell.

(c) No packer, swine contractor, or live poultry dealer shall require equipment changes on equipment previously approved and accepted by the packer, swine contractor, or live poultry dealer if existing equipment is in good working order unless the packer, swine contractor, or live poultry dealer provides adequate compensation incentives to the poultry grower or swine production contract grower.

(d) No packer, swine contractor, or live poultry dealer shall reduce the number of birds/swine placed with a poultry grower or swine production contract grower or terminate a growing arrangement or production contract based solely on the failure of a grower or producer to make equipment changes so long as existing equipment is in good working order.

(e) A packer, swine contractor, or live poultry dealer shall not engage in conduct or use a device with the intent or having the effect of limiting the ability of the poultry grower or swine production contract grower to voluntarily choose to enter into a growing arrangement, production contract or an agreement to make additional capital investments. Such conduct or device includes, but is not limited to, use of intimidation, threats, false or misleading information, statements or data, or the concealment of any material information, statements or data.

§ 201.218 Reasonable period of time to remedy a breach of contract.

The criteria the Secretary may consider when determining whether a packer, swine contractor or live poultry dealer has provided a poultry grower or swine production contract grower a reasonable period of time to remedy a breach of contract that could lead to contract termination include, but are not limited to:

(a) Whether the packer, swine contractor or live poultry dealer that intends to take an adverse action against a poultry grower or swine production contract grower based on a breach of contract by the grower or producer, including termination of a contract, has provided written notice of the breach of contract to the producer or grower upon initial discovery of a breach of contract.

(b) And whether the notice includes the following:

(1) A description of the act or omission believed to constitute a breach of contract, including identification of the section of the contract believed to be breached;

(2) When the breach occurred;

(3) The means by which the poultry grower or swine production contract grower can satisfactorily remedy the breach, if possible, based on the nature of the breach; and

(4) A date that provides a reasonable time, based on the nature of the breach, by which the breach must be remedied.

(c) Whether, when establishing the date by which a breach should be remedied, the packer, swine contractor or live poultry dealer considered the poultry grower's or swine production contract grower's ongoing responsibilities related to poultry or swine under their care and reasonable time periods related to raising and caring for the poultry or swine.

(d) Whether the written notice affords the poultry grower or swine production contract grower an opportunity to rebut in writing an allegation that there has been a breach of contract, and whether sufficient time from the date of the notice of the alleged breach is provided for submitting the rebuttal. Generally, this will be about 14 days.

(e) Whether attempts are made to assert that the poultry grower or swine production contract grower waived their claims by failing to meet unreasonable time restrictions.

(f) Whether the packer, swine contractor or live poultry dealer attempts to terminate a growing arrangement or production contract if the poultry grower's or swine production contract grower's breach is remedied within the time provided in the notice, or by another mutually agreed upon date.

(g) Whether the packer, swine contractor or live poultry dealer gives notice of such breach or failure to act within 90 days of finding the breach or failure. Such failure will generally be considered to be a waiver of any objections by the packer, swine contractor or live poultry dealer to the breach and to its legal claims based on that breach.

(h) Whether the packer, swine contractor or live poultry dealer terminates a swine production contract or poultry growing arrangement because of a dispute or breach that is submitted for arbitration, in which the poultry grower or swine production contract grower prevails in the arbitration proceeding.

§ 201.219 Arbitration.

(a) The criteria the Secretary may consider when determining whether the arbitration process provided in a contract provides a meaningful opportunity for the poultry grower, livestock producer, or swine production contract grower to participate fully in the arbitration process include, but are not limited to:

(1) Whether the contract discloses sufficient information in bold, conspicuous print describing all the cost of arbitration to be paid by the poultry grower, swine production contract grower, or livestock producer, the arbitration process and any limitations on legal rights and remedies in such a manner as to allow the grower or producer to make an informed decision on whether to elect arbitration for dispute resolution.

(2) Whether impartial and unbiased qualified neutrals shall be used as arbitrators;

(3) Whether the cost of arbitration to the poultry grower, livestock producer or swine production contract grower is reasonable compared to the costs found in a typical employer/employee arbitration process. Cost of arbitration includes, but is not limited to, administrative fees, filing fees, and arbitrator deposits and fees;

(4) Whether there are reasonable time limits in the entire arbitration process and any process or procedure resulting from the outcome of the arbitration;

(5) Whether there are fair procedures that comply with the terms of the Federal Arbitration Act;

(6) Whether the poultry grower, livestock producer, or swine production contract grower is provided access to and opportunity to engage in reasonable discovery of information held by the packer, swine contractor or live poultry dealer;

(7) Whether the arbitration is used only to resolve disputes relevant to the contractual obligations of the parties; and

(8) Whether a reasoned, written opinion based on applicable law, legal principles and precedent for the award is required to be provided to the parties;

(b) The language described in paragraph (a)(1) of this section shall immediately precede the following language, which must appear as follows on the signature page of the contract in bold conspicuous print:

Right to Decline Arbitration. A poultry grower, livestock producer or swine production contract grower has the right to decline to be bound by the arbitration provision set forth in this agreement. A poultry grower, livestock producer or swine production contract grower shall indicate whether or not it desires to be bound by the arbitration provision by signing one of the following statements:

I decline to be bound by the arbitration provisions set forth in this
 Agreement _____

I accept the arbitration provisions as set forth in this

Agreement _____

Failure to choose an option by signing one of the above renders the contract void.

J. Dudley Butler, Administrator
Grain Inspection, Packers and Stockyards Administration

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