

March 24, 2017

M. Irene Omade
GIPSA
United States Department of Agriculture
1400 Independence Avenue SW
Room 2542A-S
Washington, DC 20250-3613

RE: Comments of the National Pork Producers Council and National Cattlemen’s Beef Association on Interim Final Rule on *Scope of Sections 202(a) and (b) of the Packers and Stockyards Act*, 81 Fed Reg. 92566-92594 (Dec. 20, 2016)

Dear. Ms. Omade:

We submit these comments on behalf of the National Pork Producers Council (“NPPC”) and the National Cattlemen’s Beef Association (“NCBA”), on the Grain Inspection, Packers and Stockyards Administration’s (“GIPSA”) Interim Final Rule titled *Scope of Sections 202(a) and (b) of the Packers and Stockyards Act*¹ (hereinafter “Interim Final Rule” or “IFR”).² NPPC is a national association representing 43 affiliated state associations and America’s pork producers, who annually generate approximately \$23 billion in farm gate sales. The U.S. pork industry supports an estimated 550,000 domestic jobs, generates more than \$39 billion of gross national product, and exports an increasing volume of product valued at more than \$6 billion annually. NCBA is the oldest and largest national trade association for the U.S. cattle industry representing over 170,000 cattle producers across the country through direct membership and 46 state and breed affiliates. According to USDA’s Economic Research Service, cattle production in the United States is a \$60 billion industry. The overall retail equivalent value of the U.S. beef industry is over \$100 billion. Beef cattle are produced in all 50 states and beef exports in 2016 accounted for over \$6 billion.

NPPC and NCBA are gravely concerned by the destructive impact that the Interim Final Rule will have on the meat sector overall. This includes an expected \$1.5 billion initial costs to the beef and pork industry with pork producers subsequently incurring over \$420 million in annual costs afterward and beef producers incurring over \$935 million in annual costs.³ The Interim Final Rule attempts to rewrite certain provisions of the Packers and Stockyards Act (“PSA”) to permit plaintiffs to pursue “unfair” or “discriminatory” acts without proving that such acts cause injury to competition. GIPSA’s interpretation runs counter to the decisions of eight federal courts of appeals holding that Section 202 unambiguously requires proof of injury to competition. The Interim Final Rule, promulgated without any justification, will trigger a torrent of lawsuits against

¹ 81 Fed Reg. 92,566 (Dec. 20, 2016) (to be codified 9 C.F.R. pt. 201).

² Both NPPC and NCBA will be submitting separate comments on the *Proposed Rule on Unfair Practices and Undue Preferences*, 81 Fed. Reg. 92,703 (Dec. 20, 2016) (hereinafter, the “Proposed Rule”), which GIPSA issued in conjunction with the Interim Final Rule.

³ Compare Informa Economics, *An Estimate of the Economic Impact of GIPSA’s Proposed Rules on the Cattle and Hog Sectors*, at 1-2 (Sept. 2016), with Informa Economics, *An Estimate of the Economic Impact of GIPSA’s Proposed Rules*, at ___ (Nov. 8, 2010).

members of the pork and beef industries and subject market driven innovation to unnecessary uncertainty without providing any identifiable benefit to consumers.

The Interim Final Rule is subject to the President's Regulatory Freeze Pending Review. On January 20, 2017, the President's Chief of Staff ordered all Executive Branch agencies to "temporarily postpone" the "effective date for 60 days" of "regulations that have been published in the [Federal Register] but have not taken effect" ... "for the purpose of reviewing questions of fact, law, and policy they raise."⁴ On February 6, 2017, GIPSA delayed the effective date of the Interim Final Rule until April 22, 2017.⁵

GIPSA should issue a rule further delaying the effective date of the Interim Final Rule at least until it finalizes the Proposed Rule⁶ that would specify practices that GIPSA believes would violate the PSA without proof of competitive injury. Although GIPSA proposed in 2010 to adopt the Interim Final Rule and the Proposed Rule as a single regulatory package, GIPSA inexplicably divorced the Interim Final Rule from the Proposed Rule in 2016. Absent the guidance of the companion Proposed Rule, still open for comment, the Interim Final Rule would open the federal courthouse door (and make available the damage provisions of the PSA) to any grievance, no matter how trivial, while leaving our members at sea with respect to the reasonableness of established and new innovative market practices.

Once the new Administration has reconsidered the substantial questions of law and policy raised by the Interim Final Rule, GIPSA should issue a notice of proposed rulemaking to repeal the Interim Final Rule because it exceeds the scope of GIPSA's statutory authority. The injury to competition requirement has been upheld by the courts of appeals as an essential element of a Packers and Stockyards Act violation, and there is no contrary judicial interpretation. GIPSA has no authority to eliminate a statutory requirement that the courts of appeals have unanimously upheld. If Congress had wanted plaintiffs' lawyers and lay judges to regulate the meat industry through litigation, it would not have bothered to create an agency to enforce the PSA in the first place.

In addition, the Interim Final Rule should be repealed because it is arbitrary and capricious. GIPSA is acting without record evidence establishing an actual problem in the pork or beef industries in need of a regulatory solution. The Interim Final Rule is also overbroad because it adopts an industry-wide solution for problems that may exist only as a result of alleged practices affecting other unrelated segments of the meat sector. GIPSA's cost-benefit analysis is woefully inadequate because it fails to articulate any benefits to consumers that will result from the Interim Final Rule.

⁴ Memorandum for the Heads of Executive Departments and Agencies: Regulatory Freeze Pending Review (Jan. 20, 2017), *available at* <https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies>.

⁵ USDA, News Release, *Farmer Fair Practices Rules Effective Date, Comment Periods Extended* (Feb. 6, 2017), *at* <https://www.gipsa.usda.gov/Newrelease/2017/020317FFPRCommentPeriodsExtended.pdf>.

⁶ 81 Fed. Reg. 92,703

Finally, the Interim Final Rule cannot satisfy GIPSA's purported goal of achieving deference by the courts. There is no statutory gap for GIPSA to fill because the courts of appeals have ruled that Congress spoke unambiguously as to whether Section 202 contains a competitive injury requirement. Moreover, the Interim Final Rule is procedurally defective because GIPSA failed to follow proper notice-and-comment rulemaking procedures prior to adopting it. Nor will the courts presume a delegation of authority from Congress to fundamentally restructure regulation of the meat industry in the manner accomplished by GIPSA in the Interim Final Rule.

