Date: November 19, 2010

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Re: Rules Proposed to Implement Farm Bill Requirement for Rule-Making re Anticompetitive Market Activity

"A system that gives charter to brazen unchecked greed is a system in peril."
The Economist, 2003

The Rules Appropriately Address Aberrant Judicial Precedent

1. First, it is helpful to recall the statutory provision now in the *Packers & Stockyards Act* provides as follows:

STATUTORY PROVISION INVOLVED
7 *USC* § 192(a)(b)

It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
(b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any

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> particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect….

2. Recent Court of Appeals' opinions conflict with decisions of the United States Supreme Court and stray from the language of 7 *USC* § 192(a)-(b) [§ 192]. Harm to injury has not been required to make a case under the *P&S Act* by the United States Supreme Court.[2] Recent decisions stray badly from this premise, which has clear, simple, and obvious logic:

> …it is clear that allegations that defendants have intentionally short weighted cattle are sufficient to state a claim under the Act…. *Gerace v. Utica Veal Co., Inc.*, 500 FSupp 1465 (ND NY 1984).

3. Decisions of this kind are consistent with the *P&S Act*'s history that Congress intended the legislation to be more far-reaching than then-existing antitrust statutes.[3]

4. One Circuit Court has noted that a primary purpose of the *P&S Act* was "[t]o assure fair trade practices in livestock marketing."[4] Yet the Rules correctly note that circuits have recently strayed from this precedent and from the literal language of the Act and from its legislative history. The Rules attempt to bring the courts back. They do so appropriately. The Rules do not attempt an end-run around judicial precedent, at all.

The Status of the U.S. Beef Market For Slaughter Animals in 2010

5. The domestic market for slaughter beef is dominated by four firms controlling more than 81% of total beef production in the United States. Tyson Fresh Meats, Inc.; JBS Swift, a Brazilian company; Cargill; and National Beef have been identified as the dominant four in statements issued by USDA's Grain Inspection Packers & Stockyards Administration.[5] In addition, far more than half of all cattle slaughtered by meat processors are purchased through either contract arrangements in which cattle are sold well in advance of slaughter or acquisition of cattle from feedyards selling most of their production to a single slaughter house. These are identified as "Tyson Yards," or feedyards called upon by a single packer, leaving those who sell feed cattle in the yard vulnerable to compulsory sale of their cattle to a single producer, even if they have not made advanced sales.

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[2] *Butz v. Glover Lvstk Comm'n Co.*, 411 US 182 (1973).
[3] *Swift & Co v. US*, 308 F2d 849 (7th Cir 1962). *In re IBP, Inc.*, 57 Agri C Dec 1353 (USDA 1998).
[4] *Van Wyck v. Bergland*, 570 F2d 701, 704 (8th Cir 1978).
[5] Press releases, USDA, GIPSA, May 2010.

6. The buyer side of the market is far more concentrated than seller side statistics suggest. At the DOJ/USDA Livestock Competition Workshop in Ft. Collins, CO, Bruce Cobb, General Manager of Consolidated Beef, highlighted the lack of buyer competition for slaughter cattle in the TX/OK/NM area. Consolidated Beef, a producer driven cooperative, attempts to sell thousands of head weekly on the cash market. Over the past year, there were no buyers and no bids for 4 weeks, and only one bidder 18 weeks, two bidders for 23 weeks, and three or more bidders only 7 weeks. Thus, 8% of the time there was NO cash market for fed cattle. 42% of the time there was zero or one bidder. Moreover, even when there was more than one bid, the seller could not "negotiate" price. Bids from packers were on a take-it or leave-it basis with a very narrow window in which the seller could accept or reject. Clearly, these are not characteristics of a competitive market for slaughter cattle. Captive feeders with marketing agreements tied to the cash market are also harmed by the lack of competition in the cash market because the base price they received is tied to the cash market.

7. The authors believe it is reasonable to estimate no fewer than 80% of all beef sold for slaughter are sold either under contracts made more than 14 days before the livestock are delivered, or by producers who feed their cattle in yards and settings leaving no alternative but to accept the offered price, if a price is offered at all.

