National Pork Producers Council®

The Global Voice for the U.S. Pork Industry

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Re: Comments of the National Pork Producers Council in Response to Proposed Rule "Fair and Competitive Livestock and Poultry Markets" (AMS-FTPP-21-0046)

We are writing on behalf of the National Pork Producers Council ("NPPC") to present its comments on the Agricultural Marketing Service's ("AMS") proposed rule titled the "Fair and Competitive Livestock and Poultry Markets" (AMS-FTPP-21-0046).

NPPC appreciates the opportunity to submit comments on the proposed rulemaking regarding unfair practices. Pork producers rely on the proper enforcement of the Packers and Stockyards Act ("PSA") to ensure competitive pricing opportunities and free and fair markets. NPPC appreciates that AMS intends for the Proposed Rule to promote fair and competitive markets.

But in seeking to eliminate the harm to competition requirement of the PSA, USDA exceeds its statutory authority. Recognizing that the PSA was enacted to address antitrust concerns with consolidation among packers, courts have uniformly held that harm to competition is a required element of a PSA action. Congress has repeatedly acquiesced to this statutory construction and has even explicitly rejected an amendment that would have eliminated the harm to competition requirement. USDA simply cannot change the statute by rulemaking; only Congress can through legislation.

Moreover, the definitions and regulations within the Proposed Rule are vague and overly broad, leading to substantial and unnecessary uncertainty that would make it challenging for regulated entities to demonstrate compliance and result in burdensome and costly litigation. Furthermore, the pork industry's regulated entities include not only large-scale pork packers and processors, but also small processors and independent hog farmers engaged in contract production. Producers that sell hogs to packers as well as contract growers raising pigs for other producers would be negatively impacted as the industry responds

to heightened uncertainty, confusion, and litigation. Additionally, the majority of protections in the Proposed Rule are already covered by existing antitrust, anti-discrimination and other state and federal laws.

The following comments include important background information on the U.S. pork industry and a legal analysis that addresses many of USDA's questions and the associated impacts of the Proposed Rule.

Pork Industry Background

The U.S. pork industry has undergone significant changes in the last 30 years, transforming from a commodity-oriented sector that relied mainly on family labor to a capital-intensive, science-and-technology-driven industry producing products for many consumer audiences. Over time, the pork industry has also evolved from an industry of hundreds of thousands of small operations selling pigs in cash markets by truck or trailer loads to one that has approximately 60,000 hog farms marketing animals directly to packers and in some cases, directly to consumers.

Those 60,000 farms make the U.S. a worldwide leader in pork production marketing around 149 million hogs and pigs annually.[1] That accounts for roughly 27 billion pounds of pork processed by hundreds of pork packing and processing plants throughout the country.

According to the latest USDA Farm Typology report, released in 2022, about 96% of U.S. hog farms are family owned, accounting for approximately 81% of the hog inventory at that time.[2]

Production Contracts

Data from the 2022 Census of Agriculture showed that 35% of the hogs in inventory at the end of December 2022 were owned by independent producers, 24% were under the direct care of a contractor or integrator, and 42% were owned by a contractor but were being raised by independent contract growers.[3]

The use of production contracts accomplishes several important functions for hog producers. First, production contracts make it easier for producers to grow their farming operations without raising the capital required to construct additional facilities. They also create opportunities for other farmers to build

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[1] The Pork Industry, NPPC, https://nppc.org/the-pork-industry/ (last visited Sept. 6, 2024).
[2] Summary by Farm Typology Measured by Gross Cash Farm Income (GCFI) of Family Producers and Non-Family Farms – United States: 2017, Nat'l Agricultural Statistics Service, https://www.nass.usda.gov/Publications/AgCensus/2017/Online_Resources/Typology/typology_us.pdf (last visited Sept. 6, 2024).
[3] Hogs and Pigs – Number Sold by Type of Producer: 2022, Nat'l Agricultural Statistics Service, https://www.nass.usda.gov/Publications/AgCensus/2022/Full_Report/Volume_1,_Chapter_1_US/st99_1_024_027.pdf (last visited Sept. 6, 2024).

hog barns and enter business as independent contract growers. The grower has the benefit of building equity in barns and equipment that typically holds value well beyond the length of the contract.

Second, production contracts allow hog farms to be geographically dispersed, reducing the systemic risk of loss that would exist if animals were spatially concentrated. The growth of production contracts also coincided with the development of separate-site swine production systems that segregate pigs at various growing stages to control disease, increase pig health and enhance efficiencies. Production contracts facilitated the widespread adoption of these systems by giving pig owners access to land in different areas. This system has resulted in healthier animals, which directly corresponds to reduced consumer risk from biological hazards. Production contracts have also led to lower-cost production, higher output, more affordable pork products for U.S. and foreign consumers, and ready access to manure fertilizers that many crop farmers use.[4]

Finally, production contracts allow thousands of rural residents to remain on family farms, making a full-time living in agriculture. Production contracts make this possible by providing repayment assurance for bankers and, in turn, allowing growers to finance, upgrade and modernize buildings. They provide steady sources of income without the grower having to face output or market risk. Once paid off, contract buildings provide substantial cash flow that can be used to replace or expand facilities. Many growers eventually become independent hog producers thanks to the opportunity provided by a production contract.