COMMENTS ON THE INTERIM FINAL RULE

I. GIPSA SHOULD FURTHER DELAY THE INTERIM FINAL RULE'S EFFECTIVE DATE UNTIL THE PROPOSED RULE IS FINALIZED.

The Chief of Staff's Regulatory Freeze Memorandum authorizes GIPSA to further delay the Interim Final Rule's effective date beyond 60 days. The Memorandum provides that "you should consider proposing for notice and comment a rule to delay the effective date for regulations beyond that 60-day period. In cases where the effective date has been delayed in order to review questions of fact, law, or policy, you should consider potentially proposing further notice-and-comment rulemaking."⁷ "Following the delay in effective date," "for those regulations that raise substantial questions of law or policy, agencies should notify the OMB Director and take further appropriate action in consultation with the OMB Director."⁸

GIPSA should exercise this authority by further delaying the effective date of the Interim Final Rule until GIPSA finalizes the Proposed Rule. In 2010, GIPSA proposed to adopt a single regulatory package containing what is now the Interim Final Rule and the Proposed Rule.⁹ However, in 2016, GIPSA inexplicably separated the Interim Final Rule from the Proposed Rule. The Interim Final Rule is scheduled to become effective on April 22, 2017, but GIPSA has initiated a new notice-and-comment rulemaking proceeding addressing the Proposed Rule. GIPSA provided no reasoned explanation for its decision to divorce the Interim Final Rule from the Proposed Rule instead of adopting a single regulatory package, as it proposed to do in 2010.

GIPSA's decision to divorce the Interim Final Rule from the Proposed Rule makes little sense because the Interim Final Rule depends upon—and will have no regulatory significance without—the Proposed Rule clarifying which business practices GIPSA believes are prohibited by the PSA. The Interim Final Rule does not specify the circumstances under which "a finding of harm or likely harm to competition" is not required, although the Proposed Rule states that a competitive injury finding will still be required in certain cases. To be meaningful, the Interim Final Rule must be read in conjunction with the Proposed Rule, which will not be finalized until after the Interim Final Rule is effective. However, the Proposed Rule may never become effective, and the Interim Final Rule might stand as a universal rule without the benefit of the Proposed Rule.

⁷ Memorandum, *supra* note 3, at 1.

⁸ *Id.*

⁹ Implementation of Regulations Required Under Title XI of the Food Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35,338 (June 22, 2010) (to be codified 9 C.F.R. pt. 201).

The Interim Final Rule creates immense risk to industry because businesses are left to guess which practices are prohibited by the PSA. To account for litigation risk from the Interim Final Rule, industry may be forced to implement costly and wasteful business practices based on non-finalized proposals or to postpone innovations, even though GIPSA ultimately may determine that its Proposed Rule is unwarranted. Passing an ambiguous rule with the intent that the meaning will be resolved in court over time will result in significant harm to those subject to the lawsuits.

The primary result of the Interim Final Rule would be to open the floodgates for plaintiff's lawyers seeking damages.¹⁰ The Interim Final Rule's ambiguity encourages new lawsuits because plaintiffs may believe they would be able to win a lawsuit without having to prove harm to competition. Prior to the Interim Final Rule, the law was settled, and plaintiffs clearly knew that to prevail on a PSA claim they had to prove harm to competition. However, under the Interim Final Rule, plaintiffs are incentivized to bring the types of suits that were previously dismissed in the hopes that one of them could address the "certain conduct" mentioned in the Interim Final Rule. As a result, the pork and beef industries will be subject to significantly more lawsuits, which would have been quickly dismissed but for the Interim Final Rule, and the courts will be encouraged to act as regulators. Litigation costs and burdens will likely be passed through to consumers in the form of higher prices.

Further delaying the effective date of the Interim Final Rule will allow the new Administration to assess the legal and policy implications of the Interim Final Rule in conjunction with the Proposed Rule, as GIPSA had originally intended. Divorced from the Proposed Rule, the Interim Final Rule is nothing more than a gift to trial lawyers to bring new lawsuits that will upend the entire meat industry. After delaying the Interim Final Rule's effective date, the new Administration should determine that the Interim Final Rule ought to be repealed because of its extraordinary costs and legal defects, which are discussed below.

II. THE INTERIM FINAL RULE VIOLATES SECTION 202 OF THE PACKERS AND STOCKYARDS ACT BECAUSE GIPSA LACKS AUTHORITY TO ELIMINATE THE INJURY TO COMPETITION REQUIREMENT.

GIPSA should also issue a notice of proposed rulemaking to repeal the Interim Final Rule because it exceeds the agency's statutory authority. The Interim Final Rule removes the requirement of "proof of harm to competition" when challenging "certain conduct" in some, but not all cases, arising under Section 202 of the PSA. GIPSA lacks statutory authority to adopt a rule that attempts to change the plain meaning of the PSA and overrule decades of judicial precedent.

A. Congress Unambiguously Required Proof Of Injury To Competition To Establish A Violation Of Section 202(A) And (b).

Congress enacted the PSA in 1921 to regulate the business of meat packers. In particular, Section 202 of the PSA makes it unlawful for any packer or swine contractor to: "(a) [e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or (b) [m]ake or give

¹⁰ 81 Fed. Reg. at 92,570.

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.”¹¹

The PSA responded to concerns about monopoly in the meat-packing industry in the early 1900s.¹² As the Supreme Court explained in upholding the constitutionality of the PSA, “[t]he 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.”¹³ An FTC investigation determined that monopolies and other restraints of trade existed in the meat-packing industry, that led to enactment of the PSA.¹⁴ Both the House and Senate highlighted the anticompetitive practices in the industry as the reason for passing the PSA.¹⁵ The legislation arose because of concerns over anticompetitive practices and the need to put control of those practices in the hands of an agency with industry expertise.

To address anticompetitive practices, Congress borrowed from the Sherman Act and other antitrust statutes in crafting the PSA.¹⁶ In building off of and borrowing language from the antitrust statutes, Congress incorporated into the PSA the meaning that the language had at the time.¹⁷ Therefore, the words “unfair,” “undue,” and “unreasonable” in Section 202 clearly encompass a requirement of finding harm to competition.

B. The Courts Of Appeals Have Unanimously Held That Section 202 Requires Proof Of Injury To Competition.

For several decades, the federal courts of appeals have consistently and correctly ruled that Sections 202(a) and (b) are violated only if the practice in question has had, or is likely to have, an adverse effect on competition as understood in the antitrust context. Eight circuits—the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits—“have now weighed in on this

¹¹ 7 U.S.C. § 192(a) and (b).