8. In addition, meat packers have become dramatically vertically integrated. Packers now directly own large feedyards, large numbers of cattle, and have standing arrangements with ostensibly privately owned, but wholly captive, feedyards for a large portion of their remaining production.[6] Tyson and other major firms have widely-known, longstanding relationships with major feedyards. As a result of these relationships, the feedyards associated with them sell all, or substantially all, their cattle to the associated meat packer on a regular basis. Indeed, packing plants require the cattle and feedyards have no alternative destination for the fed animals. While legal title to assets may not be integrated, for economic purposes and purposes of market structures, these arrangements have the impact of integrative ownership.

9. The dominant business arrangement in the cattle feeding business requires a producer to place cattle in a feedyard with the expectation the cattle will be sold to a particular packer because there is no alternative destination for sale of the cattle. The packer knows this. It tracks the number of cattle on feed in its associated captive feedyards, sees those cattle as its "inventory" even though the cattle are owned by others, and operates its plant with awareness the cattle

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[6] JBS Swift owns control of Five Rivers Cattle Feedyards, a major feedyard. It has been active in the market seeking to acquire other feedyards. *www.fiveriverscattle.com/About_History.aspx*

will be shipped to it when the processor wants them. Both the producer and the processor know there will be no price negotiation. Unless the cattle are sold in advance and become actual captive supplies, the producer is required to take the price offered at time of slaughter.[7]

10. Increasingly, the packing company directs and oversees the cattle feeding process and serves as the feeder's overlord. Precise carcass sizes, feeding regimes, and uses of medicines are often directed by processors. Unlike both swine and poultry, the beef industry is not yet invaded by non-negotiable standardized contracts demanded of producers by meat packers.

The Status of Contract Swine Production in 2010

11. Brief comments on swine production in 2010 are offered. Comments distinguishing, or pointing out, similarities between the beef and pork industries appear intermittently.

12. The swine industry largely resembles the chicken industry as of 2010. It is integrated vertically. This means ownership and control of essentially all aspects of production in the vertical chain, from genetics to the sows to 14 lb. introductory nursery weight pigs to processed swine carcasses, is controlled by pork meat packers and processors. The swine industry is not quite as vertically integrated as poultry, but it is catching up rapidly.

13. In numbers of family farms, and in social welfare terms, the number of pork producers has been ravaged. As the Secretary of Agriculture frequently notes, 9 of 10 pork producers have been lost during the past 20 years. Pork is now factory produced, in CAFOs, and not on family farms. In Nebraska, for example, swine loans were once staples of agricultural bank lending. Now, hog loans are rare aberrations. This is because there are so very few hog producers left. Iowa, the nation's largest pork producing State, has only 10% as many persons who own hogs today as it had in 1990. Huge producers have replaced families. And, they are captive to unique, sole placement, contracts with packers. These producers with huge capital investments that require decades to pay off, must content with five year, or shorter, contracts with packers to sell their market-weight animals.

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[7] Each segment of agriculture has its own "lingo." What beef and pork producers call "packers" or "slaughterhouses" are called "integrators" by poultry producers. For cattle, a "feedyard" is a place where cattle are raised from 600-800 lbs. to slaughter weight. A "background" yard grows the animals from 300-600 lbs. A "custom" or "commercial" feedyard is one where cattle on feed are owned, generally, by persons different from those who operate the feedyard itself. A "nursery" to a swine producer grows piglets from 14 to approximately 40 lbs. A "finisher" completes the task and grows the animal from 40 lbs. to slaughter weight.

14. Packers integrate all decisions affecting swine production, direct the course of action in all key areas of production, largely manipulate the sourcing for nursery weight pigs by imposing varying criteria, and control the number of swine a processor can deliver to market by constraining and compelling the numbers of deliveries through one-sided, non-negotiable contracts. Increasingly meat packers dictate physical size of production facilities, equipment specifications, and locations or placements of finishing facilities.