Contract hog production payments were initially made on a per-head basis, with premiums for superior performance, such as low death loss, low feed conversion rate, and more pigs per sow per year. However, this meant that potentially poor weather conditions, disease challenges, and early marketing or delayed pig deliveries could create situations that reduced growers' incomes and their ability to repay loans.

Other payment systems were tried, but most producers finally adopted, in general, a system that pays growers a fixed amount per animal space per year. Hypothetically, the owner of a 1,000-head finishing barn may receive $42 per pig space per year (i.e., $42,000 annually). In addition, the contract grower may receive a premium for performance that exceeds pre-specified levels, such as certain feed conversion rates or low death loss. This payment system guarantees a minimum income level to growers, provides incentives to improve performance, and allows owners flexibility in the timing of placing and marketing pigs without imposing costs and undue restraints on the grower. The system has worked very well for swine contractors and contract growers in the pork industry.

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[4] Meyer, S. and Goodwin, B., "Structure and Importance of the U.S. Pork Industry" (2021).

Marketing Agreements

Another business practice developed over the past 30 years is the use of marketing agreements to transfer ownership of pigs from producers to packers. Marketing agreements, like production contracts, have evolved to meet the needs of farmers and industry.

Early marketing agreements were offered by packers to secure leaner hogs that would yield higher proportions of saleable cuts. In the 1980s and 1990s, the U.S. hog populations contained a large number of animals with too much fat and not enough lean muscle. As consumers began demanding leaner pork products, packers identified producers with lean, muscular hogs and offered them a premium if they would make a long-term commitment to selling to that packer. Another benefit is the assurance of throughput levels that maximize packing plant efficiencies, allowing producer-to-consumer price spreads to be as small as possible.[5]

For producers, one benefit of marketing agreements is guaranteed access to packing capacity. The importance of this access was driven primarily by the hog price crash of 1998. In that year, hog supply increases outpaced packing capacity, and hog prices fell to record lows. The inability to sell hogs on a timely basis drove many producers and their lenders to enter into marketing agreements to guarantee "shackle space" at a packer. Few producers or lenders wanted to take the risk of raising pigs without a guaranteed market, even over a short period of time. In today's environment of volatile market prices, many lenders require producers to secure a marketing contract that ensures shackle space and some degree of revenue certainty as a condition of their financing.

As marketing agreements have become more widely adopted, the volume of hogs traded on the cash or spot market has declined. There have been legislative and regulatory attempts over the years to limit how producers sell and packers buy hogs, including proposals that would require a minimum volume of cash sales. However, such proposals would lead to more market volatility, further concentration, less stability and inevitably, more vertical integration of the pork industry, with packers simply owning hogs from birth to slaughter.

In recent years, a focus has been placed on ensuring the most accurate and timely price reporting information is made available by USDA's Livestock, Poultry, and Grain Market News Division in accordance with the Livestock Mandatory Price Reporting Act. Many marketing agreements also use the prices reported by UDSA as it is a reliable and consistent source of price and volume information. As a

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[5] Meyer, S. and Goodwin, B., "Structure and Importance of the U.S. Pork Industry" (2021).

result, this information has become increasingly important to producers to aid in the price discovery process and as they navigate marketing and risk management decisions on the farm.

Legal Analysis of the Proposed Rule

The Proposed Rule seeks to define "unfair practices" under Section 202(a) of the PSA that cause, or have the potential to cause, harm to either market participants or the market. It consists of a two-part framework under Proposed Section 201.308, covering "unfair practices and devices." Under Proposed Section 201.308(a), AMS defines "unfair practices with respect to market participants" as ones that cause or are likely to cause "substantial injury" to one or more market participants that cannot be reasonably avoided or justified by benefits that outweigh the injury. Proposed Section 201.308(b) then identifies a non-exhaustive list of factors to evaluate in determining whether a market participant suffered "substantial injury." Under Proposed Section 201.308(c), AMS defines "unfair practices with respect to markets," and then Section 201.308(d) identifies a list of non-exhaustive factors to consider in determining whether conduct "poses or is likely to pose a threat to markets."

While AMS claims to clarify PSA's prohibition on unfair practices, in promulgating Section 201.308(a)—which would define a practice as "unfair" under the PSA if it caused substantial injury to only one market participant—AMS would be eliminating the requirement to prove harm to competition (rather than harm to a single competitor) for actions brought under Section 202(a). This violates Section 202(a), which the legislative history demonstrates, and the U.S. Circuit Courts of Appeals have unanimously held, has a requirement to prove harm to competition as the PSA is based on antitrust principles. AMS's attempt to rewrite the PSA to remove the harm to competition requirement through rulemaking exceeds AMS's authority. The harm to competition requirement under the PSA is essential to ensure the PSA restricts only conduct that injures competition and does not restrict conduct that has procompetitive results. For this reason, harm to competition (a.k.a., "antitrust injury") is a bedrock principle of antitrust law.