¹² See, e.g., *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922); *Wheeler v. Pilgrim’s Pride Corp.*, 591 F.3d 355, 360-61 (5th Cir. 2009) (en banc).

¹³ *Stafford*, 258 U.S. at 514.

¹⁴ H.R. Rep. No. 67-1297, at 23 (1921).

¹⁵ *Id.* at 24 (describing the industry’s “conspiracy for the purpose of regulating purchases of livestock and controlling the price of meat.”); S. Rep. No. 66-429, at 3 (1920) (describing the history of the industry as “one effort after another to set up monopoly.”).

¹⁶ *De Jong Packing Co. v. United States Dep’t of Agric.*, 618 F.2d 1329, 1335-37 & n. 7 (9th Cir. 1980) (finding Section 202 “incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation.”); *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1304 (11th Cir. 2005) (“long-time antitrust policies . . . formed the backbone of the PSA’s creation.”); *Wheeler*, 591 F.3d at 364, 367, 370 (Jones, C.J., concurring) (“‘Unfair’ was not an inkblot in 1921. Congress could not have expected, then, that its use of the term would occasion a free-ranging inquiry into the equities of business practices; rather, Congress intended, and made plain by its choice of language, that injury to competition would be an element of the inquiry.”).

¹⁷ *Moskal v. United States*, 498 U.S. 103, 121 (1990).

issue, with unanimous results.”¹⁸ The consistency with which the federal appellate courts have required a showing of actual or likely injury to competition in cases under Sections 202(a) and (b) is undeniable and striking.¹⁹ It reflects, above all, the courts’ understanding of the intent of Congress in enacting and amending the PSA: that it should serve to protect competition in the livestock industry, not that the Secretary of Agriculture or the judiciary should be free to ban any practice they might think “unfair.”

These judicial rulings confirming the principle that a likelihood of injury to competition must be shown to prove a violation of Sections 202(a) and (b) have been issued in a wide variety of settings. Some courts have applied the principle in affirming the dismissal of a claim under Section 202 for want of an allegation or proof of injury to competition.²⁰ The principle was also applied in an answer to a certified question in an interlocutory appeal under 28 U.S.C. § 1292(b).²¹ The injury to competition requirement has been applied in an appellate court’s affirmance of the legal standard adopted by the district court²² and of instructions given to a jury.²³ Finally, in *Armour and Co. v. United States*,²⁴ the court of appeals applied the competitive injury requirement in setting aside an order of a Judicial Officer of the Department of Agriculture.²⁵

It is widely accepted that “long-time antitrust policies . . . formed the backbone of the PSA’s creation.”²⁶ Congress felt a “need for specialized regulation [by the Department of Agriculture] of the many-tiered packing industry,” but “the legislative history does not show that the Secretary was to have carte blanche in prohibiting whatever practices he pleased.”²⁷ “[I]n Section 202(a) Congress gave the Secretary no mandate to ignore the general outline of long-time antitrust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged.”²⁸ Moreover, “the purpose behind the act ‘was not to

¹⁸ *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 277-79 (6th Cir. 2010).

¹⁹ See *In re Pilgrim’s Pride Corp.*, 728 F.3d 457 (5th Cir. 2013); *Wheeler*, 591 F.3d 355 (en banc); *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1230 (10th Cir. 2007); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005); *London*, 410 F.3d at 1303; *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *Philson v. Goldsboro Milling Co.*, 164 F.3d 625, 1998 WL 709324, at *4-5 (4th Cir. 1998) (unpublished table decision); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *Farrow v. U.S. Dep’t of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985); *De Jong Packing Co. v. United States Dep’t of Agric.*, 618 F.2d 1329, 1336-37 (9th Cir. 1980); and *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir. 1976).

²⁰ *London*, 410 F.3d 1295; *Terry*, 604 F.3d 272.

²¹ *Wheeler*, 591 F.3d 355 (en banc).

²² *Been*, 495 F.3d 1217.

²³ *Philson*, 164 F.3d 625, 1998 WL 709324 (4th Cir. Oct. 5, 1998) (unpublished table decision).

²⁴ 402 F.2d 712 (7th Cir. 1968).

²⁵ The USDA itself has challenged practices under Sections 202(a) and (b) on the basis of their alleged effects on competition. See, e.g., *De Jong Packing Co.*, 618 F.2d 1329 (conspiracy against auction stockyards); *IBP, Inc.*, 187 F.3d 974 (packer’s use of right of first refusal).

²⁶ *London*, 410 F.3d at 1304.

²⁷ *Armour*, 402 F.2d at 721.

²⁸ *Id.* at 722.

so upset the traditional principles of freedom of contract,' as to require an entirely level playing field for all."²⁹

A number of courts have indicated that the PSA may be somewhat broader than the antitrust statutes from which it was derived and more akin to the FTC's more expansive antitrust authority under Section 5 of the FTC Act. They have stressed, however, that this means only that a practice may be found to violate the PSA even if it would not be found to violate the Sherman Act owing to the lack of some collateral element required under that statute, such as the degree of intent, or the power to exclude competitors, or market power or whether injury to competition had yet occurred; a showing of the fundamental element of likely injury to competition is nonetheless required in cases under Sections 202(a) and (b). For example, *Been v. O.K. Industries, Inc.*,³⁰ involved a claim under Section 202(a) against an alleged monopsonist for its contracting practices. The court afforded the plaintiff the benefit of a less demanding standard than under the Sherman Act but held that Section 202(a) required proof of likely injury to competition.³¹

Similarly, in *De Jong Packing Co. v. USDA*,³² in which the government challenged under Section 202(a) an alleged packer conspiracy to change auction stockyards' terms of sale, the court held that a violation of Section 202 could be found even if "petitioners' lack of market power would preclude our finding that they had violated the Sherman Act" and even if competitive harm had not yet actually occurred but was reasonably likely. The court noted that "[w]hile § 202 of the Packers and Stockyards Act may have been made broader than antecedent antitrust legislation in order to achieve its remedial purpose, it nonetheless incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation."

In *Armour and Co. v. United States*,³³ the court held that the coupon promotion program at issue "does not violate Section 202(a), absent some predatory intent or some likelihood of competitive injury." The court noted that the scope of the PSA was sufficient to confer on the Secretary "broad powers under Section 202(a) with regard to trade practices which are 'unfair' in that they conflict with the basic policies of the various antitrust statutes, even though the practices may not actually violate those statutes." The court emphasized that the broader scope accorded the PSA was not intended to sever it from the policies of the antitrust laws but to further those policies and protect competition.³⁴

Accordingly, the courts of appeals have unanimously held that Section 202 contains a requirement that a plaintiff prove injury to competition. By the Interim Final Rule, GIPSA attempts to repeal the PSA's established competition standard and ignore the rulings of eight courts of appeals by deciding that proof of injury to competition is no longer an essential element of a

²⁹ *IBP, Inc.*, 187 F.3d at 977 (citation omitted).

