National Cattlemen's Beef Association

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 Cattlemen's Beef Association on *Proposed Rule on Unfair Practices and Undue Preferences*, 9 CFR Part 201, RIN 0580-AB27, 81 *Fed. Reg.* 92703 (Dec. 20, 2016)

Dear. Ms. Omade:

Thank you for the opportunity to submit comments on the proposed rule regarding Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act, 9 CFR Part 201, RIN 0580-AB27, as found on page 92703 of the December 20, 2016, *Federal Register* Volume 81, Number 244. The National Cattlemen's Beef Association (NCBA) is the oldest and largest national trade association for the U.S. cattle industry. NCBA is the definitive voice of an industry, which according to USDA's Economic Research Service, is valued at over $60 billion. 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.

After significant review and over six years of engagement on this issue, NCBA remains steadfast in our opposition to this proposed rule and urges USDA to withdraw it. This rule threatens the value-added marketing opportunities we have worked for decades to build in order to meet the demands of our consumers while providing a return to our producers. This is a fix looking for a problem, and the cost of this proposal is staggering.

America's cattle producers are innovative and constantly looking for ways to improve our businesses while providing the highest quality beef for our consumers. Our innovation and foresight led to the development of value-added marketing opportunities. These opportunities allow us to make investments in herd genetics, production practices, and branding opportunities in order to meet the demands of our consumers. These value-added opportunities, also known as alternative marketing arrangements (AMAs), resulted in premiums being paid to producers who made the investment in the various AMAs which have been established.

Not all cattle are created equal. Breed selection and genetics are two investments made by cattle producers to improve the quality of the cattle they grow and the beef they produce. Traits such as tenderness and the ability to achieve the USDA Quality Grades of Choice and Prime are highly sought after and result from genetic investment. The way the cattle are produced is also factored into many of the AMAs. Raising cattle without antibiotics or implanted hormones, grass finished cattle, and certified organic practices are also used by some producers to gain premium prices for their cattle. In order for AMAs to work, packers pay different prices for the cattle that qualify for these programs. It is expected that higher quality cattle receive a better price than ones that don't meet the AMA program requirements. We believe the proposed rule will result in a loss of, or significant reduction of, our use of AMAs. This is due to the vagueness included in the proposed rule.

The unfair, unjustly discriminatory and deceptive practice or device provisions (§201.210) and the undue or unreasonable preference or advantages provisions (§201.211) of the proposed rule are extremely vague and so ambiguous that broad interpretation is likely and compliance will be difficult. Vague and ambiguous rules typically result in producers, and each segment of the beef supply chain, being unable to determine which practices are prohibited or permissible. The resulting uncertainty will simply lead producers to incur litigation costs to protect their respective marketing arrangements. Conversely, it provides other producers an opportunity to file a lawsuit to challenge such arrangements. Neither situation is beneficial to our industry's quest to satisfy our customer.

While it is obvious that GIPSA made changes to these sections as compared to the original proposal from 2010, it fails to provide any more certainty, and therefore continues to threaten our marketing arrangements. GIPSA includes two phrases which continue to cause uncertainty and make this proposed rule vague. The phrases "Such conduct or action includes, but is not limited to…" and "These criteria include, but are not limited to…" found on pages 92722 and 92723 we believe negate any attempt by GIPSA to further define unfair, unjustly discriminatory and deceptive practice, or undue or unreasonable preference or advantage meant to give producers, GIPSA, and the courts more certainty.

Section 201.210(b) sets out conduct that GIPSA considers unfair, unjustly discriminatory, or deceptive "absent demonstration of a legitimate business justification." Section 201.211(e) says the Secretary will consider whether a packer has a "legitimate business justification" for conduct or actions that may otherwise constitute an undue or unreasonable preference or advantage.[1] Because neither provision defines the term "legitimate business justification," producers and packers are left in the dark about what conduct is justified. Section 201.211(e) also does not specify whether having a "legitimate business justification" is a complete defense. Thus, even if a producer or packer has what it believes to be a "legitimate business justification," it will be impossible to know whether it could be subject to liability for the conduct.

