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AN EXPANSIVE LEAP: THE GRAIN INSPECTION, PACKERS AND STOCKYARDS ADMINISTRATION'S UNJUSTIFIED ATTEMPT TO GROW THE PACKERS AND STOCKYARDS ACT

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I. INTRODUCTION

Throughout American history, farmers have played a vital role in American society and the construction of its economy. This

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fundamental fact remains true today. In 2013, the meat and poultry packing industry in the United States employed more than 482,100 workers (with combined salaries of more than $19 billion) and produced approximately 93.5 billion pounds of meat for consumers around the world.[1] Sales of this meat totaled $198 billion, and, when taking into account the meat and poultry packing industry's suppliers, distributors, retailers, and ancillary industries, "[t]he meat and poultry industry's economic ripple effect generates $864.2 billion annually to the U.S. economy, or roughly 6% of the entire [gross domestic product]."[2] Moreover, the contributions of American livestock and poultry farmers and the meat packing industry in the United States extend far beyond mere economic considerations. The estimated global population has increased from approximately 3.5 billion in 1967 to approximately 7.5 billion today.[3] This population increase is expected to continue exponentially, with the global population expected to reach 8.5 billion people by the year 2030 and 11.2 billion people by the year 2100.[4] Although America's livestock and poultry farmers and the meat packing industry have achieved amazing production efficiencies, even greater advances in efficiency and production will be necessary in order to continue to feed the ever-increasing global population.

However, despite the tremendous innovations and successes of American agriculture over the past several years, farmers are now under siege on multiple fronts. In order to raise funds to advance their political agenda, environmental and animal rights activists use isolated incidents and edited videos to falsely accuse livestock and poultry farmers of destroying the quality of air and water and of abusing animals. These attacks have led to unprecedented increases in the scope of governmental regulation of agricultural practices, including, perhaps most prominently in the eyes of the general public, various types of environmental regulations.[5]

1. *The United States Meat Industry at a Glance*, N. AM. MEAT INST., https://www.meatinstitute.org/index.php?ht=d/sp/i/47465/pid/47465 (last visited Feb. 25, 2017).

2. *Id.*

3. *See Human Population: Population Growth*, POPULATION REFERENCE BUREAU, http://www.prb.org/Publications/Lesson-Plans/HumanPopulation/PopulationGrowth.aspx (last visited Feb. 25, 2017).

4. *World Population Projected to Reach 9.7 Billion by 2050*, U.N. DEP'T OF ECON. AND SOC. AFF. (July 29, 2015), http://www.un.org/en/development/desa/news/population/2015-report.html.

5. *See, e.g.*, Clean Water Act, 33 U.S.C. §§ 1251–1388 (2012); Clean Air Act, 42

This article focuses on one particular piece of federal legislation and its accompanying regulations that may be less prominent in the public realm but have been a significant part of the meat packing industry for nearly one hundred years: the Packers and Stockyards Act (the "PSA" or the "Act").[6] The PSA was enacted on August 15, 1921,[7] and, as discussed in greater detail throughout this article, exists "to insure effective competition and integrity in livestock, meat, and poultry markets."[8] This purpose is currently pursued by the Grain Inspection, Packers and Stockyards Administration ("GIPSA"), which assumed responsibility for administering the Act in 1994.[9] In 2010, however, GIPSA proposed various rules and regulations[10] that quickly became the source of great controversy within the meat and poultry industry.[11] While many of these rules did not ultimately take effect at the time,[12] GIPSA recently revived several of these regulations through new interim and proposed regulations.[13]

More specifically, this article analyzes some of GIPSA's more controversial rules in light of the PSA as it has existed, been altered, and been interpreted over the past ninety-five years. Part II provides the necessary background for this analysis, discussing both the

U.S.C. §§ 7401–7671 (2012).

6. 7 U.S.C. §§ 181–229 (2012).

7. *Id.* § 181.

8. *The Packers and Stockyards Act: An Overview*, THE NAT'L AGRIC. L. CTR., http://nationalaglawcenter.org/overview/packers-and-stockyards/ (last visited Feb. 25, 2017).

9. Christopher R. Kelley, *An Overview of the Packers and Stockyards Act*, 2003 ARK. L. NOTES 35, 36 (2003). Prior to 1994, the Act was administered by the Packers and Stockyards Administration. *Id.*

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

11. *See* Shauna R. Hermel, *Alert: GIPSA Livestock Marketing Rule*, ANGUS BEEF BULL. (July 20, 2010), http://www.angusbeefbulletin.com/extra/2010/07jul10/0710mk_gipsa_rule.html (summarizing the views of industry organizations with regard to the proposed 2010 GIPSA rules).

12. *See generally* JOEL L. GREENE, CONG. RESEARCH SERV., R41673, USDA'S "GIPSA RULE" ON LIVESTOCK AND POULTRY MARKETING PRACTICES (2015) (discussing the rulemaking history of GIPSA's proposed rules and how subsequent GIPSA riders prevented enactment of certain aspects of those proposed rules).

13. Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 81 Fed. Reg. 92,566 (Dec. 20, 2016) (to be codified at 9 C.F.R. pt. 201); Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act, 81 Fed. Reg. 92,703 (Dec. 20, 2016) (to be codified at 9 C.F.R. pt. 201).

history of the PSA as originally enacted and portions of the Act that are invoked on a regular basis.[14] Part III then focuses on a more recent piece of legislation—the 2008 Farm Bill—and GIPSA's attempt to exercise its rulemaking authority under that legislation to dramatically change the landscape of the PSA.[15] Next, Part IV argues that GIPSA goes too far in these attempts, thereby effectively rewriting the PSA to increase the scope of its regulatory authority.[16] In particular, this article asserts that GIPSA's efforts are inconsistent with the purpose of the PSA, both as originally enacted and as interpreted over the past ninety-five years.[17]

II. THE PACKERS AND STOCKYARDS ACT: A HISTORICAL PERSPECTIVE

The PSA was originally enacted "[t]o regulate interstate and foreign commerce in livestock, live-stock products, dairy products, poultry, poultry products, and eggs, and for other purposes."[18] Section A of this Part discusses that purpose in light of the meat packing industry at the time the PSA was enacted.[19] Section B then discusses the general statutory structure of the PSA.[20]

A. The Historical Backdrop of the PSA

The early-1900s meat packing industry was markedly different than the industry today. At that time, the chain of commerce in the industry was connected through various forms of infrastructure, including the railroads; stock cars and refrigerator cars; and freight depots and stockyards, where livestock was ultimately sold to packers.[21] Individual producers, who might have raised livestock in any part of the country (although most frequently in the ranges in the western United States), were dependent upon this infrastructure.[22] For example, a farmer or rancher may load his