Moreover, the removal of the harm to competition requirement would open the floodgates to PSA litigation in federal courts around contract and commercial disputes, which was not Congress's intent in enacting the PSA. Such disputes are better handled under laws that are well-established to cover the type of conduct the AMS seeks to punish under the PSA.

The Proposed Rule is also overly broad and vague, leaving USDA and courts carte blanche to decide whatever conduct it sees fit to be actionable under the PSA. This again will lead to costly litigation, and burden industry participants with determining how to adjust their business practices to comply with the Proposed Rule without notice as to which types of acts could be punished. Private litigants will also be

emboldened to bring actions under the PSA based on a nearly limitless set of potential commercial grievances.

I. The Proposed Rule Exceeds the Clear Statutory Construction of Section 202(a) of the PSA and Conflicts with Established Antitrust Principles Because It Would Eliminate the Harm to Competition Requirement

a. The PSA Is an Antitrust Statute that Requires Proof of Harm to Competition for a Claim to be Actionable

The PSA is rooted in the principles of antitrust law. Indeed, Congress enacted the PSA in response to concerns regarding anticompetitive practices in the meat industry following an investigation by the FTC that found monopolies and restraints of trade pervading the meatpacking industry.[6] Both the House and the Senate highlighted anticompetitive practices in the industry as the reason for passing the PSA.[7] The law was created so that a government agency with industry expertise could reign in the anticompetitive practices that were prevalent in the meatpacking industry.

It is widely accepted that "long-time antitrust principles . . . formed the backbone of the PSA."[8] Congress borrowed from the Sherman Act and other antitrust statutes in drafting the PSA. Therefore, terms such as "unfair," "unreasonable," and "undue" in Section 202(a) of the PSA have the meaning ascribed to those terms by the courts at the time the statute was enacted, which clearly encompass a requirement of finding harm to competition.[9] It is an essential principle of antitrust law that a plaintiff must show both harm to itself (injury in fact) and harm to competition (antitrust injury) to maintain an antitrust claim.[10] The harm to competition requirement is essential to the enforcement of the antitrust laws because it ensures that the antitrust laws only restrict conduct that is anticompetitive and does not restrict conduct that is

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[6] H.R. Rep. No. 66-1297, at 23 (1921).
[7] *Id.* at 24; S. Rep. No. 66-429, at 3 (1920).

[8] *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.").

[9] *See, e.g.*, *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 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.").
[10] *See, e.g.*, *Nynex Corp. v. Discon*, 525 U.S. 128, 135 (1998) (an antitrust plaintiff "must allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself."); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990) ("The antitrust laws were enacted for 'the protection of competition, not competitors.'") (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962)).

procompetitive.[11] Courts have acknowledged as such with the PSA, concluding that it was "not Congress's intent to interrupt business practices if they do not harm competition" and that if a defendant's "course of business promotes efficiency and aids competition" in the market, then it is not actionable under the PSA because the "challenged practice cannot, by definition, adversely affect competition."[12]

Based on this statutory history and construction, the federal courts of appeal have always interpreted Section 202(a) of the PSA to include a harm to competition requirement, like other antitrust laws. All eight Circuit Courts of Appeal that have decided the issue have unanimously reached the same conclusion—that the PSA has a harm to competition requirement.[13]

Moreover, Congress has repeatedly acquiesced to the Circuit Courts' interpretation requiring a showing of harm to competition. As the Fifth Circuit has stated, "Congress has amended [Section 202] seven times without making any changes" that would affect the Circuit court decisions finding harm to competition is requirement.[14] Therefore, "[i]t is 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.'"[15] In fact, Congress has expressly considered and rejected proposed amendments to remove the harm to competition requirement. In debates on the 2008 Farm Bill, Senator Harkin introduced an amendment that would have added the words "regardless of whether the practice or device causes competitive injury" to Section 202(a).[16] This proposed amendment was removed from the bill.[17] AMS cannot step in and essentially make an amendment to the PSA through rulemaking that Congress has explicitly rejected.

Instead of following the clear intent of Congress in enacting the PSA, AMS seeks refuge in another statute—the FTC Act—in its attempt to establish that the PSA was not intended to include a harm to competition requirement. AMS relies on a 2022 policy statement from the FTC in which the FTC announced its intention to proceed without proof of actual harm to competition in actions under Section 5

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[11] *See, e.g.*, *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 895 (2007) (cautioning courts not to "increase the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage.").
[12] *Picket v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005).
[13] *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 276-79 (6th Cir. 2010); *Wheeler*, 591 F.3d 355 at 357; *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1230 (10th Cir. 2007); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *Philson v. Goldsboro Milling Co.*, 1998 WL 709324, at *4-5 (4th Cir. Oct. 5, 1998); *De Jong*, 618 F.2d at 1336-37; *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir. 1976).
[14] *Wheeler*, 591 F.3d at 361-62 (citation omitted).
[15] *Id.*
[16] 153 CONG. REC. S14410 (daily ed. Nov. 14, 2007).
[17] H.R. Rep. No. 110-627 at 469-77 (2008) (Conf. Rep.).

