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U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20520

Re: Proposed Rule Regarding Fair and Competitive Livestock and Poultry Markets (9 CFR Part 201, Doc. No. AMS–FTPP-21-0046, RIN 0581-AE04)

On behalf of the U.S. Chamber of Commerce, we are pleased to submit these comments to the U.S. Department of Agriculture in response to the Proposed Rule Regarding Fair and Competitive Livestock and Poultry Markets. We urge USDA to abandon this rulemaking initiative, which suffers from a series of fatal flaws: (1) by disregarding precedent, including eight federal circuit court decisions, the proposed rule rests on a flawed legal premise; (2) by ignoring recent data, including the latest Census results, the proposed rule rests on flawed market assumptions; (3) by glossing over litigation and other costs, the proposed rule suffers from an incomplete regulatory impact analysis; and (4) if adopted, the proposed rule would harm competition. Instead of moving forward with the proposed rule, USDA should withdraw the proposal or in the alternative withdraw the proposal and allow time for a proper regulatory analysis, and work to reduce regulatory costs.

I. By Disregarding Precedent, the Proposed Rule Rests on Flawed Legal Premise

The Packers and Stockyards Act (PSA) was enacted to protect competition, consumers, farmers, ranchers, and other players in the livestock, meat, and poultry industries. The proposed rule, however, improperly defines unfair practices to include conduct that harms market participants *without* proof of harm to competition, proof of actual harm, or proof of predatory intent. In so doing, the proposal misinterprets the statute and disregards decisions from at least eight federal circuits. Instead, in an attempt to buttress USDA's own statutory authority, the proposal relies on a flawed analysis from the Federal Trade Commission.

A. The Packers and Stockyards Act requires proof of harm to competition

Congress enacted the PSA to prevent harm to competition. As the Supreme Court explained, "the chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer, who buys." *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922).

Eight federal circuit courts have addressed the issue of whether the PSA requires proof of a harm to competition. Each has said yes. These courts have consistently held that, to prevail under section 202 of the Act, a plaintiff must show the action or behavior is harmful, or likely harmful, to competition. In *Wheeler v. Pilgrim's Pride Corp*. 591 F.3d 355, 361 (5th Cir. 2009) (*en banc*), the court explained as follows:

> Once more a federal court is called to say that the purpose of the Packers and Stockyards Act of 1921 is to protect competition and, therefore, only those practices that will likely affect competition adversely violate the Act. That is this holding.
>
> We conclude that an anti-competitive effect is necessary for an actionable claim under the PSA in light of the Act's history in Congress and its consistent interpretation by the other circuits. ... Given the clear antitrust context in which the PSA was passed, the placement of §192(a) and (b) among other subsections that clearly require anticompetitive intent or effect, and the nearly ninety years of circuit precedent, we find too that a failure to include the likelihood of an anticompetitive effect as a factor actually goes against the meaning of the statute.

Another circuit court catalogued the "tidal wave" of cases that has reached this same conclusion. *Terry v. Tyson Farms, Inc.,* 604 F.3d 272, 277 (6th Cir. 2010). As that court explained,

> The tide has now become a tidal wave, with the recent issuance of the Fifth Circuit Court of Appeals' *en banc* decision in *Wheeler v. Pilgrim's Pride Corp*., 591 F.3d 355 (5th Cir. 2009) (*en banc*), in which that court joined the ranks of all other federal appellate courts that have addressed this precise issue when it held that "the purpose of the Packers and Stockyards Act of 1921 is to protect competition and, therefore, only those practices that will likely affect competition adversely violate the Act." *Wheeler*, 591 F.3d at 357. All told, seven circuits – the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits – have now weighed in on this issue, with unanimous results. *See Wheeler*, 591 F.3d 355; *Been v. O.K. Indus., Inc*., 495 F.3d 1217, 1230 (10th Cir. 2007); *Pickett v. Tyson Fresh Meats, Inc*., 420 F.3d 1272, 1280 (11th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006); *London v. Fieldale Farms Corp*., 410 F.3d 1295, 1303 (11th

Cir. 2005), *cert. denied*, 546 U.S. 1034 (2005); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *Philson v. Goldsboro Milling Co.*, Nos. 96-2542, 96-2631, 164 F.3d 625, 1998 WL 709324, at *4-5 (4th Cir. Oct. 5, 1998) (unpublished table decision); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985); *DeJong Packing Co. v. United States Dep't of Agric.*, 618 F.2d 1329, 1336-37 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980); and *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir. 1976).