14. *See infra* Part II.
15. *See infra* Part III.
16. *See infra* Part IV.
17. *See infra* Parts III–IV.
18. Packers and Stockyards Act of 1921, ch. 64, 42 Stat. 159.
19. *See infra* Section I.A.
20. *See infra* Section I.B.
21. FED. TRADE COMM'N, REPORT OF THE FEDERAL TRADE COMMISSION ON THE MEAT-PACKING INDUSTRY 25, 40 (1919).
22. *See* Louise Carroll Wade, *Meatpacking*, ENCYCLOPEDIA OF CHI., http://www.encyclopedia.chicagohistory.org/pages/804.html (last visited Feb. 25, 2017).

animals on a freight car bound for distant stockyards or processing plants without ever directly dealing with or visiting those facilities. As a result of these market dynamics and the sheer distance separating most farmers and packing plants, the integrity and propriety of this chain of commerce was a great concern.[23] Additionally, the sanitation and working conditions of packing plants at the turn of the twentieth century[24] became a great concern that led to legislation.[25]

Suspecting antitrust law violations within the meat packing industry, in 1917, the President of the United States directed the Federal Trade Commission to investigate that industry's practices.[26] Over the next year, such an investigation took place, resulting in a six-volume report that confirmed the existence of "monopolies, controls, trusts, combinations, conspiracies, or restraints of trade out of harmony with the law and the public interest" in the meat packing industry.[27] Specifically, the report found the meat packing industry was dominated by five companies: Swift & Company, Armour & Company, Morris & Company, Cudahy Packing Company, and Wilson & Company.[28] Discussing these five companies, the report stated:

> As we have followed these five great corporations through their amazing and devious ramifications—followed them through important branches of industry, of commerce, and of finance—we have been able to trace back to its source the great power which has made possible their growth. We have found that it is not so much the means of production and preparation, nor the sheer momentum of great wealth, but the advantage which is obtained through a monopolistic control of the market places and means of transportation and distribution.[29]

Specifically, the Federal Trade Commission found that Swift, Armour, Morris, Cudahy, and Wilson used their ownership of packing houses, control over channels of distribution (including stockyards, private car lines, cold storage plants, and branch houses),

23. FED. TRADE COMM'N, *supra* note 21, at 25, 40.
24. *See generally* UPTON SINCLAIR, THE JUNGLE (1906).
25. *See, e.g.*, Federal Meat Inspection Act, 21 U.S.C. § 601 et seq. (1907).
26. FED. TRADE COMM'N, *supra* note 21, at 23.
27. *Id.* (internal quotation marks omitted).
28. *Id.*
29. *Id.* at 24.

and control over distributive machinery to "[m]anipulate live-stock markets; [r]estrict interstate and international supplies of foods; [c]ontrol the prices of dressed meats and other foods; [d]efraud both the producers of food and consumers; [c]rush effective competition; [s]ecure special privileges from railroads, stockyard companies, and municipalities; and [p]rofiteer."[30]

Although Congress rejected the Federal Trade Commission's suggestion that the federal government take ownership of stockyards and other related facilities,[31] Congress did respond to the findings in the report by enacting the PSA.[32]

The legislative history of the PSA suggests varying accounts of the Act's original, basic purpose, and two fields of thought have emerged as to what that purpose is.[33] The first, which has been recognized by the United States Supreme Court for the entire history of the Act, supports the assertion that "the PSA is one of several antitrust statutes intended to protect competition in order to protect consumers from high prices."[34] This view is bolstered by the notion that the PSA has common heritage and shares intellectual, political, and legal history with the Sherman Antitrust Act and the Federal Trade Commission Act—other antitrust statutes that focus on promoting market efficiency and consumer welfare.[35]

30. *Id.*

31. Kelley, *supra* note 9, at 37.

32. *Id.*

33. *See* John D. Shively & Jeffrey S. Roberts, *Competition Under the Packers and Stockyards Act: What Now?*, 15 DRAKE J. AGRIC. L. 419, 431 (2010).

34. *Id.* (citing Wheeler v. Pilgrim's Pride Corp., 591 F.3d 355, 370 (5th Cir. 2009) (en banc) (Jones, C.J., concurring)).

35. *Id.* at 431–32. The legislative history bolstering this view was thoroughly discussed by the concurring opinion filed in *Wheeler*. 591 F.3d at 369–70. Such history includes the report of the House Committee on Agriculture (H.R. Rep. No. 67-77, at 2–10 (1921)), which focused on the Supreme Court's competition jurisprudence developed with regard to the Interstate Commerce Act and the Federal Trade Commission Act when discussing the PSA's meatpacker provisions; the House Committee on Agriculture's May 2, 1921, Hearing on Meat Packers, which discussed the prevention of packers from "combination, apportionment of territory and of markets, as well as the oppression of competitors" as the call for the PSA; and statements by supporters of the PSA (*Committee on Agriculture of the House of Representatives, Hearing on Meat Packers*, May 2, 1921, at 54 (statement of National League of Women Voters); H.R. Rep. No. 85-1048, at 1 (1957)), which asserted that the Act would ultimately aid farmers and growers and reduce the price of food for consumers.

The second field of thought, which is advanced by GIPSA, is far broader and asserts that "the PSA is a market regulatory statute intended to protect producers from low prices, and it might well be more restrictive than antitrust statutes, which 'protect[] . . . competition, not competitors.'"[36] This view is bolstered by "ever-increasing concentration and vertical integration of beef and pork packers and poultry processors, which [some] assert increases the market power and injustices the PSA was intended to prevent."[37] This distinction forms a significant theoretical rift when discussing GIPSA's current rules.[38]

The year that Congress enacted the PSA, the Supreme Court affirmed the constitutionality of the Act in *Stafford v. Wallace*.[39] In *Stafford*, the Court held that the Act was a valid exercise of Congress's power under the Commerce Clause, as the activities falling within the purview of the Act burdened the freedom of interstate commerce and the stockyard business was an essential part of interstate commerce.[40] Thus, *Stafford* was the first indication of the

36. Shively & Roberts, *supra* note 33, at 431. Pieces of legislative history bolstering this view were also discussed in *Wheeler* via the dissent. 591 F.3d at 378–79 (Garza, J., dissenting). The dissent quotes at length from H.R. No. 85-1048, emphasizing the following language:

> The primary purpose of this Act is to assure fair competition *and* fair trade practices in livestock marketing and in the meatpacking industry. The objective is to safeguard farmers and ranchers against receiving less than the true market value of their livestock and *to protect consumers against unfair business practices* in the marketing of meats, poultry, etc. *Protection is also provided* to members of the livestock marketing and meat industries *from unfair, deceptive, unjustly discriminatory*, and monopolistic practices of competitors, large or small . . . .
>
> The act provides that meatpackers subject to its provisions shall not engage in practices that restrain commerce or create monopoly. They are prohibited from buying or selling any article for the purpose of or with the effect of manipulating or controlling prices in commerce. They are *also prohibited* from *engaging in any unfair, deceptive, or unjustly discriminatory practice or device* in the conduct of their business, or conspiring, combining, agreeing, or arranging with other persons to do any of these acts.

Id. at 378 (quoting H.R. Rep. No. 85-1048 at 1–2).

37. Shively & Roberts, *supra* note 33, at 432.

38. *See infra* Part IV.

