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"Representing the interests of Colorado's beef industry since 1867"

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November 21, 2010

Ms. Tess Butler
Grain Inspection, Packers, and Stockyards Administration
United States Department of Agriculture
1400 Independence Avenue, S.W.
Room 1643-S
Washington, DC 20250-3604

RE: Proposed Farm Bill Regulations, 75 Fed. Reg. 35338-35354

Dear Ms. Butler:

On behalf of the beef cattle ranching families of Colorado, the Colorado Cattlemen's Association (CCA) offers the following comments on the Grain Inspection, Packers, and Stockyards Administration's (GIPSA) proposed rule. The CCA is comprised of membership from all segments and sizes of the beef industry, including individuals who own/feed a few head of cattle to some of the largest cow/calf and cattle feeding entities in the country. CCA's membership embodies individuals, along with affiliated local organizations, which cumulatively represent over six thousand individuals.

Colorado's beef industry, at over \$3 billion, is the state's largest economic sector of the agriculture industry. Furthermore, Colorado's agriculture industry, contributing over \$5.6 billion, is the second largest economic contributor to the state behind tourism. The proposed rule would jeopardize not only Colorado's beef industry, but the state's economic standing; as well as result in a significant loss of jobs.

The CCA believes the proposed rules, as written, would drastically change the way that producers, packers, dealers and contractors raise, buy, and sell beef cattle. In fact, the magnitude of the proposed rule could open legal liability to sellers and halt or severely limit cattle marketing the day the rule goes into effect. This would all be due to redefining how cattle are marketed and subsequent requirements to make proprietary data public.

Congressional Intent

CCA ultimately questions the ability to propose the overreaching rules due to the extremely limited scope of the enacting language contained in the 2008 Farm Bill as granted by Congress. Specifically, Congress rejected an attempt to adopt the very standard that GIPSA now proposes. During consideration of the Farm Bill, Senator Harkin introduced an amendment which would have added “regardless of whether the practice or device causes a competitive injury” to section 202(a) of the Packers and Stockyards Act. Under the Harkin Amendment, that section would have read:

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 regardless of whether the practice or device causes a competitive injury.”

The Harkin Amendment was not enacted.

Rather, court rulings over time have stated that a claim under Sections 202(a) and (b) requires a showing of a likely adverse effect on competition is correct. GIPSA’s attempt to nullify that requirement exceeds the authority given to it by Congress and must be rejected.

Competitive Injury

Claims under Sections 202(a) and (b) require a showing of injury to competition. The Proposed Rule does not incorporate such a requirement; indeed, it expressly rejects it. See Proposed § 201.3(c). Specifically, the rule does not stipulate that all claims under Sections 202(a) and (b) require a showing of “competitive injury” even as that term is newly defined by GIPSA. Thus, under the Proposed Rules, no showing of an adverse effect on competition, however defined, would be required. GIPSA lacks the authority to promulgate such a rule.

The Supreme Court has made it clear that antitrust law protects competition, not competitors. Thus, the “competitive injury” with which the Court is concerned is injury to the overall functioning of markets, not simply disadvantage to particular market participants. The proposed rule on the other hand, seeks to implement a fairness standard that speaks to individuals, not the overall functioning of a competitive marketplace.

Alternative Marketing Agreements

Without a doubt, the proposed rule has been artfully targeted against producer-developed alternative marketing agreements (AMA’s). AMA’s are critically important to all sectors of the beef industry in order to ensure consumer preferred products, consistent supplies and multi-sector profitability.

The targeting of AMA’s, again, speaks to GIPSA’s desire to ensure “fairness” in the marketplace for each individual; as opposed to a marketplace that allows for competition by individuals. Again, a concept that the proposed rule should not have entertained at the direction of Congress.

Proposed Section 201.211(b) would require any such price premiums be offered in a “manner that does not discriminate against a producer or group of producers that can meet the same

standards.” Failure to justify deviations from the proposed rule would be considered discriminatory by GIPSA and may result in actions by GIPSA or individual producers.

In order to ensure continued use, assuming there will be any interest in using AMA’s after the proposed rule is finalized; producers/feeders/packers will undertake a significant documentation and record-keeping burden. Not to mention, run the risk of litigious recourse by producers who feel that they are being unfairly treated. In the end, it is practicable to assume that the use of AMA’s will drastically be reduced in light of other commodity-based approaches to marketings.

To this end, USDA has not adequately analyzed the economic impact that this rule would have on individuals, the industry and society at-large. Not only from targeted removal of AMA’s, but the greater impact of the cumulative rulemaking.

By ending marketing entrepreneurship, through limiting the development of marketing agreements, USDA has turned the beef industry clock back 50 years in its market development progress. Not only does CCA believe this to be a violation of contractual law, but fundamentally will disallow our industry to meet consumer demands in an efficient manner.

Proposed Rule Compliance

The proposed rule sets out many prescribed changes in how cattle will be allowed to be marketed, but offers little detail on how those changes will be implemented. Thus, the only recourse will be for GIPSA to arbitrarily determine infractions; or for the courts to settle the law’s vagueness. Either is unacceptable.

Adding another element of capricious rulemaking by GIPSA is proposed section 201.3(b), which purports to apply to *all* production and marketing agreements. What is the rationale for GIPSA to include beef production contracts in this regulation, since neither feedyards nor cattle producers are subject to the Packers and Stockyards Act? CCA finds this transgression by GIPSA equally unacceptable.