In reaching their decisions, these courts analyzed the PSA's statutory language, which incorporated antitrust terms of art, as well as its legislative history, including congressional statements of purpose. Moreover, because Congress's contrary intent is so clear, two courts affirmatively volunteered they would *not* defer to an agency rule that eliminated the element of harm to competition. See *Wheeler,* 591 F3d. at 362; *London*, 410 F3d. at 1304.

Although USDA attempts to distinguish some of this authority via a selective, tortured, and misleading analysis, the bottom line is that USDA cannot use a rulemaking to expand its legal authority in a way that disregards the statutory language and a broad and consistent history of court decisions interpreting the statute.

B. The Federal Trade Commission Act Does not Support USDA's Position

Perhaps recognizing the flaws in its legal analysis, USDA attempts to buttress its position via analogy to the Federal Trade Commission Act and a new FTC policy statement. In particular, USDA notes that it "has found the framework of the FTC Act and the FTC's policy statements useful in understanding the past century of USDA's administrative and Federal caselaw."

Neither the FTC Act nor the FTC's policy statement support USDA's position. To the contrary, the FTC's history further emphasizes that agencies must enforce their statutory authority consistent with the statutory design, congressional intent, and judicial decisions.

In 1914, Congress passed the Federal Trade Commission Act, which created the FTC. Section 5 of the Act authorized the FTC to attack "unfair methods of competition." Congress did not define the term and there has never been a consistent authoritative definition. In the late 1970s and early 1980s, the FTC brought some cases relying on an expansive view of Section 5, but the courts consistently rejected those efforts because the agency failed to define "unfair methods" according to acceptable criteria. As a result, the FTC and courts largely treated Section 5 in concert with the other major antitrust statutes, the Sherman and Clayton Acts – just as the PSA has also been interpreted and enforced consistent with those statutes.

In 2015, the Commission issued a "Statement of Enforcement Principles" consistent with this coherent and stable view of Section 5. Although recognizing that Section 5 could encompass acts that "contravene the spirit of the antitrust laws," the Statement tied enforcement to two pillars of traditional antitrust enforcement, the consumer welfare standard and the rule of reason. In 2021, the Commission withdrew this Statement. The new Commission believed that Congress had intended for Section 5 to cover much more business conduct than that encompassed by the Sherman and Clayton Acts, and in fact that Congress wanted the FTC to have more discretion to define and attack "unfair" competition. In its new statement, the FTC affirmatively declares that Section 5 extends far beyond the other antitrust statutes, with no need to show anticompetitive intent or effects.

Courts are very likely to reject the FTC's new, expansive view of Section 5. As one commissioner explained, the statement "abandons the rule of reason, which provides a structured analysis of both the harms and benefits of challenged conduct." The statement also "repudiates the consumer welfare standard and ignores the Supreme Court's admonition that antitrust 'protects competition, not competitors.'" Similarly, the statement "rejects a vast body of relevant precedent that requires the agency to demonstrate a likelihood of anticompetitive effects, consider business justifications, and assess the potential for procompetitive effects before condemning conduct." Indeed, federal courts recently have rejected the FTC's efforts to expand its own statutory authority to issue broad rules without express authorization from Congress.[1]

The statement also contains numerous internal inconsistencies. For instance, the FTC says that it can be unfair to "impair the opportunities of market participants" or to "reduce competition between rivals," but in reality, vigorous competition necessarily impairs the opportunities available to one's rivals. Likewise, it is unfair to negatively affect "consumers, workers, or other market participants," but in practice, higher labor and other input costs can result in higher prices for consumers. The FTC provides no guidance as to how it will weigh these competing factors.