39. 258 U.S. 495 (1922).

40. *Id.* at 528 ("As already noted, the word 'commerce,' when used in the [A]ct, is defined to be interstate and foreign commerce. Its provisions are carefully drawn

PSA's staying power and allowed enforcement of the Act to commence.

B. A General Overview of the PSA

The PSA provides a comprehensive approach to the meat and poultry packing industry. The Act itself contains four subchapters: a subchapter providing general definitions;[41] a subchapter addressing packers;[42] a subchapter addressing stockyards and stockyard dealers;[43] and a subchapter addressing general and administrative matters.[44] The scope of the Act can be ascertained through the definitions of the entities it covers: packers,[45] stockyards,[46] and stockyard dealers.[47] Although these terms' definitions generally pertain to "livestock,"[48] various other specific provisions of the PSA also regulate "poultry."[49]

The Act imposes various types of obligations, some specific and some general, on the above entities.[50] For example, the Act

to apply only to those practices and obstructions which in the judgment of Congress are likely to affect interstate commerce prejudicially. Thus construed and applied, we think the [A]ct clearly within Congressional power and valid.").

41. 7 U.S.C. §§ 181–83 (2012).

42. *Id.* §§ 191–98b.

43. *Id.* §§ 201–17a.

44. *Id.* §§ 221–29c.

45. *Id.* § 191 ("[A]ny person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer, or distributor in commerce.").

46. *Id.* § 202(a) ("[A]ny place, establishment, or facility commonly known as stockyards, conducted, operated, or managed for profit or nonprofit as a public market for livestock producers, feeders, market agencies, and buyers, consisting of pens, or other enclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce.").

47. *Id.* § 201(d) ("[A]ny person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser.").

48. *Id.* § 182(4) (defining livestock as "cattle, sheep, swine, horses, mules, or goats").

49. Live poultry dealers are, for example, barred from engaging in unfair, unjustly discriminatory, or deceptive practices. *See id.* § 192(a); *see also id.* § 182(6) (defining poultry as "chickens, turkeys, ducks, geese, and other domestic fowl").

50. For a detailed discussion of many of the obligations imposed by the Act (as in effect in 2003), see Kelley, *supra* note 9, at 40–56.

empowers the Secretary of Agriculture to require that packers be bonded if their annual purchases exceed $500,000,[51] imposes statutory trusts on livestock and poultry (and meat derived therefrom) purchased by packers,[52] and requires prompt payments from packers to protect livestock and poultry farmers and ranchers.[53] Also, stockyards must furnish (and only furnish) "reasonable and nondiscriminatory" services,[54] charge reasonable rates for services,[55] be managed in a way that insures a competitive market,[56] keep adequate accounts and records,[57] and comply with the Secretary of Agriculture's orders.[58]

Despite the specific requirements discussed above, the core of the PSA is a broad, general prohibition against unfair trade practices by packers, stockyards, and dealers.[59] Specifically, the Act provides:

> 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 particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect . . . .[60]

A significant legal debate centers on the scope of the broad prohibitions against "unfair" and "unjustly discriminatory" practices and "undue or unreasonable preference[s]" in parts (a) and (b) of this statute.[61] Specifically, that debate centers on whether it is necessary for claimants alleging a violation of section 192(a) or (b) of the PSA to show proof of actual or likely harm to competition in

51. 7 U.S.C. § 204.
52. *Id.* § 196(b).
53. *Id.* § 228b(a).
54. *Id.* § 205.
55. *Id.* § 206.
56. *Id.* § 208(b).
57. *Id.* § 221.
58. *Id.* §§ 211–13.
59. *Id.* § 192.
60. *Id.*
61. *See generally* Shively & Roberts, *supra* note 33. Sections 192(a) and (b) have remained "relatively unchanged" since the PSA was originally enacted. *Id.* at 424.

the overall market rather than mere harm to the individual claimant.[62] Both sides of this debate acknowledge that the PSA does not expressly address this issue.[63] Those that oppose a competitive harm requirement believe the absence of express language is conclusive. On the other hand, others recognize the terms "unfair," "unjust," and "undue or unreasonable" as legal terms of art in the antitrust context that themselves require a showing of competitive harm.[64] But, as discussed more fully below, despite this ongoing debate, the federal appellate courts that have faced this issue have universally recognized a requirement of competitive harm (or likely competitive harm) under sections 192(a) and 192(b) of the PSA.[65]

Many of the early cases applying the PSA come from the Seventh Circuit, which was the home of many of the large packers that motivated the enactment of the PSA. In 1939, the Seventh Circuit considered an order of the Secretary of Agriculture prohibiting preferential discounts to some (but not all) customers of a packer.[66] In reversing this order, the Seventh Circuit held that the Secretary was required to consider the effect of the disparate treatment on competition before finding a violation of the PSA.[67]

Approximately twenty years later, the Seventh Circuit considered an order of the Secretary of Agriculture arising from two alleged violations of the PSA: (1) an agreement between a packer and a competitive dealer to refrain from competitive bidding for top-grade hogs at a specific market and to share the hogs between them,

62. *See* Rachael L. Dettmann, Note, *You're Not the Boss of Me: An Analysis of GIPSA's Authority to Regulate Private Contracting in the Beef Industry*, 16 DRAKE J. AGRIC. L. 321, 325 (2011).

63. *See generally id.*

64. *Id.* at 326–27.

65. The Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have implemented the idea of competitive harm when analyzing claims under section 192(a) or (b), and the Fourth, Tenth, and Eleventh Circuits have each held that a claimant cannot prevail under section 192(a) or (b) without demonstrating competitive harm. *See generally* Terry v. Tyson Farms, Inc., 604 F.3d 272 (6th Cir. 2010); Wheeler v. Pilgrim's Pride, 591 F.3d 355 (5th Cir. 2009); Been v. O.K. Indus., Inc., 495 F.3d 1217 (10th Cir. 2007); London v. Fieldale Farms Corp., 410 F.3d 1295 (11th Cir. 2005); Pickett v. Tyson Fresh Meats, Inc., 420 F.3d 1272 (11th Cir. 2005); IBP, Inc. v. Glickman, 187 F.3d 974 (8th Cir. 1999); Philson v. Goldsboro Milling Co., 164 F.3d 625 (4th Cir. 1998); De Jong Packing Co. v. USDA, 618 F.2d 1329 (9th Cir. 1980); Armor & Co. v. United States, 402 F.2d 712 (7th Cir. 1968).

