

Fighting for the U.S. Cattle Producer!



R-CALF
USA

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March 22, 2017

M. Irene Omade
GIPSA, USDA
1400 Independence Avenue SW
Room 2542A-S
Washington, DC 20250-3613

Via Internet: www.regulations.gov

Re: R-CALF USA Comments in Docket No. GIPSA-2016-PSP-0009-RULEMAKING-0001, RIN 0580-AB25: Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, Interim Final Rule

Dear M. Irene Omade:

The Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (R-CALF USA) appreciates this opportunity to submit comments to the U.S. Department of Agriculture (USDA) Grain Inspection, Packers and Stockyards Administration (GIPSA) regarding the agency's interim final rule: *Scope of Sections 202(a) and (b) of the Packers and Stockyards Act* (Interim Final Rule), published at 81 Fed. Reg., 92,566 - 92,594 (December 20, 2016).

R-CALF USA is a non-profit association that represents thousands of independent U.S. cattle farmers and ranchers and sheep producers in approximately 43 states. It is the largest producer-only trade association representing the U.S. cattle industry. R-CALF USA works to sustain the profitability and viability of the U.S. cattle and sheep industries, which are vital components of U.S. agriculture. R-CALF USA's membership consists primarily of independent cow-calf operators, cattle backgrounders and feedlot owners. Various main street businesses are associate members of R-CALF USA.

The U.S. Cattle Market Cannot Functioning Properly Without a Sound Legal Framework that Establishes and Defines the Rules of Competition

Congress established the legal framework within which competition would flourish in livestock and poultry markets through its passage of the Packers and Stockyards Act of 1921. Instructively, Congress passed the livestock- and poultry-specific P&S Act just seven years after augmenting the Sherman Act of 1890 with the Federal Trade Commission Act of 1914 and Clayton Act of 1914. In other words, Congress recognized that domestic livestock markets were

uniquely susceptible to both antitrust behavior and unfair practices that could not be adequately addressed by the nation's recently enacted antitrust statutes designed to protect and preserve competition in non-livestock and non-poultry sectors of the economy.

Why rules to implement the P&S Act were not even proposed until recently may be explained by the far-reaching consent decree that the major packers voluntarily entered in 1920 to settle an antitrust lawsuit brought against them by the U.S. Department of Justice following a Federal Trade Commission investigation.¹ At that time there were five major beef packers that together controlled about 65 percent of the cattle market.² The Consent Decree did not address all of the concerns involving the packers' conduct in the marketplace, hence the subsequent passage of the P&S Act just one year later. The consent decree did, however, result in the packers' divestiture of their ownership and control of the livestock industries marketing channels, including public stockyards, stockyard railroads and other vertically integrated holdings in other sectors of the food industry.³ Market concentration declined after the consent decree and P&S Act and the industry did not begin to re-concentrate until the later in the 70s and by 1980 the largest four beef packers controlled about 36 percent of the market.⁴

The packers' vertically integrated practice of feeding and controlling livestock prior to slaughter (which cattle are known as captive supply cattle) was not at all common during the pendency of the consent decree. Thus, the Consent Decree of 1920, which remained in effect for more than six decades, until terminated by a joint motion by the Department of Justice and Swift Independent Packing Company in 1981⁵, arguably restored and protected both the livestock industry's competitive processes as well as its competitors (the nation's hundreds of thousands of disaggregated livestock producers) without the need to more fully invoke the P&S Act.

But the industry began changing radically in the 80s, a decade referred to by economists as "merger mania," resulting in an increase in the concentration level of the four largest packers from 36 percent in 1980 to 72 percent by 1990.⁶ After the termination of the consent decree, market concentration continued to increase (the four largest packers now control 85 percent of the fed cattle market⁷) and the packers began feeding and controlling cattle in earnest, representing an effective reacquisition of the industry's livestock marketing channels.⁸

¹ *United States v. Swift & Co.*, Equity No. 37623 (Sup. Ct. of D.C. 1920). See Meat Packer Legislation: Hearing Before the House Comm. on Agriculture, 66th Cong. 720 (1920).

² See U.S. Beef Industry: Cattle Cycles, Price Spreads, and Packer Concentration, Kenneth H. Mathews, Jr., et al., Economic Research Service, U.S. Department of Agriculture. Technical Bulletin No. 1874, April, 1999, at 9 (estimating the Big 5 controlled "perhaps 50 to 75 percent, depending on market definition.").

³ See Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships, Michael C. Stumo & Douglas J. O'Brien, The National Agricultural Law Center, 2003, at 93; see also *supra*, fn. 2.

⁴ See *supra*, fn. 2, at 9.

⁵ Under Siege: The U.S. Live Cattle Industry, Bill Bullard, South Dakota Law Review, Vol. 58, Issue 3, 2013, at 562, available at <http://r-calfusa.com/wp-content/uploads/2013/04/130101UnderSiegeSDIAWrEVIEWBillBullard.pdf>.

⁶ See *id.*, at 563.

⁷ See 81 Fed. Reg., at 92,575, col. 3.

⁸ See *supra*, fn. 5, at 572-583 (explaining the process of vertical integration in the cattle industry).

Thus, the increased competition and fair play facilitated by the consent decree evaporated in the early 80s and since that time competition has been substantially reduced and unfair cattle procurement practices have proliferated within the U.S. cattle market.