³⁰ 495 F.3d 1217.

³¹ *Id.* at 1231.

³² 618 F.2d at 1335-37 & n.7.

³³ 402 F.2d at 717.

³⁴ *Id.*

claim under Sections 202(a) and (b). However, as Judge Jones explained in her concurring opinion in *Wheeler*, “the words of § 202(a) and (b) of the Packers and Stockyards Act are susceptible to a plain meaning: To provide that a practice is ‘unfair,’ ‘unjustly discriminatory,’ or an ‘undue or unreasonable preference,’ a plaintiff must demonstrate an actual or potential adverse impact on competition.”³⁵ GIPSA’s attempt to nullify that requirement exceeds its limited authority under the PSA.

C. Congress Has Ratified The Unanimous Judicial Interpretation Of Section 202.

That Congress has acquiesced in the consistent rulings of the appellate courts requiring proof of likely injury to competition in cases under Sections 202(a) and (b), further shows that the Interim Final Rule contradicts congressional intent. As the court stated in *Wheeler v. Pilgrim’s Pride Corp.*, “Congress has amended [Section 202] seven times without making any changes that would affect the many court interpretations cited above.”³⁶ Therefore, “[i]t is reasonable to conclude that Congress accepts the meaning of [§ 202(a)] to require an effect on competition to be actionable because congressional silence in response to circuit unanimity ‘after years of judicial interpretation supports adherence to the traditional view.’”³⁷

Most recently, in passing the 2008 Farm Bill, Congress rejected an invitation to adopt the very standard that GIPSA now proposes. During consideration of the Farm Bill, Senator Harkin introduced an amendment (the “Harkin Amendment”) that would have added the words “regardless of whether the practice or device causes a competitive injury” to Section 202(a) of the PSA.³⁸ The Harkin Amendment was rejected by the conference committee and never enacted.³⁹

GIPSA’s contention in the Interim Final Rule that Section 202 does not contain a requirement of injury to competition is contrary to the plain meaning of the statutory language. Congress’s failure to amend the PSA with the language GIPSA now includes in its Interim Final Rule confirms that the Rule exceeds GIPSA’s limited authority.

D. GIPSA’s Interpretation Of Section 202 Is Unreasonable Because It Departed From These Judicial Decisions Without Confronting Their Logic.

GIPSA gave short shrift to the logic in prior cases holding that Section 202 requires a showing of injury to competition. Instead of confronting the logic of these cases, GIPSA concluded, with little analysis or explanation, that its “longstanding [and judicially repudiated] interpretation” of the PSA is correct and that the courts must be wrong. The Interim Final Rule is unreasonable because GIPSA never grappled with the courts’ persuasive logic that Section 202

³⁵ *Wheeler*, 591 F.3d at 367 (Jones, C.J., concurring).

³⁶ *Id.* at 361-62 (en banc) (footnote and citation omitted).

³⁷ *Id.*

³⁸ H.R. 2419, 110th Cong., 153 Cong. Rec. S14410 (daily ed. Nov. 14, 2007).

³⁹ H.R. Rep. No. 110-627, at 469-477 (2008) (Conf. Rep.); Title XI of the Food, Conservation and Energy Act of 2008, Pub. L. No. 110-246, § 11006, 122 Stat. 1651 (2008).

unambiguously requires a showing of injury to competition.⁴⁰

GIPSA admits that the courts of appeals have consistently interpreted Section 202 in a manner directly conflicting with GIPSA's interpretation.⁴¹ In the Interim Final Rule, GIPSA asserts the courts are wrong because the opinions "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."⁴² However, GIPSA's conclusory assertion is not backed up with any analysis of the courts' opinions.

First, the Interim Final Rule makes the cursory claim that the plain language of the PSA does not incorporate a requirement of proof of harm to competition. The sole support for this claim is Webster's definition of "deceptive," "unfair," and other words in the PSA.⁴³ However, as the courts have noted, the PSA's language must be interpreted in the context in which it was drafted.⁴⁴ The Interim Final Rule makes no effort to acknowledge the courts' persuasive conclusions that the meaning of the words "unfair" and "unjust" was borrowed from other competition law statutes with the understanding that the words would continue to have antitrust meanings.⁴⁵ The Interim Final Rule does not address this essential part of the courts' logic.

Second, the Interim Final Rule claims the legislative history shows Congress intended to address other evils than just harm to competition. Yet again, the Interim Final Rule fails to directly address the courts' discussion of the legislative history. In particular, the Interim Final Rule fails to address the analysis in *Wheeler* regarding Congress's failure to amend Section 202 to revise the courts' interpretation and adopt GIPSA's proposed interpretation.⁴⁶ The courts found clear congressional intent to incorporate an injury to competition requirement, but the Interim Final Rule does not sufficiently grapple with the courts' logic.

Third, the Interim Final Rule claims the courts improperly failed to defer to GIPSA's "longstanding interpretation." As explained below, GIPSA's interpretation is not entitled to deference because the statute is unambiguous, meaning there is no gap for the agency to fill. In addition, the Interim Final Rule contains no support for GIPSA's claim that its interpretation is "longstanding." There is nothing to indicate that GIPSA had always interpreted Section 202 as not containing a requirement for injury to competition. Without showing that the Interim Final

⁴⁰ *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983); *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 55 (2d Cir. 2003).

⁴¹ 81 Fed. Reg. 92,568.

⁴² *Id.* at 92,568.

⁴³ *Id.* at 92,567.

⁴⁴ *See, e.g., De Jong Packing Co.*, 618 F.2d at 1336-37 (finding Section 202 "incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation."); *London*, 410 F.3d at 1304 ("long-time antitrust policies . . . formed the backbone of the PSA's creation.").

⁴⁵ *Wheeler*, 591 F.3d at 364-65, 367, 370 (Jones, C.J., concurring).

⁴⁶ *Id.* at 361-62.

Rule represents “longstanding” interpretation, GIPSA cannot demonstrate the courts failed to appropriately defer. GIPSA’s failure to grapple with the logic of these decisions was unreasonable.