Proposed sections 201.211(a)-(d) prevent packers from treating a producer "more favorably as compared to one or more similarly situated" producers. GIPSA does not define "similarly situated" or explain what kinds of differences would justify differential treatment of growers. The ambiguity of this phrase will only be settled through costly litigation as producers and packers argue about which kinds of producers must be treated the same and what actually constitutes more or less favorable treatment. Although §202(b) of the PSA only prohibits an "undue or

[1] 81 *Fed. Reg.* at 92722-23.

unreasonable preference or advantage," proposed §201.211 does not include any exception for reasonable discrimination.

Furthermore, the proposed rule is subject to the President's Executive Order 13711 titled *Reducing Regulation and Controlling Regulatory Costs.*[2] Under the Executive Order, the total incremental cost of all new Department of Agriculture regulations for fiscal year 2017 must be zero, and the Department must eliminate two regulations for each new regulation that it proposes or promulgates.[3] According to Informa Economics' *An Estimate of the Economic Impact of GIPSA's Proposed Rules on the Cattle and Hog Sectors* published in September of 2016, the proposed rule would impose massive costs of at least $1.5 billion on the meat industry. GIPSA must comply with the Executive Order for fiscal year 2017 by either not finalizing the proposed rule or by identifying and repealing at least two other regulations that offset its $1.5 billion in costs.

Informa Economics is a respected agricultural economics firm which conducted a comprehensive analysis of the economic impact of the original 2010 rulemaking on the beef, pork, and poultry sectors. Much has changed in the beef industry over the past six-plus years. In order to take these changes into account, NCBA and the National Pork Producers Council (NPPC) contracted with Informa to provide an updated version of that study (attached). Informa's 2016 updated analysis shows that the proposed rule would impose additional costs of nearly $200 million in light of these changes in our industry. The total cost of the proposed rule to the beef and pork industries is nearly $1.5 billion. Specifically, the updated analysis shows a total economic impact to the beef industry of $954 million. That is real money regardless of the scale you use.

NCBA and NPPC submitted this updated study to USDA in September of 2016, but it was dismissed by Secretary Vilsack and the Department as being based on the original 2010 rule and not on what would eventually become this rule. As you analyze the updated Informa study, you will realize that while it took into account provisions from the 2010 rule not found in the current proposed rule, the bulk of the economic impact is based off of the changes to sections 201.210 and 201.211 which are reflected in the current proposal. Therefore, the 2016 updated economic impact is very much applicable here and illustrates the significant costs our industry would incur from a proposed rule which ultimately turns out to be a solution in search of a problem.

Even GIPSA's conservative and flawed cost-benefit analysis proves the proposed rule would result in substantial costs to the meat industry. GIPSA's cost-benefit analysis concluded that the annualized costs of the proposed rule would be $5.90 million (at a 3 percent discount rate) or $6.54 million (at a 7 percent discount rate).[4] This calculation irrationally excludes direct costs from litigation and indirect costs from changed industry practices. GIPSA inexplicably concludes that "the marginal litigation costs of §§ 201.210 and [201.211] are zero"[5] while simultaneously admitting that it will take courts years to "set[] precedents for the interpretation of the

2 Exec. Order No. 13771, 82 *Fed. Reg.* 9339 (Feb. 3, 2017).

3 *Id.* § 2.

4 81 Fed. Reg. at 92716.

5 *Id.* at 92715.

regulations."[6] In a similarly self-contradictory manner, GIPSA argues that the litigation costs of the interim final rule include the litigation costs of the proposed rule[7] while recognizing that "even if courts continue to require showing of harm or potential harm to competition in section 202(a) and 202(b) cases, . . . firms will likely still incur costs of complying with §§ 201.210 and 201.211."[8] As a result, GIPSA vastly underestimates the direct costs of the proposed rule.