15. In swine, the dominant business arrangement permits the producer to own the swine but commands the animals be contracted to the meat packer when they are acquired for the nursery unit as infants. The swine producer must deliver a minimum number, but not more than a maximum number, of pigs or breach the producer's contract with the packer. Dead swine belong to the producer. So do live ones exceeding the contracted number. Environmental issues associated with excrement and waste are dumped on producers.

16. Producer representatives routinely impose demands on each producer concerning the kind, type, and nature of the nursery and finishing facilities. Packer representatives may call on the facilities to demand compliance. The producer has no choice but to contract the swine because the spot market is so unreliable and so thin it provides no assurance as an alternative to contract swine production. The producer who does not forward contract may find himself without a way to dispose of his animals when they are market ready. The one who does greets a day of reckoning when the packer demands new capital investment, rejects swine grown from piglets acquired from a now-disapproved source, changes the carcass specifications, or finds other faults. If these fates are escaped, the hog producers must take what the packer offers at contract renewal time because the barns the animals occupy remain mortgaged and useless for any other purpose. The producer works and responds, is told and does what he is told to do. The producer "owns" title to assets wholly committed to, and controlled by, the packer. Only the numbness of not thinking about the circumstances can give the swine producer any peace.

17. And the same is true of the large cattle feeder though the iterations of facts differ. The reality is that the cattle feeder's options do not differ; this producer, too, is owned by the packer.

18. All this Concentration has not *expanded* the US labor force; it has contracted the labor force. One major reason concentration occurs is to achieve perceived labor efficiencies. In testimony before the Federal Trade Commission, Steven C. Salop, a Georgetown University professor testified:

> It is clear that the motivation and effect of many mergers is to reduce costs and improve products. Mergers involve the real asset integration that is associated with increases in efficiency. [8]

Prof. Salop argued for a dynamic welfare standard that considers more than corporate efficiencies at the costs of the labor force, producers and consumers.

> Dynamic welfare standards can be formulated by extending the static welfare standards to this dynamic environment. A dynamic version of the PCW standard, for example, would balance any consumer harms flowing from short run price increases with consumer benefits from price decreases in the longer run resulting from diffusion of the merger-induced cost reductions to other competitors. Application of an appropriate discount rate to future time periods ensures that greater weight is given to relatively more certain, short run effects.[9]

19. Attacks on the GIPSA rules asserting they will cost jobs and force layoffs lack even rudimentary analyses of economics. They are devoid of any meaningful dynamic welfare analysis. Without these assessments the attacks are without merit.

20. The authors do not believe the proposed GIPSA Rules are a panacea. They will help reinvigorate a neglected law and may improve an impoverished meat market. If so, they will create, not destroy, both jobs and opportunities. Everybody wins with healthy competition. This is not true when only the biggest or most favored are permitted to participate.

The Status of Poultry Production in 2010

21. The domestic poultry meat industry is fully integrated vertically. This means ownership and control of essentially all aspects of production in the vertical chain from baby chick to processed broilers and wholesale poultry products is held by poultry companies. These companies are known as "integrators." The poultry industry, which includes broiler, turkey and egg production, is the most vertically integrated of all major agricultural industries.

22. Integrators generally own or control the breeding flock, hatcheries, chicks, assignment of baby chicks to growers, feedmills, feed ingredients, transportation of feed, and processing (slaughter) plants. These companies, integrating all decision making affecting poultry production, direct the course of action in all key areas of production. Integrators also dictate physical size

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[8] Nov 2, 1995 Testimony of Steven C Salop, http://www.ftc.gov/opp/global/saloptst.shtm

[9] *Id.*

and equipment specifications for grow out[10] house and equipment. Locations or placements of grow out facilities are fully dictated by the integrators.

23. Under the dominant business arrangement, the integrator owns the chicks and feed, while farmers, commonly called contract growers, carry out actual production, or grow out, from chicks to birds ready for processing.[11] If the bird dies, it becomes the grower's property and responsibility. This is achieved by paying the grower or producer for only what is returned when the birds reach slaughter weight.

24. Integrators require growers to provide expensive specialized production facilities (houses, associated equipment, and utilities), grower services (labor and management), waste management and dead bird disposal. Costs for these facilities can reach $1 million or more.