E. GIPSA’s Interpretation Is Unreasonable Because It Improperly Federalizes State Contract And Tort Law Claims.

Congress passed the PSA to address potential harm to competition, not harm to competitors. In removing the requirement of proof of injury to competition, GIPSA opens the door to federalizing state contract and tort claims. The PSA was not designed to provide a federal claim for every possible dispute between producers and packers by tagging the actions at issue as “unfair.” GIPSA exceeded its rulemaking authority by trying to expand the PSA to address disputes that are not covered by the PSA and are best resolved under state law. Indeed, Section 308(b) of the PSA expressly provides that the remedies provided by the PSA “shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.”⁴⁷

Courts have routinely held that the PSA is designed only to address anticompetitive injury and not petty disputes. “The purpose behind the act ‘was not to so upset the traditional principles of freedom of contract,’ as to require an entirely level playing field for all.”⁴⁸ The PSA is “not intended to protect a business against loss in a competitive market” and GIPSA has no authority to prohibit “spirited competition.”⁴⁹ The PSA does not create any “entitlement to obtain the same type of contract” as others.⁵⁰ As the Eleventh Circuit noted, the requirement for competitive harm is essential or else dealers would face “liability under the PSA for simple breach of contract or for justifiably terminating a contract with a grower who has failed to perform as promised.”⁵¹ As Chief Judge Jones stated in concurrence in *Wheeler*, “Congress could not have expected, then, that its use of the term [unfair] would occasion a free-ranging inquiry into the equities of business practices.”⁵²

The Interim Final Rule opens the door to liability under the PSA for petty disputes, in direct contradiction to the purpose of the PSA. For example, many of the circuit court cases that were dismissed for failure to prove harm to competition involved a simple breach of contract.⁵³ These types of disputes are grounded in state law and have traditionally been resolved in state courts. The Interim Final Rule would federalize these claims, turning every simple breach of contract into a Section 202 violation. As the courts have consistently held, Congress did not intend the PSA to

⁴⁷ 7 U.S.C. § 209(b).

⁴⁸ *IBP, Inc.*, 187 F.3d at 977 (citation omitted).

⁴⁹ *Armour*, 402 F.2d at 719-720.

⁵⁰ *Jackson*, 53 F.3d at 1458.

⁵¹ *London*, 410 F.3d at 1304.

⁵² *Wheeler*, 591 F.3d at 364, 367, 370.

⁵³ *Been*, 495 F.3d at 1229; *London*, 410 F.3d at 1299-1300; *Philson*, 164 F.3d 625, 1998 WL 709324, at *4-5 (unpublished table decision); *Jackson*, 53 F.3d at 1458; *Pac. Trading Co.*, 547 F.2d at 369-70.

grant GIPSA authority to meddle in private contracts or other private disputes, yet that is precisely the aim of the Interim Final Rule.

III. THE INTERIM FINAL RULE IS ARBITRARY AND CAPRICIOUS.

The Interim Final Rule also violates the Administrative Procedure Act in several respects. First, GIPSA has not identified any systemic problem in the pork or beef industries that the Interim Final Rule is expected to fix. Second, GIPSA acted arbitrarily and capriciously by adopting an industry-wide solution for a problem that may exist—if at all—in meat products other than pork or beef. Third, GIPSA’s evaluation of the costs and benefits of the Interim Final Rule is untenable.

A. GIPSA Identified No Evidence That The Interim Final Rule Would Address Any Systemic Problem In The Pork Or Beef Industries.

It is firmly established that agency action must be supported by substantial evidence in the record.⁵⁴ In addition, a “rational connection between facts and judgment[s] [is] required to pass muster under the arbitrary and capricious standard.”⁵⁵ GIPSA’s record contains no evidence of a problem in the pork or beef industries justifying the Interim Final Rule, nor do the minimal facts in the record support GIPSA’s decision to extend the Interim Final Rule to the pork or beef industries.

Indeed, GIPSA failed to provide specific examples of a problem in the pork or beef industries that the PSA was unable to address because of the injury to competition requirement. In the Interim Final Rule, GIPSA provides three general examples of conduct that a plaintiff could successfully challenge without proof of harm to competition: “retaliatory conduct, use of inaccurate scales, or providing a poultry grower sick birds.”⁵⁶ However, GIPSA does not offer any evidence that this type of conduct is occurring in the pork or beef industries.⁵⁷

B. The Interim Final Rule Is Overbroad Because GIPSA Should Have Targeted Any Unfair Practices In Other Meat Products With Narrowly Tailored Rules.

The Interim Final Rule arbitrarily imposes a one-size-fits-all rule on the poultry, pork, and beef industries despite their significant differences. Although the Interim Final Rule does not explain which problem it is trying to address, GIPSA appears to be concerned about practices

⁵⁴ *Lakeland Bus Lines, Inc. v. N.L.R.B.*, 347 F.3d 955, 961-62 (D.C. Cir. 2003); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) (“It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data....”).

⁵⁵ *Motor Vehicle Mfrs. Ass’n of U.S., Inc.*, 463 U.S. at 56; *see also, Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 93 (D.C. Cir. 2010).

⁵⁶ 81 Fed. Reg. at 92,571. GIPSA discusses in detail the impact that the Proposed Rules will have. However, these are not incorporated into the IFR and as mentioned before, cannot serve as the basis for issuing the IFR.

⁵⁷ *Florida Gas Transmission Co. v. F.E.R.C.*, 604 F.3d 636, 641 (D.C. Cir. 2010) (“Congress has not authorized the Commission to exercise its NGA § 5 powers based on speculation, conjecture, divination, or anything short of factual findings based on substantial evidence.”).

outside of the pork and beef industries. As the Interim Final Rule recognizes, there are vast disparities in the various industries.⁵⁸

It was arbitrary and capricious for GIPSA to adopt an “industry-wide solution for a problem that exists only in isolated pockets.”⁵⁹ If GIPSA wanted to address problems in other meat products, it should have adopted narrowly tailored rules to address those problems, instead of imposing its disruptive Interim Final Rule on the entire meat industry. GIPSA cannot regulate in such a manner without providing a reasoned explanation for using an axe when only a scalpel is necessary.

C. GIPSA’s Cost-Benefit Analysis Ignores Relevant Costs And Is Deeply Flawed.

It is arbitrary and capricious for an agency to adopt a policy without a “serious evaluation of the costs” it will impose upon regulated entities.⁶⁰ Yet that is exactly what GIPSA did here. It failed to update its cost-benefit analysis to reflect changes in the market since 2010, accurately calculate the costs of increased litigation, or establish that the Interim Final Rule will yield any benefits at all.