of the FTC Act (prohibiting unfair methods of competition).[18] However, the FTC 2022 Policy Statement is a departure from the established precedent that Section 5 is to be enforced consistently with the antitrust laws and requires proof of harm to competition. As such, the policy statement has come under scrutiny and is expected to face challenges in courts because the FTC, like AMS with the Proposed Rule, would exceed its authority in enforcing the FTC Act under the policy statement.[19] Indeed, courts have rejected previous attempts by the FTC to enforce Section 5 without demonstrating harm to competition.[20] The FTC 2022 Policy Statement also departs from a policy statement issued by the FTC in 2015 that echoed the historical approach to enforce the FTC Act consistently with the antitrust laws. In the 2015 statement, the FTC stated that it would evaluate conduct for a violation of Section 5 under a framework like the "rule of reason" analysis used to determine antitrust violations.[21] That framework required that the challenged conduct "must cause, or be likely to cause, harm to competition or the competitive process" to be in violation of Section 5.[22] As such, the FTC 2022 Policy Statement is a similar attempt to expand Section 5 beyond its traditional meaning.

AMS also turns to its own interpretation of the PSA that there is no harm to competition requirement under the PSA, and asserts that the agency has taken this position consistently in administrative adjudications under the PSA. While that may be AMS's position, that interpretation has been directly and

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[18] *See, e.g.*, Proposed Rule at 53890-91, 53896-97, 53897 n.114 (citing FTC, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf ("FTC 2022 Policy Statement")).

[19] Thomas Lambert & Tate Cooper, *The New Age of Antitrust: Neo-Brandeisianism's Democracy Paradox*, 49 IOWA J. CORP. L. 347, 371 (2024) ("The intelligible principle that theoretically constrains the FTC's [Unfair Methods of Competition] rules—to preclude only "unfair" business practices - is all but toothless when unfairness is unmoored from market output and consumer welfare considerations."). Members of Congress have challenged the FTC's authority to enforce the policy statement, saying that it "causes confusion and strays from the rule of law." 169 CONG. REC. 5615 (2023). Legislation recommended by the House Appropriations Committee, and currently pending a vote of the full House of Representatives, would forbid federal funds from being "used to implement, administer, or enforce" the Policy Statement. H.R. 8773, 118th Cong. § 537 (2024).

[20] *See, e.g.*, *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 582 (9th Cir. 1980) ("[T]he weight of the case law, as well as the practices and statements of the Commission, establish the rule that the Commission must find either collusion or an actual effect on competition to make out a section 5 violation for use of delivered pricing."); *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 142 (2d Cir. 1984) ("Even if the Commission has authority under § 5 to forbid legitimate, non-collusive business practices which substantially lessen competition, there has not been a sufficient showing of lessening of competition in the instant case to permit the exercise of that power.").

[21] FTC, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

[22] *Id.*

repeatedly rejected by the courts.[23] As such, courts will not give deference to the AMS's interpretation, and it is the courts' interpretation of the PSA that prevails.[24] This is particularly true given the Supreme Court's overruling of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* ("*Chevron*"),[25] which had held courts should defer to agency interpretation of a law if the statute at issue is ambiguous. Even under the *Chevron* standard, USDA's interpretation should not have been given deference because the statute is not ambiguous.[26] However, courts must now independently interpret a statute in evaluating an agency action, and the Supreme Court's decision overruling *Chevron* reiterates that it is the judiciary, not agencies, that should be interpreting statutory intent.[27] Indeed, courts have expressly overruled AMS adjudications that found Section 202(a) violations without proof of harm to competition. For example, in *Armour and Company v. United States*, the court of appeals applied the competitive injury requirement in setting aside an order of a Judicial Officer of USDA.[28]

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[23] *Supra* n. 6 (collecting cases).

[24] *Loper Bright Enters. v. Raimondo*, 219 L. Ed. 2d 832, 867 (2024) ("Judges have always been expected to apply their "'judgment'" independent of the political branches when interpreting the laws those branches enact. THE FEDERALIST No. 78, at 523. And one of those laws, the APA, bars judges from disregarding that responsibility just because an Executive Branch agency views a statute differently.").

[25] 467 U.S. 837 (1984).

[26] *See London*, 410 F.3d at 1305 ("Because Congress plainly intended to prohibit 'only those unfair, discriminatory or deceptive practices adversely affecting competition, a contrary interpretation of Section 202(a) deserves no deference." (citations and internal quotations omitted)); *Wheeler*, 591 F.3d at 362 (recognizing that *Chevron* deference is "unwarranted where Congress has delegated no authority to change the meaning the courts have given to the statutory terms" of Section 202 of the PSA).