25. Beginning in the 1950s broiler production contracting evolved from simple credit arrangements with feed companies, to profit-sharing arrangements, to flat fee contracts, and finally to a basic feed-conversion contracts.[12] Almost all broiler and turkey contracts now establish a base fee the grower will receive, with adjustments based on relative performance compared to other growers for the same integrator in the same complex. Economists call this a "tournament pay system" but, due to variable feed and chick quality, more of a "lottery."

26. Open, transparent cash markets for broilers or turkeys ready for processing disappeared decades ago.[13] There is no open market for poultry ready for processing, and no open market for the sale of broilers or turkeys. In poultry the choice is stark: Sign the handcuffing contract offered, or get out of the business.

27. Early in the course of complete vertical integration poultry companies and growers tended to look out for each other's economic welfare like partners. Vukina and Leegomonchai, observed, *"Production contracts have played a decisive role in the broiler industry's remarkable growth but the integrator-grower relations have gradually worsened. Starting in the mid 1990s the*

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[10] Each segment of agriculture has its own "lingo" What poultry producers call integrators are the same as what beef and pork producers call "packers" or "slaughterhouses". A "grow out" house is where young birds gain weight to reach market readiness, or slaughter weight.

[11] See, for example, Tomislav Vukina, "Vertical Integration and Contracting in the U.S. Poultry Sector," Journal of Food Distribution Research, July 2001:29-38.

[12] Vukina further discusses evolution of the poultry industry. See *supra* note 4. The lack of bargaining power is also discussed by Daryll E. Ray, "On Compensating Producers Who Contract Production," Article Number 233, Agricultural Policy Analysis Center, University of Tennessee, 2005.

[13] Although there is no open, transparent market for birds ready for processing, there have special "sweetheart" deals allowing executives and insiders of some integrators to sell birds ready for processing to the integrator.

tensions have received increasing attention nationwide."[14] Now, growers are wholly controlled by the integrator with whom they contract, and they generally have no choice about which integrator to contract with because the market offers no choices. Integrators do no compete against one another for birds to process, or for producers to grow them.

28. Broiler production is both capital and labor intensive.[15] Growers bring roughly one-half of the capital and much of the labor required to produce a processed whole bird. Growers' capital and labor are both "captive" to the integrator. Integrators typically mandate specifications for poultry houses and equipment, and often require growers to make investments in upgrading equipment or facilities. A 2001 USDA national survey reveals that 84% of contract poultry growers were *"... required to make investments in equipment or facilities."*[16]

29. New growers typically borrow all funds for construction of houses and equipment, offering a small acreage of land as collateral. Mandated house and equipment upgrades can send growers back to the start of their debt challenge. Decades are required to pay of the construction debt. But production contracts are generally limited to tw0 to five years duration. Renewal time puts the integrator in control and leaves the producer with no power to bargain.

30. New growers are not permitted to negotiate contract terms; the only option offered by an integrator is to accept or reject the integrator's form contract. Accepting means the grower will have birds to grow; rejecting means she will not. Vukina and Leegomonchai, state, *"Modern broiler contracts are written by the integrator and offered to prospective growers on a **take-it-or-leave-it** basis."*[17] The integrator solely determines when a new contract is adopted and all terms of that contract. Because of the long economic life of highly specialized poultry grow out facilities, the business options facing an existing grower are often (a) bankruptcy, or (b) acceptance of whatever contract changes are dictated by the integrator. Arms-length contract negotiations rarely if ever occur between grower and integrator; rather, contracts of adhesion characterize the industry.

31. MacDonald and Korb, economists with ERS/USDA, state, *"Once the investment is made, growers face the risk of opportunistic behavior by integrators, who may have considerable monopsony power at that point. ...*

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[14] Tomislav Vukina and Porametr Leegomonchai, "Political Economy of Regulation of Broiler Contracts," American Journal of Agricultural Economics 88, December 2006, 1258-1265.
[15] Vukina notes, "The poultry industry is predominately organized in a manner that limits capital requirements by the integrator." *Supra* note 4.
[16] http://www.ers.usda.gov/Briefing/FarmStructure/Questions/livestock.htm
[17] Tomislav Vukina and Porametr Leegomonchai, "Political Economy of Regulation of Broiler Contracts," American Journal of Agricultural Economics 88, December 2006, 1258-1265. Bold emphasis added.