Moreover, GIPSA's cost-benefit analysis incorrectly assumes that the proposed rule would not "result in a decreased use of AMAs, use of grower ranking systems or other incentive pay, reduced capital formation, or decreased efficiencies in the meat and poultry industries."[9] In fact, it is "abundantly clear" that the proposed rule would lead to a decreased use of AMAs and other changes to business practices.[10] In its cost-benefit analysis for the interim final rule, GIPSA calculated the annual cost of these industry changes: $89.14 million (at a 3 percent discount rate) or $91.48 million (at a 7 percent discount rate).[11] Thus, even GIPSA's extremely conservative calculations show that the proposed rule would cost industry almost $100 million per year. On this basis alone, to comply with the President's Executive Order, GIPSA should not finalize the proposed rule in the absence of offsetting regulatory repeals.

The proposed rule threatens to impose massive costs on the beef industry by threatening the use of AMAs and relying on a woefully inadequate economic analysis. Yet it is stunning to us that GIPSA admits it is "unable to quantify the benefits"[12] of this proposed rule. Issuing a proposed rule with no benefit is just bad government. While we heard Secretary Vilsack say many times that this proposed rule, and the accompanying interim final rule, would not have an impact on marketing arrangements, it is clear that his attempt to add more definition and clarification has only added to the vagueness, ambiguity, and uncertainty of this proposed rule. Experience has shown us that uncertainty leads straight to the courts. That threat of litigation based on a vague and ambiguous rule will cause our partners in the supply chain to cease the use of AMAs, or they will restructure AMAs in a "one size fits all" approach. Neither will help us to differentiate and market our cattle as we currently do.

Finally, we continue to question the need for this rule as we do not have evidence of systemic problems within the cattle industry which cannot already be addressed by the Packers and Stockyards Act. As can be the case with government, this proposed rule takes the approach of adding more regulatory burden rather than simply enforcing the laws on the books. For a law that

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6 *Id.* at 92716.

7 *Id.* at 92715.

8 *Id.* at 92717.

9 81 *Fed. Reg.* at 92715.

10 Informa Economics, 2016, page 22.

11 We calculated GIPSA's estimated annual costs resulting solely from changes to industry practices by subtracting the lower boundary of GIPSA's estimated annual costs from the upper boundary. *See* 81 *Fed. Reg.* at 92586 (noting that "[i]f the industries do not change any of their current business practices, GIPSA expects additional litigation to be the only costs and the costs of the regulation will be closer to the lower boundary," but if "the industries respond by reducing the use of AMAs and restricting their use of incentive pay, GIPSA expects the costs of the regulations to be closer to the upper boundary").

12 81 *Fed. Reg.* at 92718.

is almost 100 years old, the Packers and Stockyards Act has proven to remain resilient and applicable to market regulation today. We simply ask that GIPSA use its current authority to investigate allegations of market manipulation. This proposed rule will not add to the Act's success. Ultimately, as a result of this rule, producers will lose the very programs we helped establish.

We have commented before, and are now commenting yet again, that this rule is unwarranted, unnecessary, and dangerous to our industry. Once we learned of Secretary Vilsack's intention, we asked for the opportunity to discuss the situation, but were turned down. For years, bi-partisan Members of Congress fought to kill these very proposals. Only after a midnight rulemaking by the Obama Administration did we see this issue come up again. In testimony just this week to the House Agriculture Committee's Subcommittee on Livestock and Foreign Agriculture, representatives of America's beef, turkey, and pork industries told Congress that the GIPSA rules needed to be withdrawn. Even more important is that both Subcommittee Chairman David Rouzer and Ranking Member Jim Costa agreed. As such, GIPSA should not finalize this proposed rule, and therefore withdraw it. We also want to reiterate our request that the interim final rule be withdrawn as well.

Sincerely,

Craig Uden
President