[27] *Id.*

[28] 402 F.2d 712 (7th Cir. 1968).

b. AMS's Position Conflicts with Other Established Antitrust Principles

As discussed above, the antitrust laws are designed to protect competition, and not individual competitors.[29] That is so because, in the eyes of the law, conduct that may have the effect of disadvantaging one competitor may be better for competition overall because it results in increased efficiencies and output, and benefits consumers. Likewise, antitrust law is meant to enhance consumer welfare, not to aid specific competitors or other market participants.[30] And just like the other antitrust laws, courts have made clear that Congress designed the PSA to protect competition, not to protect specific competitors and/or aid a specific category of competitors against hard-nosed competition.[31]

Yet the Proposed Rule departs from these established principles by prohibiting conduct to protect market participants (i.e., competitors), not consumers, without a showing of harm to competition. This will have the effect of restricting conduct that may ultimately benefit both competition and consumers.[32] It also cannot be assumed that harm to an individual market participant alone negatively impacts competition in the market.[33]

Further, while AMS claims that the PSA is meant to be broader than the antitrust laws,[34] even assuming that that is true, requiring proof of harm to competition does not make the PSA less broad than antitrust laws. Courts have acknowledged the same, determining that the PSA may be somewhat broader than the antitrust laws it was derived from, but that only means a practice may be found to violate the PSA even if it would not be found to violate the Sherman Act because it lacks another element required under that statute, such as market power. Courts have applied a less demanding standard than the Sherman Act but still held that Section 202(a) required proof of harm to competition.[35]

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[29] *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007) ("The purpose of the antitrust laws . . . is 'the protection of *competition*, not *competitors*.'") (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990)) (emphasis in original).

[30] *Sanofi-Aventis U.S., LLC v. Mylan, Inc.*, 44 F.4th 959, 985 (10th Cir. 2022) (explaining that, in enforcing the antitrust laws, courts "still seek to 'protect the process of competition,' but we do it 'with the interests of consumers, not competitors, in mind.") (quoting *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072 (10th Cir. 2013)).

[31] *See Armour*, 402 F.2d at 719-20 (determining the PSA is "not intended to protect a business against loss in a competitive market" and that USDA has no authority to prohibit "spirited competition").

[32] *Cf. Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986) ("[T]he lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors.").

[33] *See Breaking Free, LLC v. JCG Foods of Ala., LLC*, 2021 WL 2139052, at *8 (N.D. Ala. May 26, 2021) ("Plaintiffs do not cite, and the court has not located, any authority for the proposition that evidence of a plaintiff's individual damages can show likely harm to an industry at large.").

[34] *See, e.g.*, Proposed Rule at 53877, 53896-97.

[35] *See, e.g.*, *Been v. O.K. Industries, Inc.*, 495 F.3d 1217, 1231 (2007); *see also De Jong*, 618 F.2d at 1335-37 & n.7 (holding violation of PSA could be found even if the petitioners' "lack of market power would preclude our finding that they had violated the Sherman Act" and determining that while Section 202 of the PSA "may have been broader than antecedent antitrust

AMS contends the purposed rule will improve competition in the industry, but it has offered no explanation or economic analysis that demonstrates it would. The commentary to the Proposed Rule contains an analysis that AMS contends demonstrates that the Proposed Rule will reduce market concentration without demonstrating how it will do so.[36] The Commentary to the Proposed Rule contains no analysis of if or how the Proposed Rule will reduce market concentration, it simply accepts that as an assumption.

Relatedly, AMS's economic analysis also relies on an unsupported and unexplained assumption that "buyer and seller market power" would be reduced.[37] AMS noted that "changing competitive conditions could have production efficiency effects which may or may not be larger than market power effects," and that "an accounting of net benefits would involve analysis of supply and demand changes," which AMS did not conduct.[38] But it is hard to imagine how a rule aimed at allowing firms to sue for myriad individual, commercial grievances will reduce concentration and improve competition in the marketplace, when there are many reasons to believe that the increased cost and litigation risk may have the opposite effect.

c. The Proposed Rule Would Inappropriately Extend the PSA to Prohibit Conduct not Intended to be Actionable Under the PSA

Allowing actions under Section 202(a) of the PSA to proceed by demonstrating only harm to a single market participant under the Proposed Rule would open the door to litigation under the PSA for essentially any commercial dispute. Indeed, the examples AMS provides of conduct that could be "unfair" under the new rule, such as late payment or mis-weighing, fall under the category of standard breach of contract or other common law applicable to commercial disputes.[39] While USDA suggests that the Proposed Rule "would not make every commercial dispute into a P&S Act matter," it provides no clear lines to prevent that seemingly inevitable result.[40] Moreover, AMS makes clear that the regulation "proposes a specific framework under which claims—including ones involving a breach of contract—of unfair practices under the P&S Act would be analyzed."[41]

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litigation in order to achieve its remedial purpose, it nonetheless incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation.").

[36] Proposed Rule at 53900-03.

[37] *Id.* at 53902.

[38] *Id*. at 53905

[39] *See, e.g.*, *id.* at 53898-99. AMS does not contend otherwise. For example, when describing what it believes "illustrates the principles underlying these proposed revisions", including the failure to pay for meat, live poultry, or livestock," AMS highlights that the producers "*cannot avoid this breach of contract.*" *Id.* at 53894 (emphasis added).

[40] *Id.* at 53899.