With a short-term contract, integrators may adjust payment schemes, or hold up growers for additional investments, as a condition of renewal."[18] The 2008 Pew Commission report on Industrialized Farm Animal Production emphasizes the limited choices grower have, *"Once the commitment is made to such capital investment, many farmers have no choice but to continue to produce until the loan is paid off. Such contracts make access to open and competitive markets nearly impossible for most … poultry producers, who must contract with integrators if they are to sell their product."*[19]

32. The GIPSA Rules, as proposed, offer genuine efforts to correct the dramatic imbalance of power that has literally killed all markets for broilers and all choices for growers. While cattle and hog producers need the GIPSA Rules, no one needs them more than the men and women of America who grow billions of birds each year to feed the Nation's appetite for chicken and turkey.

Marketing Contracts Will be Facilitated,
Not Adversely Impacted by the Rules

33. The Rules, as drafted, will permit marketing contracts to be used to buy cattle on cash markets, or to price cattle so purchased on a pricing grid. The same is true for other animals. Contrary assertions by some opponents of the Rules are not accurate. GIPSA's position is that the proposed Rules will not preclude packers or processors from using marketing and production contracts to provide premiums to deserving producers. They simply have to keep reasonable records to show the premium price paid is justified by the product quality and is not a reward for size, social advantage, or some other non-meritorious basis.[20]

34. Proposed Rules pertaining to justification of business reasons for differential treatment of producers states, "this justification ***need not be extensive*** but should be enough to identify the benefit-cost basis of any pricing differentials received or paid." Packers currently provide extensive information under mandatory price reporting (MPR), including grade, yield, business arrangement, and price. In essence, packers' current record keeping should largely suffice to meet proposed requirements. No substantive record keeping costs should be necessary under the proposed Rules.

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[18] *Ibid, pp 12-13.*

[19] Putting Meat on the Table: Industrial Farm Animal Production in America, a Report of the Pew Commission on Industrial Farm Animal Production, The Pew Charitable Trusts and Johns Hopkins Bloomberg School of Public Health, April 29, 2008, p. 49.

[20] USDA GIPSA "Statement by Under Secretary Avalos: Misconceptions and Explanations of the GIPSA Proposed Rule, July 26, 2010.

35. We demonstrated, through our work, that high-quality cattle are available on the cash market as 27.8% of cattle sold in cash were marketed on grids between April 2004 and August 2010. These animals graded "more than 80% choice."[21]

36. Concerns about how to comply with this Rule are easily resolved. Trades must be transparent and trading must be transparent.[22]

37. This important provision of the Rules should not be eviscerated. Public trading, which is entirely visible, will cure concerns considerably. Transparent trading eliminates uncertainties and fears, excludes self-dealing and impressions of it, engenders confidence, and invigorates market activity.

38. Strict statutory construction supports the conclusion that § 192 includes no words, phrases, clauses, or inferences suggesting it is necessary to plead or prove an adverse impact on the overall competitive market for a producer, who has been dealt with "unfairly, unjustly" or in a "discriminatory or deceptive practice or device" to state a claim. The Rules attempt to return to this long-respected historical ground and turn the tide on its recent judicial erosion.

39. Certainly, merit can be rewarded under these Rules. There is no reason to think otherwise. No words in the Rules require a different outcome.

Retail Prices Will Not be Increased by the Rules

40. The Rules will not add costs to the production or trading of beef animals. It will make the marketplace more competitive. This more competitive marketplace will mean producers will have better means of knowledge as to when and how to trade, and a better chance for parity in the trading relationship with their trading partner, then exists now. This is not a cost additive measure. Indeed, competition is believed broadly to drive prices down, not up. The Rules strive to assure competition and parity in trade between producers and purchasers.