First, GIPSA relied on outdated data from 2010 in calculating the costs and benefits of the Interim Final Rule. Changes to industry behavior in response to the Interim Final Rule will be costly for industry and consumers, yet GIPSA’s analysis of the costs from the rule is not based on the current market. An Informa study conducted in 2016 found the cost of the Interim Final Rule and Proposed Rule would be \$200 million more for the beef and pork industries than the costs Informa calculated in its 2010 study.⁶¹ It was arbitrary and capricious for GIPSA to ignore changes in the marketplace and rely on outdated and incorrect data.⁶²

Second, GIPSA’s calculation of the potential costs from increased litigation is deeply flawed. The Interim Final Rule focuses on attorneys’ fees and court costs as the sole costs of increased litigation. This arbitrarily ignores the largest costs from the Interim Final Rule in the form of the actual settlements, judgments and most especially changed behavior. The magnitude of this litigation risk can best be illustrated by *Pickett v. Tyson Fresh Meats, Inc.* in which a jury returned a verdict of \$1,281,690,000.⁶³ Nowhere in the Interim Final Rule did GIPSA consider the cost of paying these massive judgments and settlements. Neither did it even attempt to

⁵⁸ *Id.* at 92,572.

⁵⁹ *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1019 (D.C. Cir. 1987).

⁶⁰ *Business Roundtable v. SEC*, 647 F.3d 1144, 1151-52 (D.C. Cir. 2011).

⁶¹ Compare Informa Economics, *An Estimate of the Economic Impact of GIPSA’s Proposed Rules on the Cattle and Hog Sectors*, at 39 (Sept. 2016), with Informa Economics, *An Estimate of the Economic Impact of GIPSA’s Proposed Rules*, at 52-54 (November 8, 2010).

⁶² *Sierra Club v. U.S. E.P.A.*, 671 F.3d 955, 965 (9th Cir. 2012) (finding agency acted arbitrarily in relying on outdated data and failing to analyze newly supplied data); *Dow AgroSciences LLC v. NMFS*, 707 F.3d 462, 473 (4th Cir. 2013) (reliance on outdated data is arbitrary).

⁶³ 315 F. Supp. 2d 1172 (M.D. Ala. 2004), *aff’d*, 420 F.3d 1272 (11th Cir. 2005).

comprehend what the likely expected marketplace response to these significant costs would be. Therefore, GIPSA’s analysis cannot be considered a “serious evaluation of the costs.”⁶⁴

Third, the Interim Final Rule does not present any evidence that it will bring about any benefits to consumers or the pork and beef industries. GIPSA did not identify specific bad practices in the pork or beef industries that the Interim Final Rule would prevent or beneficial changes that will result from the Interim Final Rule. The only certain result of the Interim Final Rule is an increase in the number of lawsuits against members of the pork and beef industries, but this can hardly be considered a benefit. “No regulation is ‘appropriate’ if it does significantly more harm than good.”⁶⁵ The costs from litigation combined with the costs of eliminating efficient industry practices in response to the Interim Final Rule clearly outweigh whatever minor benefit exists from an increase in frivolous and unfounded lawsuits.

IV. THE INTERIM FINAL RULE IS NOT ENTITLED TO JUDICIAL DEFERENCE.

GIPSA’s confidence that its new interpretation of Section 202 will “be entitled to judicial deference”⁶⁶ is misplaced. The eight circuit courts of appeals that have considered this issue have soundly rejected the interpretation adopted by GIPSA. GIPSA’s quixotic attempt to alter the unambiguous meaning of the statute is not entitled to *Chevron* deference because there is no “statutory gap” for the agency to fill. Further, GIPSA’s interpretation is procedurally defective, and no court would presume that Congress intended to delegate a question of such economic and political magnitude to GIPSA. Even under the *Skidmore* standard, GIPSA’s interpretation of Section 202 fails because it lacks even the power to persuade.

A. There Is No Statutory Gap For GIPSA To Fill Because Courts Have Held That Section 202 Unambiguously Requires Harm To Competition.

GIPSA’s Interim Final Rule is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because courts have held that Section 202 unambiguously requires proof of injury to competition. Unambiguous statutory language is “a clear sign that Congress did *not* delegate gap-filling authority to an agency” under *Chevron*.⁶⁷ Thus, “a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction” that would otherwise be entitled to *Chevron* deference.⁶⁸

⁶⁴ *Business Roundtable*, 647 F.3d at 1151-52.

⁶⁵ *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

⁶⁶ Letter from Thomas J. Vilsack, Secretary, USDA, to Neil Dierks, CEO, NPPC (Oct. 13, 2016).

⁶⁷ *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843 (2012).

⁶⁸ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005); *see also id.* at 982 (“A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference . . . if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”).

The eight courts of appeals that have considered the precise question at issue here have concluded that Section 202 unambiguously requires proof of injury to competition.⁶⁹ As the Eleventh Circuit explained in *Fieldale Farms*, “[b]ecause Congress plainly intended to prohibit ‘only those unfair, discriminatory or deceptive practices adversely affecting competition,’ a contrary interpretation of Section 202(a) deserves no deference.”⁷⁰ In *Wheeler*, the Fifth Circuit similarly recognized that *Chevron* deference “is unwarranted [because] Congress has delegated no authority to change the meaning the courts have given to the statutory terms” of Section 202.⁷¹ Because courts have already held that Section 202 unambiguously requires proof of injury to competition, “there is no longer any different construction . . . available for adoption by the agency.”⁷²

B. The Interim Final Rule Is Procedurally Defective Because GIPSA Did Not Comply With The APA’s Notice-And-Comment Requirements.

The Interim Final Rule is also unworthy of deference because GIPSA failed to comply with the APA’s notice-and-comment requirements prior to adopting the Interim Final Rule.⁷³ As the Supreme Court recently explained, “*Chevron* deference is not warranted where the regulation is ‘procedurally defective’ – that is, where the agency errs by failing to follow the correct procedures in issuing the regulation.”⁷⁴ Among other things, the APA’s notice and comment provisions require that “[t]he opportunity to participate . . . occur[] reasonably close to the time in which the [agency] makes a decision.”⁷⁵ Accordingly, when a rulemaking record grows stale due to the

⁶⁹ See, e.g., *Terry*, 604 F.3d at 277 (“All told, seven circuits—the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits—have now weighed in on this issue, with unanimous results.”).

⁷⁰ *London*, 410 F.3d at 1303 (internal citation omitted).

⁷¹ *Wheeler*, 591 F.3d at 362.

⁷² *Home Concrete & Supply*, 132 S. Ct. at 1843.