[41] *Id.*

Allowing breach of contract claims under Section 202(a) of the PSA directly contradicts the intent and purpose of the PSA to regulate only unfair practices that have an anticompetitive effect. As the courts have made clear, "in 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."[42] Further, courts have found that "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."[43] Moreover, as noted by a Circuit Court, "Congress could not have expected" that the use of the term "unfair" in Section 202(a) "would occasion a free-ranging inquiry into the equities of business practices."[44]

The Proposed Rule is even more problematic when assessed with the Inclusive Competition and Market Integrity Under the Packers and Stockyards Act final rule ("Inclusive Competition Rule"), which became effective in May 2024.[45] As the NPPC highlighted in its January 18, 2023 comment letter to the proposed Inclusive Competition Rule, the Inclusive Competition Rule also covers overly broad and vaguely defined conduct that will inhibit freedom of contract outside the intended scope of the PSA.[46] The vague nature of the Market Inclusive Rule also leaves open the possibility that almost any type of conduct that treats one producer differently than another may be prohibited under the Market Inclusive Rule.[47] This is particularly true where AMS has taken the position that proof of harm to competition will not be necessary under the Market Inclusive Rule, a position that would be further emboldened under the Proposed Rule.

If the Proposed Rule is enforced as proposed (and together with the Inclusive Competition Rule), it would increase litigation under the PSA and disincentivize innovative and free, efficient contracting practices in fear of facing PSA litigation to defend them because a single producer claims injury due to a purported breach of contract or disparate treatment, especially as protections for these injuries exist elsewhere in the law. This could ultimately require packers to give the same contract terms to all producers or to limit the number of producers they contract with just to avoid costly litigation under the PSA. This also applies at the farm level, where the risk of litigation could also eliminate the ability for contract growers to negotiate higher rates in exchange for facility upgrades or superior management practices. The implied requirement to offer the same contract terms to everyone would decrease competition among producers and could lead

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[42] *Armour*, 402 F.2d at 721.
[43] *IBP, Inc*., 187 F.3d at 977 (citation omitted).
[44] *Wheeler*, 591 F.3d at 364, 367, 379 (Jones, J. concurring).
[45] 89 Fed. Reg. 16092.
[46] Letter from NPPC to Brett Offutt, Chief Legal Officer/Policy Advisor Packers and Stockyards Division, at 4-11 (January 17, 2023).
[47] *Id.*

to penalizing efficiency and rewarding inefficiency.[48] As described above,[49] the pork industry has developed an efficient system of production contracts and marketing arrangements through the normal course of practice in the market. The Proposed Rule could unwind that development, potentially erasing decades of progress and carefully negotiated agreements that may be specifically suited for a farmer's particular production model or market risk profile.

That result would squarely conflict with the PSA. As courts have consistently held, the PSA is not intended to regulate contractual relations that do not upset competition.[50] Congress did not enact the PSA to "upset traditional principles of freedom of contract," and thus the PSA does not "statutorily create an entitlement to obtain the same type of contract" as others.[51] Courts have also made clear that defendants should not face "liability under the PSA for simple breach of contract or justifiably terminating a contract with a grower who has failed to perform as promised."[52] Accordingly, many of the Circuit court cases that have dismissed claims under the PSA because the plaintiff could not prove harm to competition were based on conduct that was also alleged to be a breach of contract.[53]

The Proposed Rule would open the door to a myriad of contract disputes in federal courts in direct contradiction of the intention of the PSA to regulate only anticompetitive conduct. Moreover, it would disrupt the balance between federal and state courts in adjudicating claims. Plaintiffs could use the PSA as a vehicle to get traditional breach of contract claims under state law to be heard in federal courts by establishing federal subject matter jurisdiction under the PSA.

II. The Proposed Rule is Vague and Overbroad which Will Lead to Uncertainty in Compliance and Costly Litigation

The Proposed Rule is also overly broad and vague such that both regulated entities and their counterparties would incur significant legal expenses to interpret the Proposed Rule and will be burdened with having to adjust their business practices to try and comport with an uncertain legal landscape. Further, such

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[48] *See Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993) (finding antitrust law "condemns price discrimination only to the extent that it threatens to injure competition" because "Congress did not intend to outlaw price differences that result from or further the forces of competition").

[49] *Supra* at 1-4.

[50] *See London*, 410 F.3d at 2304 ("Failure to require a competitive impact showing would subject dealers to liability under the PSA for simple breach of contract . . .").

[51] *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995) (affirming judgment as a matter of law for defendant on claim based on plaintiff's allegation that it did not receive same contract options as other growers); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999) (purpose of the PSA "was not to so upset the traditional principles of freedom of contract, as to require an entirely level playing field for all"); *Griffin v. Smithfield Food, Inc.*, 183 F. Supp. 2d 824, 828 (same).

[52] *London*, 410 F.3d at 1304.

[53] *See, e.g.*, *Been*, 495 F.3d at 1229; *London*, 410 F.3d at 1299-1300; *Philson*, 164 F.3d at 625.

interpretations are destined to conflict and result in litigation which is costly for all parties and impractical for the federal judiciary.