41. Under the Rules, equal pay for equal quality is expected to reduce somewhat the price received by captive producers presently receiving preferential treatment, and increase somewhat the price received by independent producers. The net effect on supply of slaughter animals is expected to be a wash. Hence, retail meat prices should not be impacted.

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[21] See "Restoring Economic Health to Beef Markets," Domina, David A., and Taylor, C. Robert, August 25, 2010.

[22] Ideally the trading would be electronic, the trades would be transparent, but the parties to the trades would not know who one another are, just as commodities are traded. See, David A. Domina and C. Robert Taylor, The Debilitating Effects of Concentration in Markets Affecting Agriculture. 15 Drake Journal of Ag Law, 61 (2010).

42. True competition will take care of the inefficient through dynamic adjustments. Inefficient captive producers, as well as inefficient small independent producers, will be eventually eliminated by competitive forces if unjustified differential pricing is eliminated. Differential pricing serves to preserve the captive producers receiving preferential treatment, while eliminating independent producers, even if they are equally efficient producers. With preferential treatment, packers and integrators—and not market forces--essentially control who will remain in production agriculture. The Rules seek to eliminate this unfair treatment.

43. In all other sectors of the economy, these circumstances are believed to generate benefits, not detriments, to producers. No study suggests otherwise with any meaningful proof.

44. To be sustainable, a transcontinental super power's economic system requires thousands and thousands of business components, not just a handful. None can be so large as to cripple the entire sector if one fails. Thousands of parts, with hundreds advancing quickly, others advancing apace, all while only dozens fail, all on a continuous basis, keeps each economic sector crisp, sharp, and competitive. The US Small Business Administration's Chief Economist supplies support:

> "Small business drives the American economy," said Dr. Chad Moutray, Chief Economist for the Office of Advocacy. "Main street provides the jobs and spurs our economic growth. American entrepreneurs are creative and productive and these numbers prove it."
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> "Small businesses are job creators. Office of Advocacy funded data and research shows that small businesses represent 99.7% of all firms. They create more than half of the private non-farm gross domestic product, and they create 60% to 80% of the new jobs. In 2009, there were an estimated 23,794,500 businesses in the US. Of the 5,683,700 firms with employees, 5,666,600 were small firms…."[23]

[23] Press release, Office of Advocacy, US Small Bus Admin, Small Business Drives the US Economy (Aug 4 2005), http://www.sba.gov/advo/press/05-37.html.

The Rules Will Not Cost Jobs

45. Failure to enforce the Rules has already cost jobs—and farms-and ranches-and family business—across the United States. The Rules will not cost jobs.[24] This is because the Rules will not change the labor ratios required to produce animals, transport them, slaughter them, take them to retail, or sell them. The Rules will simply make the marketplace fair where live animals are exchanged for money.

46. But, there is strong evidence about what is wrong with the *P&S Act* as the Courts have interpreted it. Here's one example of the problem:

> Changes in the counts of farms by constant—dollar sales class—from 1982 onward–are consistent with the trends in the counts by acreage class that were discussed earlier. Only one sales class grew consistently over the 16-year period. Large farms increased their numbers by 53,000, growing from 104,000 in 1982 to 157,000 by 1997. The share of all farms in this group also grew, from 5 percent to 8 percent over the same period. Most farms in the large farm group had sales between $250,000 and $499,999, but the number of farms with sales of at least $500,000 grew more rapidly.
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> The number of farms in the other sales classes declined in each inter-census period, with the exception of farms with sales less than $10,000. . . . There, the number of farms declined from 1982 to 1987 and from 1987 to 1992, but increased from 1992 to 1997. . . . [M]ost of the increase from 1992 to 1997 occurred among "point farms," or farms with sales less than $1,000 that might normally have sales that high and satisfy the criteria necessary to be considered a farm. Because of this growth, farms with sales less than $10,000 now account for half of all U.S. farms.[25]

47. As an economic paradigm, ultimately this means huge farms, operated by an overseer in close contractual contact with a processor, are more and more likely to employ workers for wages priced at a level sufficient to maintain the family