66. Swift & Co. v. Wallace, 105 F.2d 848, 852 (7th Cir. 1939).

67. *Id.* at 854.

and (2) a practice by the packer of quoting prices to dealers before the dealers purchased hogs (and honoring the quoted price even if the market changed in the interim).[68] The court held that "the agreement between competitive buyers to split or share the purchase of top grade hogs" violated the PSA because "[t]he essential nature and the necessary result of this arrangement or practice was to eliminate competition."[69] On the other hand, the court held that the mere "dissemination of price information to country dealers is not illegal per se" under the PSA, but "is illegal only if made 'for the purpose of restricting or limiting competition, manipulating livestock prices or controlling the movement of livestock.'"[70]

A few years later, in considering whether a packer's short-term coupon program for a particular type of bacon violated the PSA, the Seventh Circuit reiterated its conclusion, based on the legislative history of and case law interpreting the PSA, that a violation of section 192(a) requires either "some predatory intent or some likelihood of competitive injury."[71] As the court further expounded:

> When viewed together, the antitrust laws, although not completely harmonious and frequently overlapping, express a basic public policy distinguishing between fair and vigorous competition on the one hand and predatory or controlled competition on the other. Normally the twin solvents for determining when the boundaries of fair competition have been exceeded are the existence of predatory intent and the likelihood of injury to competition. The clearer the danger of the latter, as when competitors conspire to eliminate the uncertainties of price competition, the less important is proof of the former. Conversely, the likelihood of injury arising from conduct adopted with predatory purpose is so great as to require little or no showing that such injury has already taken place. Each statutory prohibition of specified acts or practices reflects the Congressional conclusions as to the gravity of the injury to be feared and the relative difficulty of distinguishing honest competition and predation. The fact that a given provision does not expressly specify the degree of injury or the type of intent required, does not imply that these basic indicators of the line between free

68. Swift & Co. v. United States, 308 F.2d 849, 852–54 (7th Cir. 1962).
69. *Id.* at 853.
70. *Id.* at 854.
71. Armour & Co. v. United States, 402 F.2d 712, 717 (7th Cir. 1968).

> competition and predation are to be ignored. Surely words such as "unfair" and "unjustly" in Section 202(a) and "undue" and "unreasonable" in Section 202(b) require some examination of the seller's intent and the likely effects of its acts or practices under scrutiny, even though these tests under Section 202(a) and (b) be less stringent than under some of the anti-trust laws. These adjectival qualifications expressed in the statutory language enjoin the Department and courts to apply a rule of reason in determining the lawfulness of a particular practice under Section 202(a) and (b).[72]

Other circuits have also consistently reached the same result. In *Farrow v. United States Department of Agriculture*, for example, the Eighth Circuit recognized that a practice is "unfair" under the PSA "if it injures or is likely to injure competition."[73] Relying on "the backdrop of corruption the [PSA] was intended to prevent" and "the PSA's antitrust ancestry," the Eleventh Circuit joined several of its sister circuits in 2005 and expressly held "that in order to prevail under the PSA, a plaintiff must show that the defendant's deceptive or unfair practice adversely affects competition or is likely to adversely affect competition."[74] The Tenth Circuit joined this growing group two years later and held that a violation of section 192(a) of the PSA requires proof "that the [challenged] practice injures or is likely to injure competition."[75]

The most thorough analysis of this issue, however, is in the Fifth Circuit's en banc decision in *Wheeler v. Pilgrim's Pride*.[76] In *Wheeler*, the plaintiffs were chicken growers who alleged that the defendant gave a non-party grower more preferable terms than those given to the plaintiffs.[77] The plaintiffs argued that this preferential treatment constituted "'deceptive, unlawful, unfair, capricious, arbitrary, and discriminatory' conduct in violation of § 192(a) and (b)."[78] A majority of the Fifth Circuit disagreed because the plaintiffs had not demonstrated an "injury, or likelihood of injury, to competition"—a

72. *Id.*
73. 760 F.2d 211, 214 (8th Cir. 1985).
74. Londale v. Fieldale Farms Corp., 410 F.3d 1295, 1302–05 (11th Cir. 2005).
75. Been v. O.K. Indus., Inc., 495 F.3d 1217, 1230 (10th Cir. 2007).
76. 591 F.3d 355 (5th Cir. 2009) (en banc).
77. *Id.* at 357.
78. *Id.*

necessity, according to the majority, for a claim brought under section 192(a) or (b).[79]

In reaching this conclusion, the majority relied on several justifications. First, the majority found that "[t]he anti-competitive behaviors of the big meat packing companies of the 1920s motivated Congress to pass the Act, and the Supreme Court in *Stafford v. Wallace* concluded that the Act was constitutional because of the anti-competitive concerns of Congress."[80] Second, the majority found that "[i]t [was] reasonable to conclude that Congress accepts the meaning of § 192(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.'"[81] Finally, the majority noted that the requirement of competitive harm promotes predictability.[82] Requiring this showing of competitive harm under section 192(a) or (b) is predictable, given judicial precedent requiring the same.[83] A significant concurring opinion, joined by several of the judges in the majority, further clarified that the requirement of competitive harm is consistent with the plain language of the statute.[84] The concurrence reasoned that key statutory terms had become legal terms of art with clear, recognized meanings, which included competitive harm, by the time the PSA was enacted.[85]

Several Fifth Circuit judges dissented, concluding that a claim brought under section 192(a) or (b) should not require a showing of competitive harm.[86] The dissent focused mainly on the language of section 192 as a whole, stating:

> The plain language of the PSA, however, is clear. Some subsections contain "restraining commerce" language [subsections 192(c), (d), and (e)] and some do not [subsections 192(a) and 192(b)]. We have to give effect to

79. *Id.* at 363.

80. *Id.* at 362.

81. *Id.* at 361–62 (quoting General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 593–94 (2004)). The majority noted that "after 1921 and up to 2002, Congress has amended § 192 seven times without making any changes that would affect the many court interpretations" imposing a competitive harm requirement, notwithstanding judicial history requiring a showing of competitive harm. *Id.* at 361.

82. *Id.* at 363.

83. *Id.*

84. *Id.* at 364–71 (Jones, J. concurring).

85. *Id.*

86. *Id.* at 372 (Garza, J., dissenting).

> this difference. . . . The most natural reading is that those subsections with the "restraining commerce" language require a competitive injury and those without it do not. Because the majority's construction of the PSA avoids this straightforward conclusion only by reading absent terms into the statute, it should be rejected.[87]

In sum, the trend in favor of requiring a showing of competitive harm as an element of section 192(a) or (b) is strong, despite advocacy of arguments to the contrary. There is little indication at this point that the trend will cease within the judiciary without further action by other governmental entities.

III. EXPANSION OF THE PSA THROUGH THE 2008 FARM BILL

One of the ways in which the PSA has been amended or impacted is through the passage of "farm bills." The term "farm bill" refers to an omnibus bill concerning a wide variety of topics, including agriculture, conservation, and food assistance.[88] The first farm bill, titled the Agriculture Adjustment Act of 1933, was passed to combat the effects of the Great Depression.[89] The Agricultural Adjustment Act of 1933 set the stage for similar legislation, which is still drafted and enacted periodically today; the most recent farm bill was passed three years ago and is entitled the Agricultural Act of 2014.[90]

Since the adoption of the PSA and the enactment of the first farm bill, livestock and poultry farming has undergone significant economic changes. Specifically, consolidation has produced larger farming operations that are owned by fewer farmers.[91] Many of these larger operations (particularly in swine and poultry) have vertically integrated their operations.[92] They now use contract-grower

87. *Id.* at 377.