In short, the FTC's new statement fails to provide a viable framework that could result in credible enforcement. In the 1970s and 1980s, courts rejected the FTC's expansive view of Section 5 for these same reasons. If USDA attempts to follow the FTC's path today, with courts regularly forcing agencies to adhere closely to statutory language, the proposed regulation almost certainly will suffer the same fate in court. At a minimum, by basing its claim to authority on a novel and not-yet-tested theory newly employed by the FTC, USDA seeks to use an equally non-legislative action to expand its statutory power over competition.

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[1] *See* U.S. Chamber Statement Regarding Non-Compete Litigation, at https://www.uschamber.com/lawsuits/u-s-chamber-wins-lawsuit-over-ftc-noncompete-agreements-ban.

II. By Ignoring Recent Data, the Proposed Rule Rests on a Flawed Market Analysis

The proposed rule rests on the assumption that the U.S. economy is becoming increasingly concentrated. But, contrary to the assumptions of Executive Order 14036 and the proposed rule, that trend simply does not exist. In a recent paper, Carl Shapiro, a senior official during the Obama Administration, and Ali Yurukoglu found that the U.S. economy is flush with competition and that the Biden-Harris Administration's overconcentration narrative is a myth:

> To summarize, if one were to measure concentration using "markets" based on NAICS codes, then the levels are so low and the increase so modest that traditional concerns associated with market concentration are unlikely to be significant in most U.S. industries. Alternatively, if one uses narrower markets that include reasonable substitutes, as in Benkard et al (2023), then one would conclude that concentration levels in the U.S. economy are such that antitrust enforcers should remain vigilant, but that decreases in the median and in the highest percentiles of concentration do not support a conclusion that there has been a decline in competition or that antitrust enforcement has been inadequate. Analysis of concentration using data from the EU shows essentially the same patterns as data from the U.S., which suggests that the underlying drivers are not related to the strictness of merger control. In short, the existing empirical evidence regarding market concentration does not provide an empirical basis for major changes in antitrust enforcement. If anything, the evidence on concentration trends suggests that we are seeing competition in action, with successful firms expanding into adjacent markets.

This study confirms other recent papers that also find that no part of the U.S. economy is suffering from an overconcentration problem. In an exhaustive analysis of all available census data from the past two decades, Dr. Robert Kulick finds that since 2002, U.S. economic concentration has remained flat.[2] In fact, since 2007, the economy became *less* concentrated. Another study, also analyzing the most recent data, confirms that "census data show U.S. industries have not become more concentrated."[3]

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[2] Robert Kulick and Andrew Card, *Industrial Concentration in the United States: 2002-2017* (March 2022) ("Kulick study"), at https://www.uschamber.com/finance/antitrust/industrial-concentration-in-the-united-states-2002-2017.
[3] Robert D. Atkinson & Filipe Lage de Sousa, *No, Monopoly Has Not Grown* (June 2021), at https://itif.org/publications/2021/06/07/no-monopoly-has-not-grown). Similarly, a recent working paper by Stanford and Chicago economists finds "that product market concentration has been decreasing since 1994." Benkard et al,

Indeed, the Council of Economic Advisers itself rejected the overconcentration narrative. In 2020, CEA concluded that "the argument that the U.S. economy is suffering from insufficient competition is built on a weak empirical foundation and questionable assumptions."[4] As it explained:

> Research purporting to document a pattern of increasing concentration and increasing markups uses data on segments of the economy that are far too broad to offer any insights about competition, either in specific markets or in the economy at large. Where data do accurately identify issues of concentration or supercompetitive profits, additional analysis is needed to distinguish between alternative explanations, rather than equating these market indicators with harmful market power.

The bottom line: the economy is not becoming more concentrated over time.