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[24] The Dunham and Associates report, commissioned and paid for by AMI, claims substantial job losses from the Rules. This study suffers from several fatal flaws. The job losses are driven by their undocumented, unsupported and unjustified claim that retail prices will increase by 3.33%. This so-called study suffers from several other fatal flaws. They used a "multiplier" model and only tweaked negative impacts. With a 3.33% price increase, somebody in the economy is going to benefit, lawyers or producers, somebody. Had they tweaked the model for these positive impacts, they would have found no substantive job losses or GDP impacts for the economy. The IMPLAN model is widely used for multiplier analysis, but what Dunham and Associated did is referred to in academic modeling community as a GIGO study—Garbage In, Garbage Out.

[25] USDA, AGRICULTURE FACT BOOK 2001-2002, at 26-27 (2003), available at http://www.usda.gov/factbook/2002 factbook.pdf

minimally, but not allow it to accumulate wealth. Wealth accumulation occurs only in ownership hands. A new farmer needs to make friends with a packing plant executive to get a contract, or have no market for his or her goods and services.

48. This economic phenomenon is orchestrated by commitment to efficiency, even at the expense of security for American's food sector. The efficiency-first philosophy leads to a system of limited redundancies and significant size in which firms function in order to supply basic food needs. It encourages circumstances in which a major firm failure risks catastrophic destruction. Recent experience in American banking proves this. In food processing, as in banking, the parts of the economic machine are so big that a failure damages the entire machine to the point of limited utility and discernable instability.[26] This is not the American historical model. There is much evidence the nation's founders expected many small farms, ranches, and firms to compete, assuring that one's failure would give rise to another's birth, and the transformative power for the nation's growth would be change begotten by competition, not modification birthed by newly discovered efficiencies.[27] Recalling their goals is useful.

Meat Markets, and Consumers, Need the GIPSA Rules

49. Markets for meat animals need the proposed GIPSA rules to be adopted. This is because the statute requires reinvigoration. The Rules will not reinvent the *P&S Act*. They will reinvigorate it. Market vibrancy will result and will help consumers, producers, and allow processors their fair share. This is the theory of capitalism, controlled with intelligent regulations to assure that the markets are not abused.

50. The tendency of big businesses to attempt to control laws and regulations (and to fight against rules intended to establish competition) was astutely observed by Adam Smith over two Centuries ago,[28]

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[26] *See* F. WILLIAM ENGDAHL, *supra* note 66 (focusing on the seed industry and single firm dominance over seed for crops). The "Big Food" problem is multi-faceted; it also poses health risks and the public is aware of this.

[27] *See* George Washington, Inaugural Address of 1789 (Apr. 30, 1789) (transcript available at http://www.archives.gov/exhibits/american_originals/inaugtxt.html); Letter from Thomas Jefferson to Jean Baptiste Say (Feb. 1, 1804), *available at* http://etext.virginia.edu/etcbin/toccer-new2?id=JefLett.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=159&division=div1.

[28] Adam Smith was not, as many erroneously maintain, the Patron Saint of free, unregulated, uncontrolled markets. For discussion of what Adam Smith actually said, as opposed to what some corporate executives and politicians now claim, see Mollie M. Taylor, Reflections on Adam Smith's *Wealth of Nations*, Organization for Competitive Markets Newsletter, September 2005.

"**To widen the market and to narrow the competition is always the interest of the dealers** ... The proposal of any new law or regulation of commerce which comes from this order, ought always to be listened to with great precaution, and ought never to be adopted, till after having been long and carefully examined, not only with the most scrupulous, but with the most suspicious attention. **It comes from an order of men, whose interest is never exactly the same with that of the public, who have generally an interest to deceive and even to oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed it**." Adam Smith, The Wealth of Nations, Book I Chapter XI, 1776.

51. Competition and Democracy go hand in hand, as has been widely recognized in mainstream economics since Adam Smith's time. Recently, The Economist emphasized the need for true competiton,[29]

> "The Economist has been advocating economic liberty since 1843. We still think we are right."