88. *A Short History and Summary of the Farm Bill*, FARM POLICY FACTS, https://www.farmpolicyfacts.org/farm-policy-history/ (last visited Feb. 25, 2017).

89. *Id.*

90. Agricultural Adjustment Act of 2014, Pub. L. No. 113-79, 128 Stat. 649. For a full list of, and links to, farm bills enacted since 1933, see *United States Farm Bills*, NAT'L AGRIC. L. CTR., http://nationalaglawcenter.org/farmbills/ (last visited Feb. 22, 2017).

91. JAMES M. MACDONALD ET AL., ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., ERR-152, FARM SIZE AND THE ORGANIZATION OF U.S. CROP FARMING 15 (Aug. 2013), https://www.ers.usda.gov/webdocs/publications/45108/39359_err152.pdf.

92. CLEMENT E. WARD, VERTICAL INTEGRATION COMPARISON: BEEF, PORK, AND POULTRY (1997).

agreements under which smaller farmers contract to provide the facilities and labor to care for animals that are owned (and eventually marketed) by the larger integrator.[93] Although these larger, integrated farming operations have been decried by some as "corporate farming," these arrangements can provide significant benefits to the contract growers by providing consistent, guaranteed income that is not dependent on highly volatile market prices or significant disease risks.[94] These practices also benefit consumers because they ensure consistent supply and quality of meat products and reduce prices through improved efficiency.[95]

The farm bill passed in 2008, which is over five hundred pages in length and entitled the Food, Conservation, and Energy Act (the "2008 Farm Bill" or the "Bill"), made various modifications to the PSA.[96] In particular, the 2008 Farm Bill added new provisions that regulated the contractual relationships between larger, integrated farmers and contract growers in swine and poultry.[97] This development is a marked expansion of the historical scope of the PSA, which had never before regulated the economic activities of farmers; it had regulated only packers, stockyards, and dealers.[98] The 2008 Farm Bill also directed the United States Department of Agriculture (USDA) to adopt regulations on certain specific topics.[99] These changes are more fully discussed below.

93. *Id.*

94. Phillip L. Kunkel & Jeffrey A. Peterson, *Agricultural Production Contracts*, U. MINN. EXTENSION 1, 1–2 (June 2015), https://www.extension.umn.edu/agriculture/business/taxation/farm-legal-series/agricultural-production-contracts/docs/agricultural-production-contracts.pdf ("Such contracts may provide for a more stable income for the producer by reducing traditional marketing risks. . . . An agricultural production contract may provide the producer with a guaranteed market . . . .").

95. Nathan Wittmaack, *Should Corporate Farming Be Limited in the United States?: An Economic Perspective*, 8 MAJOR THEMES ECON. 45, 54 (2006) (discussing how the "corporate farming" style creates efficiency gains that are passed on to the consumer).

96. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923.

97. *Id.* § 208 (codified as amended at 7 U.S.C. § 197a (2012)).

98. *See generally* Kelley, *supra* note 9 (describing what the PSA regulated prior to the 2008 Farm Bill).

99. Food, Conservation, and Energy Act § 11006.

A. An Increase in Benefits to Growers and Producers

Section 11005 of the 2008 Farm Bill added sections 197a, 197b, and 197c to the PSA, which deal with production contracts, choice of law and venue, and arbitration, respectively.[100] Each of these new provisions increases (or, at least, attempts to increase) the benefits or protections afforded to contract growers.[101]

First, the 2008 Farm Bill granted poultry growers and swine production contract growers the right to cancel a growing or production contract within three business days of the contract's execution or by a contractually specified cancellation date.[102] The contract itself must "clearly disclose" these cancellation rights, as well as the method of cancellation.[103] The contract must also "conspicuously state," on the contract's first page, that "additional large capital investments may be required of the poultry grower or swine production contract grower during the term of the poultry growing arrangement or swine production contract," if such investments may, in fact, be required.[104]

Second, with regard to choice-of-law and venue,[105] the 2008 Farm Bill mandated that the proper forum in which a contract dispute between the parties to a poultry growing arrangement or swine production or marketing contract is the federal judicial district in which principle performance is set to take place.[106] Additionally, the Bill allows the contract to specify which state's law applies in a

100. *Id.* § 11005.

101. *See id.*

102. *See* 7 U.S.C. § 197a(a)(1) (2012).

103. *Id.* § 197a(a)(2).

104. *Id.* § 197a(b)(1).

105. For a discussion of choice-of-law provisions generally and the enforceability of choice-of-law provisions in the arbitration context specifically, see Ross Ball, *FAA Preemption by Choice-of-Law Provisions: Enforceable or Unenforceable?*, 2006 J. DISP. RESOL. 613, 613 (2006) ("Generally, choice-of-law provisions allow corporations that do business in several states or countries to draft their agreements and conduct their business in accordance with the law they choose. When the choice-of-law provision is contained in a contract that does not have an agreement to arbitrate, courts generally have no qualms about enforcing them. However, when the contract does contain an agreement to arbitrate, courts are reluctant to enforce the choice-of-law provision as to the arbitration agreement because the Federal Arbitration Act (FAA) governs arbitration agreements.").

106. 7 U.S.C. § 197b(a).

contract dispute, unless prohibited by the law of the state in which the principal part of the performance under the contract occurs.[107]

Third and finally, with regard to arbitration, the 2008 Farm Bill granted producers and growers the right—to be exercised prior to entering the contract—to decline to be bound by a contractual provision requiring arbitration, should such a provision be present in a livestock or poultry contract.[108] The Bill also required that such contracts conspicuously disclose the right to decline arbitration[109] and allowed a producer or grower to elect the use of arbitration, even if the producer or grower declined such use at the time the contract was formed.[110]

While a review of the 2008 Farm Bill's enactment does not appear to reveal great amounts of controversy regarding these additions,[111] the debate surrounding, and the rejection of, other proposed Bill amendments demonstrate that sweeping reform to the PSA was not intended. For example, Tester amendment No. 3666 would have expanded the scope of the PSA by preventing a packer from defending an unfair purchasing practices lawsuit on the grounds that its actions were based on a justified business decision.[112] Additionally, Grassley amendment No. 3823 would have created an Agricultural Competition task force to study problems in agricultural competition and generally increase oversight over agricultural mergers, transactions, and competition issues.[113]

107. *Id.* § 197b(b).

108. *Id.* § 197c(a).

109. *Id.* § 197c(b).

110. *Id.* § 197c(c).

111. *See* 154 CONG. REC. 3801, 3811 (2008) (statement of Rep. Goodlatte) ("[T]his bill is bipartisan because we worked together to give on both sides to make sure that we came up with a good farm bill that could command strong bipartisan support.").