CCA has engaged lending institutions in analyzing the rule to determine if concerns exist around business stability and management. Our concerns were validated and the proposed rule will likely cause greater security requirements previous to offerings of lines of credit, lending allowances and favorable terms for producers. These implications will limit producers’ ability to manage risk, finance expansion; and ultimately secure generational opportunities in family beef production businesses.

Proposed Rule Inconsistencies

First and foremost, the rule does not attempt to qualify or quantify positive or negative impacts to the livestock industries. Congress attempted to right this oversight only to have USDA indicate they had conducted adequate economic analysis. Where are the results of the analysis? What did the results determine? Why didn’t GIPSA utilize the results in the proposed rule to validate the many regulatory changes offered?

Furthermore, the proposed rules do not reference any of GIPSA’s previous economic studies that offer a substantive body of evidence germane to the rule. In actuality, some of GIPSA’s own work offers a contrary position to certain actions offered in the proposed rule:

- USDA formed an interagency working group to recommend the priority research areas and six projects were awarded to economists at leading Land Grant Institutions (Iowa State University, Kansas State University, Oklahoma State University, Texas A&M University, University of Nebraska, and Virginia Polytechnic Institute and State University). A seventh study was conducted by the Economic Research Service of USDA. These projects entailed an extensive data collection effort, including over 200,000 individual procurement transactions.

The study resulted in a series of reports (available online at the GIPSA website: <http://archive.gipsa.usda.gov/pubs/packers/conc-rpt.htm>). Those were:

- Definition of Regional Cattle Procurement Markets – three independent studies
 - Price Determination in Slaughter Cattle Procurement
 - Role of Captive Supplies in Beef Packing – two independent studies
 - Effects of Concentration on Prices Paid for Cattle
 - Vertical Coordination in Hog Production
 - Hog Procurement in the Eastern Corn Belt
 - Assessing Competition in Meatpacking: Economic History, Theory and Evidence.
- While the concentration publications were being finalized, GIPSA conducted an investigation of cattle procurement in the Texas Panhandle. GIPSA collected detailed data on cattle procurement by four large beef packing plants. The data set consisted of over 24,000 transactions. Economists at two leading Land Grant Universities (Iowa State University and University of Nebraska) were commissioned to conduct the economic analysis and write a report of their findings for GIPSA (available online at the GIPSA website: <http://archive.gipsa.usda.gov/psp/issues/txpeer/peerreview.htm>).
 - GIPSA failed to acknowledge the most recent Congressionally-mandated study administered through GIPSA. Congress appropriated \$4 million to GIPSA in 2003 to conduct a broad study of the effects of alternative marketing arrangements (AMAs) on the livestock and meat industries. GIPSA awarded RTI International the contract to conduct research on five topics:
 - Part A. Identify and classify types of spot marketing arrangements and AMAs.
 - Part B. Describe terms, availability, and reasons for use of spot marketing arrangements and AMAs.
 - Part C. Determine extent of use, analyze price differences, and analyze short-run market effects of AMAs.
 - Part D. Measure and compare costs and benefits associated with spot marketing arrangements and AMAs.
 - Part E. Analyze the implications of AMAs for the livestock and meat marketing system.
 - An interim report was released in August 2005 on parts A and B and the final reports were published in January 2007 (available online at the GIPSA website: <http://www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=imp&topic=ir-mms>). A part of the study was the most extensive data collection effort ever on these topics, consisting of over 590,000 transactions, and the most thorough personal interviews and surveys ever undertaken on topics pertaining directly to the proposed rule.

The final report consists of six volumes:

- Volume 1. Executive summary and overview
- Volume 2. Data collection methods and results
- Volume 3. Fed cattle and beef industries
- Volume 4. Hog and pork industries
- Volume 5. Lamb and lamb meat industries
- Volume 6. Meat distribution and sales.

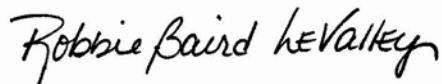
Again, GIPSA failed to acknowledge this most recent, most comprehensive research which is available at its own website and which was conducted for GIPSA. GIPSA is obligated to identify how specific findings support specific sections of the proposed rule.

Packer-to-Packer Sales

The proposed rule bans packer-to-packer sales of livestock. This applies to individual packers and any affiliates or subsidiaries they might own or be a part of. This will have severe unintended consequences, especially to smaller packers and dealers. First of all, if a packer selling to another packer has resulted in competitive injury to the marketplace, then GIPSA should penalize violators and enforce existing regulations of the Packers & Stockyards Act. Secondly, prohibiting packer-to-packer sales would encourage consolidation and displace producer livestock. For example, there is a beef packer located in the Pacific Northwest that also owns a feedlot in southwest Kansas. Under this proposal, that company would be required to ship all of its Kansas feedlot cattle to Washington state for processing. Those cattle would displace the local cattle that typically supply that plant. The proposal would add inefficiencies for the feedlot through added transportation costs, which could result in the sale or liquidation of that feedlot, thereby driving consolidation and less competition.

In closing, the Colorado Cattlemen's Association requests that the proposed rule be remanded back for redrafting based on the intent of Congress through the enacting legislation of the 2008 Farm Bill. Anything short of this will result in irrefutable harm to existing and future marketing relationships, arrangements and structures within the beef cattle industry...much of which will be caused by the arbitrary and capricious nature of the proposed rule. Thank you for your consideration of our comments and we look forward to future dialogue on this topic.

Sincerely



Robbie LeValley
President

Cc: Colorado Congressional Delegation
Bill Ritter, Colorado Governor
John Stulp, Colorado Commissioner of Agriculture