Moreover, concentration does not, by itself, suggest a lack of competition. According to the bipartisan Antitrust Modernization Commission, economic research finds procompetitive reasons to explain highly concentrated markets, namely, "that the most efficient firms were winning the competitive struggle and thereby achieving high market shares."[5] In a recent letter, the American Bar Association's Antitrust Law Section agreed that, "Size, in the sense of number of users or market capitalization, is not by itself evidence of market power."[6] Indeed, the Kulick study shows that rising industry concentration often was correlated with higher levels of economic output, more jobs, and higher wages.

Although the proposed rule notes that a handful of firms have large shares in various markets, that fact reveals nothing about output, price, efficiency, innovation, ease of entry, and a host of other economic factors relevant to the inquiry of whether a market suffers from a lack of competition. For example, as a prior USDA RFI regarding the seed industry noted, the supposedly overconcentrated seed industry has introduced "GM seeds [that] have generally been accompanied by higher productivity." Moreover, "R&D spending and new variety introductions by the private seed industry has generally grown in recent decades." Seed prices have actually "declined since 2015, with commodity price swings playing a significant factor." These facts suggested that the seed industry remains highly competitive and innovative.

Concentration in Product Markets, at https://www.nber.org/papers/w28745. See also Rossi-Hansberg et al, Diverging Trends in National and Local Concentration (2020), U. Chicago Press Journals, at https://www.journals.uchicago.edu/doi/abs/10.1086/712317.

[4] CEA, 2020 Economic Report to the President, Chapter 6, at https://www.govinfo.gov/content/pkg/ERP-2020/pdf/ERP-2020-chapter6.pdf. See also Carl Shapiro, *Antitrust in a Time of Populism*, 61 Int'l J. of Indus. Org. 714, at 722 (2018); Testimony of Carl Shapiro, Committee on the Judiciary, U.S. Senate, The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?, Dec. 13, 2017, at 1:11:00.

[5] AMC Report 34, at https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[6] See https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at-comments/2022/comments-aico-act.pdf.

Even when there is a concentrated market, the specific industry and market must be studied and analyzed because concentration can have different impacts in different markets. The beef market, which is one of the markets targeted by this particular rule, is no exception. The data shows that, although four firms make up roughly 80% of the market (a level that has existed since the early nineties), these companies also produce significant cost efficiencies that benefit producers and consumers. In fact, due to fluctuations in the cattle cycle, beef processing companies are currently losing significant amounts of money, while ranchers are commanding record prices for their animals.

Economists who have worked with the USDA and studied these issues in depth agree: "Research shows market power in fed cattle markets has small negative impacts on prices, which are offset by substantially larger cost efficiencies to the benefit of cattle producers and beef consumers." Oklahoma State University Division of Agricultural Sciences and Natural Resources, Fed Cattle Price Discovery Issues and Considerations, at 17 (2020); *see also* Texas A&M University Agricultural and Food Policy Center, The U.S. Beef Supply Chain: Issues and Challenges, at 30 (2021) ("Research shows that small but significant negative price impacts of market power are outweighed by several magnitudes in cost efficiencies that benefit producers and consumers.").

In short, by embracing the overconcentration narrative, the proposed rule rests on faulty economic assumptions.

III. By Glossing Over Litigation and Other Costs, the Proposed Rule Suffers from an Incomplete Regulatory Impact Analysis

USDA's regulatory impact analysis fails to disclose its methodology, account for litigation costs, or even attempt to estimate its chilling impact on procompetitive conduct. For this independent reason, USDA should withdraw its proposal and start from scratch.

To the extent that USDA has conducted any sort of regulatory impact analysis, it largely concedes that it either cannot quantify costs and benefits or that it spins various estimates from whole cloth. USDA did not employ an independent economist or consultant to estimate the costs and benefits with more certainty. It did not survey, or perhaps even ask, anyone in the private sector. It did not look to any comparable foreign regimes. Instead, USDA consulted "AMS [Agricultural Marketing Services] subject matter experts [who] were auditors and supervisors with many years of experience ... conducting investigations and compliance reviews of regulated entities."