112. *See* 153 CONG. REC. 14406-01 (2007); *see also* 153 CONG. REC. 15390-01 (2007) (statement of Sen. Roberts) (In opposition to the amendment: "This amendment will result in all producers being treated the same . . . regardless of how efficient or inefficient their operation may be and regardless of the quality of product they produce."); *id.* (statement of Sen. Burr) ("I hope my colleagues here understand that the law, as currently written, works. It has served this country well and it has produced choice, it has produced quality, and it has fairly reimbursed all who entered into it. Let's not change it, and let's make sure the products that America has chosen and continues to choose in the marketplace are driven by the marketplace, not manipulated by this body in Washington.").

113. 153 CONG. REC. 15078-02 (2007); 153 CONG. REC. 15433-01 (2007) (statement of Sen. Grassley) (discussing proposed amendment 3823); *id.* (statement

In sum, the 2008 Farm Bill made some small adjustments to the PSA, but the non-severity of these adjustments—along with the rejection of some more severe amendments—demonstrates that the Bill was not intended to bring sweeping reform to the Act or the way in which it was administered.

B. The Administrative Rules Produced as a Result of the 2008 Farm Bill

In addition to the amendments it made to the PSA itself, the 2008 Farm Bill instructed USDA to promulgate specific rules to aid in the Act's implementation.[114] This Section discusses those instructions and USDA's response thereto.

1. The 2008 Farm Bill's Narrow Direction to USDA

Section 11006 of the 2008 Farm Bill directed the Secretary of Agriculture to promulgate rules,[115] no later than two years subsequent to the passage of the Bill, establishing criteria for the Secretary to use in determining:

> (1) whether an undue or unreasonable preference or advantage has occurred in violation of such Act;
>
> (2) whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement;
>
> (3) when a requirement of additional capital investments over the life of a poultry growing arrangement

of Sen. Brownback) (In opposition to amendment 3823: "I believe the route to go is what we have been doing in the Packers and Stockyards Administration and having industry standards that are similar across all industries, and that we should support the Packers and Stockyards Administration, support the laws that are there, fund those entities—which I support doing—maintaining those standards but allowing these innovative approaches to take place for a major industry in my State and for my producers and cattle producers across the country.").

114. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 11006, 122 Stat. 923, 1358.

115. The promulgation of administrative rules is a common occurrence in which an executive agency writes and enacts rules pursuant to a congressional grant of rulemaking power. Informal, or "notice-and-comment," rulemaking (which was utilized by USDA in the rulemakings noted in this article) requires publication of a notice of proposed rulemaking, 5 U.S.C. § 553(b), a period of time in which interested persons may provide comments on the proposed rule, § 553(c), and publication of the final rule not less than 30 days prior to its effective date, § 553(c). The informal rulemaking process does not include a hearing requirement. *See generally* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224 (1973).

> or swine production contract constitutes a violation of such Act; and
>
> (4) if a live poultry dealer or swine contractor has provided a reasonable period of time for a poultry grower or a swine production contract grower to remedy a breach of contract that could lead to termination of the poultry growing arrangement or swine production contract.[116]

The Bill, via enactment of 7 U.S.C. § 197c, also directed the Secretary of Agriculture to promulgate regulations related to the PSA's newly codified provisions governing arbitration.[117]

2. GIPSA's Rulemaking Process in Response to the 2008 Farm Bill

On June 22, 2010, GIPSA, acting on behalf of the Secretary of Agriculture, published its proposed rules in the Federal Register and provided that GIPSA would consider comments received by August 23, 2010.[118] To the surprise of many, the proposed rules were expansive. For example, the proposed rules would attempt to reverse, by administrative fiat, decades of federal judicial precedent by eliminating the need for a claimant under 7 U.S.C. § 192(a) or (b) to demonstrate a competitive injury.[119] The proposed rules also sought to impose capital investment recoupment requirements in grower contracts, modify the grower payment system, require vigorous recordkeeping requirements, and require disclosure and online publication of sample contracts.[120] An analysis prepared for the National Pork Producers Association determined that the proposed regulations "would have limited farmers' ability to sell animals, dictated the terms of private contracts, made it harder to get farm financing, raised consumer prices and reduced choices, stifled industry innovation,"[121] and "cost the pork industry more than $330 million annually."[122]

116. § 11006, 122 Stat. at 1358.

117. 7 U.S.C. § 197c(f) (2012); *see supra* Section III.A.

118. Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008, 75 Fed. Reg. 35,338 (proposed June 22, 2010).

119. *Id.*

120. *Id.*

121. NAT'L PORK PRODUCERS COUNCIL, *For the Week Ending April 22, 2016* (Apr. 22, 2016), http://nppc.org/for-the-week-ending-april-22-2016/.

122. *'GIPSA' Rule Would Wipe Out TPP Benefits, Says NPPC*, NAT'L PORK PRODUCERS COUNCIL (May 26, 2016), nppc.org/gipsa-rule-would-wipe-out-tpp-benefits-says-nppc/.

GIPSA's proposed rules were discussed extensively in a July 20, 2010, hearing before the House of Representatives Subcommittee on Livestock, Dairy, and Poultry.[123] The general tone of the hearing was, mildly put, critical of GIPSA's proposed rules.[124] First, as a procedural matter, the Subcommittee was critical that GIPSA only provided a sixty-day comment period with regard to the proposed rules, as opposed to a longer comment period.[125] Second, the Subcommittee expressed its opposition, as a matter of substance, to various items within the proposed rule, including the elimination of a need to demonstrate competitive harm under 7 U.S.C. § 192(a) or (b);[126] the ban on packer-to-packer sales;[127] the classification of a packer paying a premium or applying a discount on the purchase price received by a producer without substantiation as an unfair, unjust, discriminatory, or deceptive practice;[128] and the requirement that grower contracts be for a duration that provides the producer with an opportunity to recoup up to eighty percent of his or her investment.[129] The Subcommittee also expressed its displeasure that "[a] number of [the proposed GIPSA] provisions had previously been rejected . . . in the Senate process, and certainly in the [2008]

123. *Hearing to Review Livestock and Related Programs at USDA in Advance of the 2012 Farm Bill: Hearing Before the Subcomm. on Livestock, Dairy, and Poultry of the H. Comm. Agric.*, 111th Cong. 2 (2010).

124. *Id.* at 3 (statement of Hon. David Scott, Chairman, H. Subcomm. on Livestock, Dairy, and Poultry) ("This proposed rule goes well beyond—well beyond—what Congress intended.").

125. *Id.* ("You are given only 60 days for review and comment, which is clearly an inadequate amount of time. These are the most sweeping changes to the Packers and Stockyards Act in nearly 100 years, and GIPSA did little or nothing to get the input from the livestock and poultry industry.").

126. *Id.* at 46–47 (statement of Rep. David P. Roe, Member, H. Subcomm. on Livestock, Dairy, and Poultry).

127. *Id.* at 36–37, 40–41, 44–46 (statement of Rep. Jim Costa, Member, H. Subcomm. on Livestock, Dairy, and Poultry; statement of Rep. K. Michael Conaway, Member, H. Subcomm. on Livestock, Dairy, and Poultry; statement of Rep. Walt Minnick, Member, H. Subcomm. on Livestock, Dairy, and Poultry; statement of Rep. David P. Roe, Member, H. Subcomm. on Livestock, Dairy, and Poultry).