⁷³ See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 577 (2009) (according no deference where “the agency finalized the rule and, without offering States or other interested parties notice or opportunity for comment, articulated a sweeping position on the FDCA’s pre-emptive effect in the regulatory preamble”); *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”); *Ketchikan Drywall Servs., Inc. v. Immigration & Customs Enf’t*, 725 F.3d 1103, 1112 (9th Cir. 2013) (“Where an agency action was not undertaken pursuant to a ‘relatively formal administrative procedure’ . . . we are unlikely to find that the agency action carries such force.” (citing *Mead*, 533 U.S. at 230)).

⁷⁴ *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2120 (2016) (quoting *Mead*, 533 U.S. at 227).

⁷⁵ *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995) (recognizing that “[a]fter a gap of nearly six years, the public may have new or different information to offer for consideration”); see also *Bus. Roundtable*, 647 F.3d at 1148-49 (vacating rule after agency “failed to respond to substantial problems raised by commenters”); *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1482-83 (D.C. Cir. 1994) (describing agency’s termination of rulemaking process based on staleness of six-year-old record).

passage of time, the agency must either re-open the comment period to refresh the record or terminate the rulemaking proceeding altogether.⁷⁶

Here, more than six years have passed since GIPSA first published the Interim Final Rule as a proposed rule in June 2010. Since that time, the pork and beef industries have undergone significant and substantial changes. For example, the increasing prevalence of farm-to-table practices and development by livestock producers of greenfield slaughterhouses and packaging plants have more closely tied farmers, ranchers and producers to meat packing in 2016 than they were in 2010. The cattle industry has seen significant supply shifts due to multiple factors which have resulted in market changes over the past few years. Applying the 2010 proposal to current conditions would result in nearly \$200 million in supplemental costs, increasing the total cost of this unnecessary rule on the beef and pork sector to nearly \$1.5 billion.⁷⁷ GIPSA's refusal to allow parties a meaningful opportunity to comment on the significant changes that have occurred in the meat industry is wholly contrary to the APA's goal of "improv[ing] the quality of agency rulemaking by exposing regulations to diverse public comment, ensur[ing] fairness to affected parties, and provid[ing] a well-developed record."⁷⁸

GIPSA's abrupt promulgation of a six-year-old proposal on an outdated record does not fit within the narrow "good cause" exception to the APA's notice and comment requirements. The APA authorizes agencies to dispense with notice and comment when the agency, "for good cause," finds that those procedures are "impracticable, unnecessary, or contrary to the public interest."⁷⁹ This exception, which is "narrowly construed and only reluctantly countenanced," excuses "notice and comment in emergency situations, or where delay could result in serious harm."⁸⁰ In general, an agency must point to some "dramatic change in circumstances that would constitute an emergency justifying shunting off public participation in the rulemaking."⁸¹ "Bald assertions that the agency does not believe comments would be useful cannot create good cause to forgo notice and comment procedures."⁸²

GIPSA lacked good cause to dispense with notice-and-comment rulemaking procedures prior to adopting the Interim Final Rule. There can be no dispute that potential economic impact on some undefined number of growers and producers—the only rationale provided by GIPSA in

⁷⁶ See, e.g., *Verizon Tel. Co. v. FCC*, 453 F.3d 487, 493-94 (D.C. Cir. 2006) (describing re-opening of comment period to refresh the record in a rulemaking proceeding that had grown stale due to the passage of time); *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1482-83 (D.C. Cir. 1994) (describing agency's termination of rulemaking proceeding based on staleness of six-year-old record).

⁷⁷ Compare Informa Economics, *An Estimate of the Economic Impact of GIPSA's Proposed Rules on the Cattle and Hog Sectors*, at 39 (Sept. 2016), with Informa Economics, *An Estimate of the Economic Impact of GIPSA's Proposed Rules*, at 52-54 (Nov. 8, 2010).

⁷⁸ *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (internal quotation marks and citation omitted).

⁷⁹ 5 U.S.C. § 553(b)(3)(B) and notes.

⁸⁰ *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (quotation marks and citation omitted); see also *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014).

⁸¹ *Am. Acad. of Pediatrics v. Heckler*, 561 F. Supp. 395, 401 (D.D.C. 1983).

⁸² *Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 800 (D.C. Cir. 1983).

its 2010 proposed rule⁸³ — is not the type of emergency that justifies the curtailment of public participation.⁸⁴ That is especially true when the rulemaking has been dormant for over six years without any market disruption supporting a finding of emergency conditions.⁸⁵

Nor do statutory mandates provide any urgency. Although the 2008 Farm Bill mandated certain regulatory action by GIPSA, this Interim Final Rule is wholly outside of that mandate.⁸⁶ In fact, USDA has already implemented “the majority” of the directives in the 2008 Farm Bill through separate rulemakings.⁸⁷

Finally, the Interim Final Rule does not involve a minor or merely technical matter. GIPSA’s interpretation of Sections 202(a) and (b) could expose the meat industry to legal challenges claiming millions of dollars in damages enforceable through private rights of action. Accordingly, *Chevron* deference is unwarranted because the Interim Final Rule is procedurally defective.

C. **Any Chevron Deference Is Inapplicable Because Congress Did Not Implicitly Grant GIPSA The Power to Reconfigure the Structure of the Multi-Billion Dollar Livestock Industry.**

The Interim Final Rule is also not entitled to *Chevron* deference because Congress has not delegated any authority to GIPSA to implement such a sweeping rule. An agency rule is entitled to deference only “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”⁸⁸ The Farm Bill provided no Congressional directive for GIPSA to address the PSA’s injury to competition requirement. And GIPSA’s general rulemaking authority under Section 407 of the PSA authorizes the Secretary of Agriculture

⁸³ See 75 Fed. Reg. at 35,342.

⁸⁴ See, e.g., *Sorenson Commc’ns*, 755 F.3d at 706 (rejecting “the threat of impending fiscal peril as cause for waiving notice and comment”); *Mack Trucks*, 682 F.3d at 93-94 (rejecting as “nonsensical” an agency’s approach that “would give agencies ‘good cause’ under the APA every time a manufacturer in a regulated field felt a new regulation imposed some degree of economic hardship”).

⁸⁵ *Wash. All. of Tech. Workers v. U.S. Dep’t of Homeland Sec.*, 156 F. Supp. 3d 123, 147 (D.D.C. 2015), *vacated as moot*, 650 F. App’x 13 (D.C. Cir. 2016) (finding no emergency because the agency had “waited to initiate proceedings [and] not pointed to any changed circumstances that made [the rule] suddenly urgent”).