To begin with, the Proposed Rule would create a new standard of determining harm to market participants under section 202(a) of the PSA: "substantial injury."[54] In so doing, the Proposed Rule does not define a workable standard but instead identifies factors that "may" be considered in assessing whether a given practice causes, or is likely to cause, a substantial injury.[55] Regulated entities will be left to guess which practices are prohibited by the PSA under the Proposed Rule. Not only does this leave parties unable to assess the standards by which their conduct will be judged, it also leaves the door open for the Secretary and courts to consider other unspecified factors, selectively consider the enumerated factors, or disregard the enumerated factors entirely. This conflicts with the legislative history of the PSA which, as courts have concluded, "does not show that the Secretary was to have carte blanche in prohibiting whatever practices he pleases."[56]

Even removing the permissive language from the Proposed Rule would not cure this deficiency, however. The factors to consider for substantial injury enumerated in the Proposed Rule are so broad and vague as to render nearly all market conduct potentially sanctionable. For example, the Proposed Rule states that a practice may produce a substantial injury if it *may* "deny a covered producer the full value of their products or services."[57] The Proposed Rule makes no effort to define "full value". This formulation is troubling because it suggests that there is a "correct" price for goods and empowers the Secretary of Agriculture, rather than the market, to determine that price.[58]

The Proposed Rule also states that a practice may produce a substantial injury if it "violates traditional doctrines of law or equity."[59] Again, the Proposed Rule makes no effort to define these "traditional doctrines." Beyond that, it also fails to explain how conflicts between doctrines will be resolved. Administering antitrust law inevitably requires adjudicating conflicts between the bedrock freedom to contract and collusive or monopolistic practices that may harm the competitive process. The Proposed Rule does not provide regulated entities with any guidance on how the Secretary or courts will undertake this analysis, never mind that they would not even consider injury to competition in doing so. Further, it

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[54] Proposed Rule § 201.308(b)(1).
[55] *Id.*
[56] *Armour*, 402 F.2d at 721.
[57] Proposed Rule § 201.308(b)(1).
[58] *See Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995) ("The antitrust laws are not a price-control statute or a public utility or a common-carrier rate-regulation statute.").
[59] *Id.*

is circular to declare that conduct which causes a substantial injury is contrary to law and subsequently define a substantial injury as one caused by conduct which is contrary to law.

The Proposed Rule would also allow (but not require) the consideration of the "magnitude of the injury" caused by a given practice.[60] The Proposed Rule's framework for considering "magnitude" is indecipherable: "An injury *may* be substantial if it causes significant harm to one market participant or if it imposes a small harm to many market participants."[61] The incompatibility between this formulation and antitrust law was discussed above. But this provision is also inexcusably vague. Defining "substantial harm" to mean "significant harm" does not provide guidance, it merely substitutes one undefined term for another. The only specific guidance the Proposed Rule provides is that the injured party must be a market participant, noting that "injury to a cow d[oes] not result in any injury the Act was designed to prevent."[62] But merely excluding animals from the list of potential victims provides no insight into the required magnitude of injury.

Any of these problems, standing alone, would make it difficult for actors in the pork industry to determine their rights and obligations under the Proposed Rule. Taken as a whole, these vague provisions render the task impossible.

III. AMS Concedes the Proposed Rule Is Intended to Cover Conduct that Is Already Prohibited Under Existing Laws; Those Laws Are Better Suited to Address the Conduct at Issue

The Proposed Rule unjustifiably generates duplicate causes of action for conduct which is already prohibited under existing laws with well-established precedent, resulting in an increased regulatory burden without even a notional benefit to competition or aggrieved parties. Moreover, AMS violates Section 308(b) of the PSA which expressly provides that the remedies afforded under the PSA "shall not in any way abridge or alter remedies now existing at common law or by statute."[63]

The commentary to the Proposed Rule indicates AMS wants to prohibit conduct under the PSA such as failing to pay for purchased goods and mis-weighing livestock.[64] All of this conduct is already illegal. In the latter instance, this conduct is already actionable under federal statute in addition to the common law.[65]

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[60] Proposed Rule § 201.308(b)(2).
[61] *Id.*
[62] *Id.* at 53896 n.106 (citing *In Re: Ariz. Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996)).
[63] 7 U.S.C. § 209(b).
[64] Proposed Rule at 53893-94.
[65] 15 USCS § 50 ("Any person who shall willfully make or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any person, partnership, or corporation subject to this Act, or who shall willfully neglect or fail to make, or cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions

Unexcused failure to perform under a contract has been actionable for centuries at common law.[66] The Proposed Rule admits that some of the conduct it proscribes is a "breach of contract."[67] The Proposed Rule explains that, though a seller may eventually recover in a breach of contract action, the seller is harmed by even a delay in being paid by a regulated entity to which it has delivered product.[68] But any demonstrable harm from such a delay would be recoverable in a breach of contract action unless the parties had contracted to limit the regulated entity's liability for such a delay, which they are entitled to do.

Similarly, misrepresenting the weight of livestock was actionable as common law fraud at the time the PSA became law.[69] Even before the PSA, Congress had already provided a statutory prohibition which can impose criminal penalties for mis-weighing of livestock.[70]

Creating duplicate—if not triplicate—causes of action to punish the same conduct would not provide any additional protections to anyone in the marketplace. Instead, it would create enhanced regulatory burdens, increased litigation costs, and unjustified power for USDA. Courts will be left blazing a path of new law under the PSA, rather than relying on well-established laws that are better suited to address the harms AMS has identified.