128. *Id.* at 54–55 (statement of Rep. Jim Costa, Member, H. Subcomm. on Livestock, Dairy, and Poultry).

129. *Id.* at 56–57.

farm bill."[130] The meeting resulted in an understanding that the GIPSA rules were in need of closer scrutiny.[131]

On December 9, 2011, after receiving more than 61,000 comments in response to the proposed rules, GIPSA published its final rules in the Federal Register.[132] The final rules, which dramatically cut back on the proposed rules, only governed the general subjects of reasonable notice in the case of bird delivery suspension, contract requirements for additional capital investments, determining what constitutes a reasonable amount of time for remedying a breach of contract, and arbitration.[133] Thus, the final rules, which went into effect February 7, 2012,[134] addressed four of the five congressional directives in the Farm Bill.[135]

3. The GIPSA Riders and the Newest GIPSA Rules

One of the reasons that some of the proposed GIPSA rules were not finalized in 2011, and remained that way, is that they were blocked by so-called "GIPSA riders," which refer to provisions attached to annual agricultural funding bills that prevent finalization of the more controversial GIPSA rules.[136] The first GIPSA rider was imposed shortly before USDA finalized the GIPSA rules via passage of the Consolidated and Further Continuing Appropriations Act—

130. *Id.* at 1 (statement of Hon. David Scott, Chairman, H. Subcomm. on Livestock, Dairy, and Poultry).

131. *See id.* at 54 (discussion between Rep. Jim Costa, Member, H. Subcomm. on Livestock, Dairy, and Poultry and Hon. Edward M. Avalos, Under Secretary, for Marketing and Regulatory Programs, U.S. Dep't of Agric.). Costa stated to Avalos, "Mr. Under Secretary, when you . . . go back to the shop at the USDA this afternoon, and if the Secretary happens to call you or look into your office and say, 'How did it go, the hearing this afternoon,' what would be your response?" Avalos replied, "Congressman, that is an easy answer. I would say, 'Mr. Secretary, it was a tremendous lesson for me. Mr. Secretary, we need to continue and encourage comments and input on the proposed GIPSA rule.'" *Id.*

132. Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Suspension of Delivery of Birds, Additional Capital Investment Criteria, Breach of Contract, and Arbitration, 76 Fed. Reg. 76,874, 76,876 (Dec. 9, 2011) (to be codified at 9 C.F.R. pt. 201).

133. *Id.*

134. *Id.*

135. *See supra* Section III.B.1.

136. *See generally* GREENE, *supra* note 12 (discussing the rulemaking history of GIPSA's proposed rules and how subsequent GIPSA riders prevented enactment of certain aspects of those proposed rules).

the agricultural funding bill for fiscal year 2012.[137] Similar GIPSA riders were imposed for fiscal years 2013,[138] 2014,[139] and 2015.[140] However, there was no GIPSA rider attached to fiscal year 2016's agricultural funding bill, thus leaving the door open for USDA to once again push the GIPSA rules proposed and rejected in 2010.[141]

The USDA began walking through this open door in March 2016 when the USDA Secretary, Thomas Vilsack, announced that the proposed GIPSA rules were being worked on and that USDA intended to move forward with certain elements of that proposal.[142] In October, 2016, new proposed rules were sent to the White House for review, and on December 20, 2016, GIPSA published proposed rules and one interim final rule in the Federal Register.[143]

The interim final rule sets the groundwork for GIPSA's newest rules and states:

> A finding that the challenged conduct or action adversely affects or is likely to adversely affect competition is not necessary in all cases [brought pursuant to sections 192(a) and/or (b) of the Act]. Certain conduct or action can be found to violate sections [192](a) and/or (b) of the Act without a finding of harm or likely harm to competition.[144]

This language is ambiguous in that it does not explicate the types of conduct or action that could violate sections 192(a) and/or (b) of the PSA without a finding of competitive harm, and GIPSA purports to resolve this ambiguity through the proposed rules.

The first part of the proposed rules (section 201.210) is structured as three paragraphs: paragraph (a) states that any conduct or action that the PSA explicitly deems to be "unfair," "unjustly discriminatory," or "deceptive" per se violates section

137. *See* Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552 (2011); GREENE, *supra* note 12, at 32.

138. Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, 127 Stat. 198; GREENE, *supra* note 12, at 32.

139. Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5; GREENE, *supra* note 12, at 33.

140. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2014); GREENE, *supra* note 12, at 34;

141. *GIPSA Rule*, NAT'L PORK PRODUCERS COUNCIL, http://nppc.org/wp-content/uploads/2016/06/GIPSARule-003.pdf (last visited Feb. 25, 2017).

142. *See id.*

143. Grain Inspection, Packers and Stockyards Administration, 81 Fed. Reg. 92,566–94, 92,703–40 (Dec. 20, 2016) (to be codified at 9 C.F.R. pt. 201).

144. *Id.* at 92,594.

192(a) of the Act;[145] paragraph (b) provides a list of nine examples[146] of conduct or action that, absent demonstration of a legitimate business justification, violate section 192(a) of the Act, whether or not there is a showing of competitive harm; and paragraph (c) states that "any conduct or action that harms or is likely to harm competition" violates section 192(a) of the Act.[147] The second part of the proposed rules (section 201.214) would add a tenth example to section 201.210(b) by amendment: failure to "use a poultry grower ranking system in a fair manner after applying" four specific criteria.[148] The final part of the proposed rules (section 201.211) lists criteria that will be considered when determining whether there has been a violation of section 192(b) of the PSA.[149] The last of these criteria is "[w]hether the conduct or action by a packer, swine contractor, or live poultry dealer harms or is likely to harm competition."[150]

145. *Id.* at 92,722.

146. These examples are: (1) retaliatory actions or threats of action "in response to lawful communication, association, or assertion of rights" by a producer or grower; (2) "conduct or action that limits or attempts to limit . . . the legal rights and remedies" of a producer or grower (e.g., the right to seek an award of attorney fees); (3) failure to comply with the requirements of 9 C.F.R. § 201.100 (dealing with records to be furnished to poultry growers and sellers); (4) failure to "provide reasonable notice to a poultry grower before suspending the delivery of birds, after applying" 9 C.F.R. § 201.215; (5) "requiring unreasonable additional capital investments from a poultry grower or swine production contract grower after applying" 9 C.F.R. § 201.216; (6) failure to "provide a reasonable period of time to remedy a breach of contract," after applying 9 C.F.R. § 201.217; (7) failure to "provide a meaningful opportunity to participate" in arbitration, after applying 9 C.F.R. § 201.218; (8) failure to "ensure accurate scales and weighing"; and (9) failure to "ensure the accuracy of . . . electronic evaluation systems and devices . . . ." *Id.* at 92,722–23.

147. *Id.* at 92,723.