52. The authors of this paper respectfully echo The Economist. For months now, the proposed GIPSA Rules have been vetted, commented upon, assailed and lauded. The conversation about the Rules has revealed two views of "free" markets and two views of "Capitalism". One view, ours, sees "free" markets as fair ones where success and failure are opportunities shared by all regardless of birthright or size. Commodity products of equal quality sold to a common processor command equal prices; no one gets a "fix". Regulations are used to keep people honest, and accommodate, not stifle, their trade. The other view, not ours, sees "free" markets as unregulated places where "fixes" and "favors" and "deals" are the order of the day, and in the end, the best back slapper with the best lobbyist gets the most money. In this view, executives get paid thousands of times more than their line workers, producers get beat down to below product cost prices for goods and consumers get beat up for below average quality at bloated prices.

53. Exertion of monopsony power by giant transnational companies siphons profits from agricultural production off to international financial centers and out of rural economies. Economic multipliers kick in, with multiplied negative impacts on rural areas. The depressing economic plight of most rural areas of the United States is obvious to anyone who will open their eyes.

54. Our view, the free and fair view, is simply better than their view, the bare and bloated view. Our view requires competitive markets; their view requires

[29] The Economist, June 28-July4, 2003, p. 13.

markets where huge processes, monopsonists and monopolists, wield control. Respectfully, our view is not only better. It is right. And theirs is wrong. History has repeatedly shown their view to be wrong for common citizens.

55. The Economist explains:

> "To mark our anniversary, we publish this week a survey by the editor: 'Capitalism and Democracy'. It argues, among other things, that the main dangers to the success of capitalism are the very people who would consider themselves its most ardent advocates: the bosses of companies, the owners of companies, and the politicians who tirelessly insist that they are 'pro-business'. At the intersection of these groups lies most of what is wrong with capitalism, and the best opportunities to make that system even more successful than it has been thus far.
>
> "Many of the corporate scandals that America, especially, has endured in recent years reflect outright criminality. A lawful order knows what to do with criminals, and pro-business politicians are in truth militantly anti-capitalist if they flinch from cracking down on bosses' crimes. The other great ongoing scandal is not a matter of law-breaking: it is that bosses have grown accustomed to rewarding themselves like owners, though bearing few risks of ownership—while the real owners, shareholders in the companies concerned, have let them get on with it. Pro-business politicians who regard this vacuum of accountable control as a private matter of no wider concern are doing capitalism a grave disservice**. A system that gives charter to brazen unchecked greed is a system in peril.**
>
> "Economic liberalism, much like political liberalism, puts great weight on checks and balances, on limits to power and hence to abuses of power. **In economics, the most potent checking force bar none is competition. Bosses, shareholders and pro-business politicians all loathe it."**

56. Today, it is clear that economic conservatism and political conservatism put great weight on the notion that one with market power will not use it to grow or gain selfishly at the expense of others. There could be no clearer proof that this thinking is fallacious than the example offered by unregulated financial markets and the havoc their undisciplined, and unregulated behavior, caused. The view that the Rules should not be adopted is one that espouses an eviscerated Packers & Stockyards Act. The opposing view turns the clock back to before 1921, to a time when, like actual market conditions of today, processors of meat abuse

producers, wield market power, and cause artificial price deviations against both those who raise, and those who consume, the nation's meat supply.

57. The authors vigorously oppose this abusive view. We support the GIPSA Rules.

Conclusion

58. America's ranchers, farmers, hog producers, and poultry producers, each and all, need reinvigoration of the Packers & Stockyards Act. Even those producers now benefiting from the advances of the current system, at the expense of their neighbors, will ultimately be better off with a more competitive market.

59. They do not know it now, but the oxen of the producers opposing the GIPSA Rules are being gorged, even as they cheer on those who have seduced them to favor markets that are opaque, dominated by monopsonists, and abusive of both producers and consumers.

60. The Packers & Stockyards Act should be reinvigorated. It is not being reinvented by the GIPSA Rules. Markets should be free and fair, not bare and bloated. The time has come. The comments are now in. The GIPSA Rules should be adopted.

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