This explanation is as transparent as mud. The public has no idea how many "subject matter experts" were consulted, what they were asked, whether their responses were anonymous, or whether these supposed experts had any practical experience working in the private sector, analyzing markets, or estimating the costs that businesses incur on a daily basis. USDA's regulatory impact analysis boils down to "trust us." This is woefully – and legally –insufficient.

For instance, the proposed regulation asserts that "AMS does not expect that regulated packers, live poultry dealers, or swine contracts will need to make costly immediate changes in their current practices … because the proposed rule serves as a framework for agency analysis and enforcement to address problematic practices as they may arise, rather than as a mandate to ameliorate specifically identified practices at present." Did USDA ask anyone in the industry before reaching this conclusion? To the contrary, many of the Chamber's members would have to make "costly immediate changes in their current practices" because the proposed regulation creates novel, vague standards that could invalidate their current contracts and daily business practices. These new costs could sweep across the entire industry and ultimately result in higher food prices for consumers.

For this reason, the proposed regulation vastly underestimates potential legal and litigation costs, the latter of which USDA does not even attempt to estimate. Although USDA blithely asserts that the proposed rule will "mitigate" uncertainty, in reality, the proposed would spread doubt and indecision across the industry. Every exclusive contract, long-term contract, and spot contract, every failed negotiation, and many hiring and investment decisions would become subject to a charge of "unfairness" and become a potential federal lawsuit or investigation, rather than a simple contract dispute that could and should be settled in state court or through arbitration. At every level of the supply chain, market participants could flood the courts with claims that many innocuous, lawful actions violate the proposed regulation. *Cf. Been*, 495 F.3d at 1229 ("Not to require a showing of competitive injury or the likelihood thereof would make a federal case out of every breach of contract. Nothing in the PSA suggests that Congress intended this result."). Courts would have to resolve those cases on a case-by-case basis, a proposition that would enrich lawyers but drastically raise costs for market participants and consumers.

Finally, USDA fails to estimate the proposed rule's indirect costs on economic activity in the industry. Although USDA acknowledges "the possibility that litigation spurred by the proposed rule could deter entry or cause firms to leave the market and hinder innovative practices that make the market more competitive or more efficient," USDA makes no effort to quantity these very real costs. Without question, the proposed rule will discourage market participants from pursuing clearly procompetitive contracts and investments because the proposal creates legal and regulatory uncertainty and carries the threat of costly private litigation and even more costly enforcement actions.[7]

Prior to finalizing this rule or any version of it, USDA should return to the drawing board to conduct a meaningful, complete, and transparent regulatory impact analysis. The Chamber's members estimate that they could conduct a meaningful study, if not a thorough study, in as little as six months; before implementing a sea change to the PSA's longstanding interpretation and enforcement, USDA should take some time to study the issue in a meaningful and quantitative manner.

IV. If Adopted, the Proposed Rule Would Harm Competition

Setting aside these shortcomings, USDA also should withdraw the proposed rule because it would reduce competition. If allowed to stand, this rule would create a costly nightmare for the livestock producer, the meat packer, and ultimately, the consumer.

Most obviously, because of its lack of standards, the proposed rule creates a substantial risk that packers will curtail the use of alternative marketing agreements, agreements that, in the past, USDA has acknowledged "increased the economic efficiency of the livestock markets and yielded economic benefits to consumers, producers and packers" alike. Study after study has demonstrated the benefits of AMAs to producers, consumers, and packers. AMAs have improved quality, reduced transaction costs for producers and packers, and helped producers manage risk. As USDA has explained, these types of contracts "help farmers and livestock producers manage price and production risks, elicit the production of products with specific quality attributes by tying prices to those attributes, and smooth the flows of commodities to processing plants encouraging more efficient use of farm and processing capacities. Agricultural contracts can also lead to improvements in efficiency throughout the supply chain for products by providing farmers with incentives to deliver products consumers desire and produce products in ways that reduce processing costs and, ultimately, retail prices." 81 *Fed. Reg.* at 92573.