148. *Id.* at 92,740. These four specific criteria are: (1) whether sufficient information has been provided to a grower in order to make informed decisions; (2) whether "inputs of comparable quality and quantity" are provided to all growers in a tournament ranking group; (3) whether "growers provided with dissimilar production variables" are included in a tournament ranking group in a manner that affects the grower's compensation; and (4) whether the "dealer has demonstrated a legitimate business justification for use of a [tournament system] that may otherwise be unfair, unjustly discriminatory, or deceptive or [give] an undue or unreasonable preference or advantage . . . ." *Id.*

149. *Id.* at 92,723.

150. *Id.* The other criteria set forth in § 201.211 are: (1) whether one or more producers or growers are treated more favorably than other similarly situated producers or growers "who have engaged in lawful communication, association, or

After a brief extension by the Trump administration, the comment period for the proposed rules closed on March 24, 2017.[151] Under the Administrative Procedure Act, GIPSA must now publish a final rule in order for the proposed rules to become effective.[152] The interim final rule, on the other hand, is scheduled to take effect on April 22, 2017, but its ultimate effectiveness appears to be uncertain at present.[153]

IV. THE LEGAL ARGUMENT: WHY GIPSA'S NEWEST RULES ARE WITHOUT JUSTIFICATION

The preceding narrative sets up what is really at the heart of this article—that GIPSA's newest rules are seriously flawed from at least three angles. Specifically, GIPSA's rules are out of sync with the purpose of the PSA, the meat packing industry in light of the PSA's purpose, and the federal judiciary and legislature.

First, GIPSA's newest rules are contrary to the purpose of the PSA because the PSA is, and was always meant to be, an antitrust statute. As discussed above, the PSA was enacted in response to specific conditions in the meat packing industry 100 years ago.[154] Specifically, a small number of packers controlled the market and utilized a number of anticompetitive and monopolistic practices to reduce prices paid to livestock producers and increase market prices

assertion of their rights"; (2) whether one or more producers or growers are treated more favorably than other similarly situated producers or growers who are alleged, without a reasonable basis, to have violated any applicable law, rule, or regulation; (3) whether one or more producers or growers are treated more favorably than other similarly situated producers or growers "for an arbitrary reason unrelated to the livestock or poultry operation"; (4) whether one or more producers or growers are treated more favorably than other similarly situated producers or growers "on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, sexual orientation, or marital or family status"; and (5) "[w]hether the packer, . . . contractor, or . . . dealer has demonstrated a legitimate business justification for conduct or action that may otherwise constitute an undue or unreasonable preference or advantage." *Id.*

151. Poultry Grower Ranking Systems, 82 Fed. Reg. 9533–34 (Feb. 7, 2017).

152. *See* 5 U.S.C. § 553(c) (2012).

153. GIPSA has stated that it may alter the interim final rule based on comments it received thereon, 81 Fed. Reg. 92,570–71; 82 Fed. Reg. 9489 (Feb. 7, 2017), and many industry groups are currently advocating that the interim final rule be abandoned altogether. *NPPC Asks USDA to Abandon GIPSA Rules*, NAT'L PORK PRODUCERS COUNCIL (Mar. 24, 2017), http://nppc.org/nppc-asks-usda-to-abandon-gipsa-rules/.

154. *See supra* notes 21–25 and accompanying text.

paid by consumers.[155] The PSA was enacted to adapt the existing antitrust principals, as reflected in other statutes, to the unique practices in the livestock farming and meat packing industry.[156]

Second, GIPSA's newest rules are discordant with the meat packing industry in light of the PSA's purpose. The PSA is an antitrust statute; thus, its general purpose is to regulate specific industry sectors in order to prevent monopolization within those sectors, which in turn benefits other industry players and consumers.[157] However, monopolization cannot occur where barriers to entry are absent or negligible. Historically, the sector of the meat industry most susceptible to monopolization is meat packing.[158] This industry requires large capital investments in facilities and equipment, a large source of available labor, and access to significant transportation infrastructure in order to efficiently operate.[159] These needs pose a significant barrier to entry into this industry and thus make the meat packing industry susceptible to monopoly or oligopoly, as demonstrated by the history of such conditions within the industry.

In contrast, monopolization is unlikely to occur at the grower level—the sector of the meat industry that GIPSA's newest rules focus on—because the grower industry lacks significant barriers to entry. In comparison to the meat packing industry, the necessary investment and labor to operate a livestock barn is comparatively small. Thus, it is paradoxical to suggest that the PSA—an antitrust statute—is a proper avenue for regulation with regard to growers.

Third and finally, GIPSA's newest rules are incongruous with both the judicial and legislative branches of the federal government. The jurisprudential landscape surrounding the PSA has unwaveringly required a showing of competitive harm in order to demonstrate a violation of the Act's ban on unfair or deceptive practices imposed by 7 U.S.C. § 192.[160] In conjunction, the legislative history associated with the PSA's ban on unfair or deceptive practices demonstrates Congress's acquiescence and silent approval of section

155. *See supra* notes 26–30 and accompanying text.

156. *See supra* notes 33–38 and accompanying text.

157. 7 U.S.C. § 192 (2012); *see supra* Section II.B; *supra* note 34 and accompanying text.

158. *See supra* notes 28–30 and accompanying text.

159. *See supra* notes 28–30 and accompanying text.

160. *See supra* note 65 and accompanying text.

192's competitive harm requirement.[161] For GIPSA—a facet of the executive branch—to now attempt to exercise its rulemaking authority to circumnavigate these actions for purposes of pursuing its own policy agendas cuts against the fundamental notions embraced by America's longstanding separation-of-powers principles. After all:

> The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election . . . . They are means, and powerful means, by which the excellences of republican government may be retained and its imperfections lessened or avoided.[162]

In sum, GIPSA's newest rules would completely sever the PSA from its antitrust roots and would instead transform the statute into an expansive, unlimited regulation by the federal government of routine commercial practices within the livestock industry. If approved, any breach of a contract in the livestock industry would be subject to potential regulation by the federal government. These issues, however, have historically been (and properly remain) the province of state law. Thus, the newest rules represent an unjustified and improper attempt by GIPSA to dramatically increase the scope of its regulatory power.

V. CONCLUSION

Like a myriad of other industries, the meat packing industry has changed with the times. What was once a disjunctive landscape of scattered growers and omnipotent packers is now a large, interconnected, and sophisticated system. However, one thing that has not changed throughout this paradigmatic shift is the PSA. At its start, the PSA was an antitrust statute, carefully crafted in light of its goal to foster competition. Throughout its life, the PSA has retained this purpose, despite numerous arguments raised to the contrary.

Only time will tell whether GIPSA's newest rules manage to alter the well-established landscape of the PSA. Undoubtedly, that period of time will be riddled with legal arguments, which may mirror those

161. *See supra* note 81 and accompanying text.

162. THE FEDERALIST NO. 9, at 49 (Alexander Hamilton) (E. H. Scott ed., 1898).

asserted by this article or raise entirely new arguments altogether. Above all else, however, one can only hope that the ultimate result serves to foster, rather than impede, the meat industry, which is surely one of the most important sectors in both the United States' economy and society.