The agency acknowledges that litigating these issues is already costly and time-consuming.[71] This proposed solution would only magnify those burdens. Critically, AMS did not endeavor to even determine the additional costs to industry participants that would be incurred because of increased litigation under the Proposed Rule. Instead, without support, AMS contends that costs of litigation will be decreased by the Proposed Rule because it will provide certainty around enforcement.[72]

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appertaining to the business of such person, partnership, or corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such person, partnership, or corporation . . . shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.) The PSA explicitly makes this portion of the Federal Trade Commission Act applicable to the jurisdiction of the Secretary of Agriculture. 7 USCS § 222.

[66] *See, e.g.*, *Slade's Case*, 76 Eng. Rep. 1074 (K.B. 1602).

[67] Proposed Rule at 53893.

[68] *Id.*

[69] *See, e.g.*, *Henderson v. Ball*, 193 Iowa 812, 817 (1922).

[70] *Supra* n. 65.

[71] Proposed Rule at 53894.

[72] *Id.* at 53905.

Moreover, in analyzing the economic effects of the Proposed Rule, AMS does not actually estimate litigation costs because it is "uncertain which of these offsetting effects will dominate and to what extent."[73]

AMS itself acknowledges in its commentary to the Proposed Rule that "one cannot discount the possibility that litigation spurred by the proposed rule could defer entry or cause firms to leave the market and hinder innovative or even practices that make the market more competitive or more efficient."[74] Further, AMS itself notes that "AMS does not estimate litigation costs in this analysis," leaving out crucial components of an analysis of costs and benefits, calling into question the entire analysis.

The assertion that the Proposed Rule will provide certainty is dubious, at best.

IV. At a Minimum, the Proposed Rule Should Be Revised to Require Both Harm to Market Participants and Harm to Competitors

As described above, under the antitrust laws and the PSA, a plaintiff needs to demonstrate both injury to itself and an injury to competition to maintain an action.[75] In the Proposed Rule, AMS has defined an unfair practice under proposed Section 202(a) of the PSA to be one that causes either harm to a market participant (proposed Section 301.208(a)) or the market (proposed Section 301.208(c)). The Proposed Rule would more closely align with antitrust principles and the statutory intent of the PSA if it were to define an unfair practice as one which caused harm to both an individual market participant and the market as whole.

Putting aside the overly broad and vague nature of the Proposed Rule's defined unfair conduct as detailed above, the primary issue with the Proposed Rule is that it defines a practice as unfair under the PSA as one that may only injure a single market participant. The Proposed Rule would be more workable if it were to combine proposed Sections 301.208(a) and (c) to require a showing of both harm to a market participant and harm to the market. NPPC submits that, at a minimum, AMS should amend the Proposed Rule to require both harm to one or more market participants and harm to the market, and then provide the industry an opportunity to comment on the scope of any Proposed Rule that would further define what practices may be deemed prohibited by the PSA.

Moreover, NPPC agrees that incipient conduct that has the potential to harm competition could constitute a violation of the PSA, which is also the case under other antitrust laws. However, the Proposed Rule in Section 301.208(c) would create a standard that would not require a high enough showing of the likelihood of the incipient harm to be actionable under the antitrust laws. Proposed Section 301.208(c) provides that

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[73] Proposed Rule.at 53905
[74] *Id.* at 53902
[75] *See supra* at 5-8.

conduct is unfair if it "may negatively affect competitive conditions." This language could be changed to "has negatively affected competitive conditions or has a dangerous probability of negatively affecting competitive conditions." This would be in line with the principle of antitrust law that a plaintiff must show actual harm to competition or a "dangerous probability" of harm.[76]

Conclusion

NPPC supports the full enforcement of the Packers and Stockyards Act to ensure fair markets and competitive opportunities for all producers. However, the Proposed Rule does not appear to address any specific existing issue in the pork industry that would be solved by these regulations and instead would burden the industry with excess litigation costs. The vast majority of the examples of "unfair practices" given in the Proposed Rule fall under other existing laws and invite more uncertainty for both contractors and packers.

The additional costs, and most critically the uncertainty of the rule could be harmful to all industry participants including independent hog farmers, contractors, and small pork processors who cannot manage the additional—potentially extensive—compliance-related costs. Furthermore, the overlapping impact with prior and potentially future PSA rules adds another layer of complexity and uncertainty that can harm producers, many of which are still recovering from the historic economic losses incurred over the past two years.

NPPC stands ready to work with USDA on regulations that help ensure full enforcement of the PSA in a clearly defined and understandable way that does not unduly burden the pork industry while ensuring the market can freely innovate for everyone's benefit. Given the uncertainty of the effect of these regulations, NPPC asks that USDA consider working closely with stakeholders on any future PSA rulemaking. If USDA has questions regarding these comments, please contact NPPC at 202-347-3600.

Respectfully Submitted,

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[76] *See, e.g., Spectrum Sports v. McQuillan*, 506 U.S. 447, 455 (1993) ("But when [intent to monopolize] and the consequent dangerous probability exist, [the Sherman Act], like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.") (quoting *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905)).