⁸⁶ See 76 Fed. Reg. 76,874 (Dec. 9, 2011) (summarizing mandates from 2008 Farm Bill).

⁸⁷ *Id.* at 76,876.

⁸⁸ *Mead Corp.*, 533 U.S. at 226-27; see also *Am. Library Ass’n v. FCC*, 406 F.3d 689, 699 (D.C. Cir. 2005) (“crucial threshold consideration” in determining the applicability of *Chevron* deference is “whether the agency acted pursuant to delegated authority”); *AT&T v. FCC*, 323 F.3d 1081, 1086 (D.C. Cir. 2003) (*Chevron* deference is warranted “only when ‘Congress has left a gap for the agency to fill pursuant to an express or implied delegation of authority to the agency’”) (citation omitted); *MPAA v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) (“The agency’s interpretation of [a] statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue. . . . *Mead* reinforces *Chevron*’s command that deference to an agency’s interpretation of a statute is due only when the agency acts pursuant to ‘delegated authority.’”).

only to “make such rules, regulations and orders *as may be necessary to carry out the provisions of this Act*,”⁸⁹ not to change the meaning of the PSA itself.

In examining a particular statutory provision, courts “must be guided to a degree by common sense as to” whether “Congress is likely to [have] delegate[d] a policy decision of such economic and political magnitude to an administrative agency.”⁹⁰ Section 202’s injury to competition requirement is “a question of deep ‘economic and political significance’ that is central to [the PSA’s] statutory scheme,” and courts are likely to “hesitate before concluding that Congress has intended . . . an implicit delegation” of authority to the agency in such cases.⁹¹ This is especially true here, where the Interim Final Rule would wipe out decades of precedent and expose the meat industry to legal challenges claiming millions of dollars in damages enforceable through private rights of action. “[H]ad Congress wished to assign that question to an agency, it surely would have done so.”⁹² Indeed, “it is especially unlikely that Congress would have delegated this decision to [GIPSA], which has no expertise in crafting . . . policy of this sort.”⁹³

The fact that Congress has explicitly declined to amend the PSA to overturn the myriad circuit court decisions holding that Section 202 requires proof of injury or likelihood of injury to competition further confirms that Congress never intended to authorize GIPSA to overturn this long-standing and widely held statutory construction. As the *Wheeler* court aptly observed, “up to 2002, Congress has amended [Section 202] seven times without making any changes that would affect the[se] many court interpretations.”⁹⁴ It is therefore “reasonable to conclude that Congress accepts the meaning of [Section 202(a)] to require an effect on competition to be actionable because congressional silence in response to circuit unanimity ‘after years of judicial interpretation supports adherence to the traditional view.’”⁹⁵

Moreover, as noted above,⁹⁶ Congress even considered and rejected an amendment to the 2008 Farm Bill that would have adopted the very standard that GIPSA now proposes. As the Supreme Court recently explained, “[i]f a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation.”⁹⁷ Here, “[w]hen it amended the [PSA], Congress was aware of this unanimous [circuit court] precedent,” made “a considered judgment to retain the relevant statutory text,” and even “rejected a proposed amendment that would have eliminated”

⁸⁹ 7 U.S.C. § 407(a) (emphasis added).

⁹⁰ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

⁹¹ *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015) (internal quotation marks and citation omitted).

⁹² *Id.* at 2489.

⁹³ *Id.*

⁹⁴ *Wheeler*, 591 F.3d at 361.

⁹⁵ *Id.* at 361-62 (citation omitted).

⁹⁶ *See supra* Part II.C.

⁹⁷ *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) (citation and internal quotation marks omitted).

the interpretation that GIPSA has now proposed.⁹⁸ Thus, “Congress’s decision . . . to amend the [PSA] while adhering to the operative language in [Section 202] is convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals finding” that Section 202 requires proof of injury or likelihood of injury to competition.⁹⁹

D. GIPSA’s Interpretation Of Section 202 Is Not Entitled To *Skidmore* Deference.

Deference to GIPSA’s interpretation of Section 202 in the Interim Final Rule would be unwarranted even under the much less stringent standard of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Under *Skidmore*, agency interpretations are “‘entitled to respect’ . . . , but only to the extent that those interpretations have the ‘power to persuade.’”¹⁰⁰ “The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”¹⁰¹

Each of these factors is absent here. As previously discussed, GIPSA has affirmatively refused to consider the significant changes that have occurred in the meat industry by refusing to re-open and refresh the stale record in this proceeding. GIPSA has failed to provide any explanation as to how the Interim Final Rule will fulfill its purported goal of “mitigat[ing] the risks of potential market failures or unequal bargaining power to all livestock producers, swine production contract growers, and poultry growers,”¹⁰² nor has it cited a single example of conduct in the pork or beef industries that is unfair and has survived only because of the competitive harm requirement. Although GIPSA claims that “USDA has consistently taken the position” that proof of competitive harm is not necessary under Section 202, courts have rightly observed that, prior to adopting the Interim Final Rule, GIPSA had never “promulgated a regulation applicable to” such cases.¹⁰³ Thus, GIPSA’s interpretation of Section 202 is not entitled to deference even under *Skidmore*.

CONCLUSION

NPPC and NCBA have grave concerns about the Interim Final Rule and its practical effect on the U.S. pork and beef industries. The Interim Final Rule adopts a view of the PSA that has been uniformly rejected by the courts of appeals. Not only is it legally unsustainable, it is an ill-conceived public policy that will harm U.S. pork and beef producers. Should it become effective, the Interim Final Rule will harm consumers and hand our competitors in the international market a competitive advantage—offering them the opportunity to replace the U.S. pork and beef industries as the leading exporters of pork and beef products. Additionally, pork and cattle producers will see a negative impact on the value-added programs they have worked for years to develop and implement. GIPSA should delay the Interim Final Rule’s effective date until GIPSA

⁹⁸ *Id.* at 2519-20.

⁹⁹ *Id.* at 2520.

¹⁰⁰ *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (quoting *Skidmore*, 323 U.S. at 140).

¹⁰¹ *Skidmore*, 323 U.S. at 140.

¹⁰² 81 Fed. Reg. at 92,591.

¹⁰³ *Been*, 495 F.3d at 1227.

finalizes the Proposed Rule, and then, after reconsidering the Interim Final Rule in conjunction with the Proposed Rule, issue a notice of proposed rulemaking to repeal the Interim Final Rule.

Sincerely,



Ken Maschhoff
President
National Pork Producers Council



Craig Uden
President
National Cattlemen's Beef Association