With the new rules, however, some unhappy producers who participate in the "spot" or "cash" market could be emboldened to resurrect the failed argument that such agreements constitute an "undue or unreasonable preference" or are otherwise "unfair" in violation of the Act. By eliminating the need to show a harm to competition, the new rules likely would lead to a flood of new litigation. Ultimately, the proposed rule would harm most of those that USDA claims to protect: producers and the American consumer. The rules threaten producers' freedom to contract and would

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[7] The proposed rule also will impose significant new burdens on USDA's staff, something the agency fails to address.

reduce their options to market their livestock. They would increase costs and threaten to reduce quality and the choices available to American consumers.

As another example, the proposed rule also would reduce competition by resurrecting enforcement of concepts enshrined in the Robinson-Patman Act. According to the proposal, PSA "includes within its scope every trade practice which is an 'unfair method of competition' under section 5 of the FTC Act or is otherwise prohibited by the Clayton Act or the Robinson-Patman Act."

Such a concept would raise prices for consumers. As explained in a recent column, "antitrust activists are pushing to bring back old ideas that will exacerbate inflation in healthcare, groceries, consumer products and beyond."[8] These ideas would penalize companies for lowering prices: "The Robinson-Patman Act of 1936 sought to protect small retail businesses from larger, more efficient chain stores. As the Justice Department concluded in 1977, the unfortunate result was that American consumers paid more for groceries and household goods." Indeed, in 2007, the bipartisan Antitrust Modernization Committee recommended repealing the Robinson-Patman Act.

More fundamentally, the Robinson-Patman Act and similar agriculture statutes have the goal of protecting various competitors in the supply chain, rather than consumers or the competitive process itself. As a result, these statutes harm consumers and ultimately the U.S. economy itself:

> Antitrust laws protect competition. Competition benefits society—and consumers—by spurring innovation, improving quality and lowering prices. Companies and industries rise and fall, but the competitive process ensures that American consumers benefit. That is why antitrust focuses on whether a merger or other business conduct harms consumers. Yet some argue for jettisoning "consumer welfare"—the lodestar of U.S. antitrust laws—to promote other interests like protecting less efficient competitors and organized labor and reducing income inequality.[9]

USDA will not help, and should not attempt to help, farmers or others in the supply chain by raising food prices for American families.

V. USDA Should Withdraw the Proposed Rule, Allow Time for a Proper Regulatory Analysis, and Work to Reduce Regulatory Costs

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[8] See https://www.wsj.com/articles/inflation-rises-antitrust-reformers-lower-prices-competition-consumer-benefit-brandeis-biden-11640032926?mod=article_inline.

[9] Id.

Rather than focus on the false concentration narrative, USDA should focus on constructive ways to increase competition.[10] These policies include reducing regulations to expand domestic energy production and reduce barriers to entry, reducing taxes to increase the supply of labor, and reducing tariffs to open new markets for American farmers and companies.[11] At a minimum, USDA must conduct a thorough and transparent regulatory impact analysis.

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For all these reasons, legal, economic, policy, and common sense, USDA cannot issue a rule that would remove the requirement that a plaintiff must show harm or likely harm to competition in order to prove a violation of the Packers and Stockyards Act. Try as it might, the Biden-Harris Administration cannot remove competition from sensible competition policy.

The Chamber appreciates the opportunity to submit these comments and would be happy to discuss these issues further.

Sincerely,

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[10] See https://www.uschamber.com/assets/documents/220118_FoodSupply_CompetitionHearing_HouseJudiciary.pdf.
[11] E.g., https://www.uschamber.com/economy/u-s-chamber-urges-focus-on-energy-food-and-housing-to-combat-historic-inflation#:~:text=New%20findings%20from%20MetLife%20and,up%20from%2074%25%20last%20quarter.