This erosion of competition and the increase in unfair practices is manifested by the cattle industry's alarming decline in the number of cattle producers,⁹ number of cattle feeders,¹⁰ size of the U.S. cattle herd,¹¹ volume of U.S. beef production,¹² and the industry's dysfunctional marketplace.¹³

The termination of the consent decree has significantly elevated the importance of the P&S Act, which is now the sole available tool with which to preserve competition and protect competitors and participants against unfair practices in U.S. livestock and poultry markets. Consequently, the legal framework (or rules of competition) established and defined in the P&S Act must now be brought to life and put into service through the two proposed rules and the interim final rule that comprise this current rulemaking. Failure to properly finalize the proposed rules and implement the interim final rule will effectively nullify the protections Congress envisioned 96 years ago. If the rules of competition are not properly implemented, competition will continue to erode, the U.S. cattle industry will continue its decline, and the concentrated packers will soon capture control of the live cattle supply chain just as they have already captured control of the poultry and hog supply chains.

Comments Regarding New Section 201.3 *Applicability of Regulations in this Part*

For all the reasons GIPSA included in the preamble to its Interim Final Rule, R-CALF USA agrees completely with the language in new § 201.3 that clarifies that certain conduct or action can be found to violate sections 202(a) and/or (b) of the P&S Act without a finding of harm or likely harm to competition.

If the Interim Final Rule is not timely finalized as written, confusion will continue to cloud the cattle and sheep industries because the P&S Act's legal framework intended to protect both the competitive process (*i.e.*, competition), as well as the hundreds of thousands of disaggregated cattle and sheep producers whose livestock are ultimately purchased by just a handful of packers (*i.e.*, the competitors and/or participants), will remain a disassembled mess. The P&S Act's clear language found at sections 202(a) through (g) protects competition with conventional antitrust protections (sections 202(c) through (g)) and competitors/participants with strict prohibitions against unfair business practices (sections 202(a) and (b)). However, the packer lobby – the dominant packers and their allied producer groups (which the packers effectively infiltrated by seating their own ambassadors on those groups' governing boards), have effectively nullified sections 202(a) and (b) protections for disaggregated competitors/participants. They did this by convincing susceptible courts to condone unfair

⁹ See, e.g., attached chart, "Loss of U.S. livestock Operations," *infra*, at 5.

¹⁰ See, e.g., attached chart, "Decline in Number of U.S. Feedlots," *infra*, at 6.

¹¹ See, e.g., attached chart, "Disruption of U.S. Cattle Cycle," *infra*, at 6.

¹² See, e.g., attached chart, "Origins of the United States' Beef Supply," *infra*, at 7.

¹³ See, e.g., attached chart, "Returns to U.S. Cattle Feeders," *infra*, at 7.

business practices directed at individual farmers and ranchers and convincing Congress to impede GIPSA's effort to properly implement those important protections.

The packer lobby disingenuously argues that the P&S Act was not intended to move beyond the traditional antitrust standard that require a showing of competitive harm before a statutory violation can be found. However, the packer lobby previously acknowledged that the protections contained in the P&S Act go beyond traditional antitrust laws. The American Meat Institute (now the North American Meat Institute) stated in 2002 that the P&S Act "is an additional layer of fair business practice mandates on meat packers, above and beyond the Sherman Act and the Clayton Act."¹⁴ This official statement is consistent with the Interim Final Rule that properly distinguishes the "fair business practice mandates" contained in sections 202(a) and (b) of the P&S Act as different and distinct from traditional antitrust statutes that protect livestock market competition against antitrust violations but do not protect livestock sellers against unfair business practices.

The packer lobby, through its member the National Cattlemen's Beef Association (NCBA), also claims that if the standard requiring a finding of harm or likely harm to competition is not necessary in all cases involving violations of sections 202(a) and (b) of the P&S Act, then 'the packers will offer one price for all cattle, regardless of quality,¹⁵ presumably under the pretext of avoiding possible litigation. This is downright scary. If the NCBA, which is the nation's largest beef-packing and cattle-producing trade association, is correct and the nation's few remaining packers now possess and wield sufficient monopsony power (buying power) in the live cattle market to defy the competitive market forces that allocate higher values to higher-quality products (in this case cattle) and lower values to lesser-quality products then, "Houston, we have a problem." In fact, if the NCBA is right and the Big 4 packers that now control about 85 percent of the fed cattle market¹⁶ can manipulate the market in their favor by procuring all their cattle for one price, then there is no stronger endorsement for the immediate implementation of the Interim Final Rule and the attendant proposed rules so GIPSA, the Department of Justice, and independent U.S. cattle and sheep producers will have the necessary tools under the P&S Act to stop the Big 4 from exercising their extraordinary market power to the detriment of the entire industry.

Conclusion

For the foregoing reasons, R-CALF USA urges GIPSA to finalize the Interim Final Rule as quickly as possible. We appreciate the agency's willingness to defend and preserve for

¹⁴ Statement of the American Meat Institute on Ag Economists' Debate Over Packer Ownership Ban, The Market Works, March 12, 2002, available at <http://www.themarketworks.org/news/statement-american-meat-institute-ag-economists-debate-over-packer-ownership-ban>.

¹⁵ NCBA President Testifies on Cattlemen's Priorities for Farm Bill, USAgNet, March 22, 2017, available at <http://www.usagnet.com/story-national.php?Id=594&yr=2017>; *see also* Market Crisis, Fair Practices Rule a Miscue for Beef, The Progressive Farmer, March 16, 2017, available at <https://www.dtnpf.com/agriculture/web/ag/news/article/2017/03/16/fair-practices-rule-miscue-beef>.

¹⁶ *See* 81 Fed. Reg., at 92,575, col. 3.

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independent U.S. cattle and sheep producers the important protections that Congress enacted for them in the P&S Act.

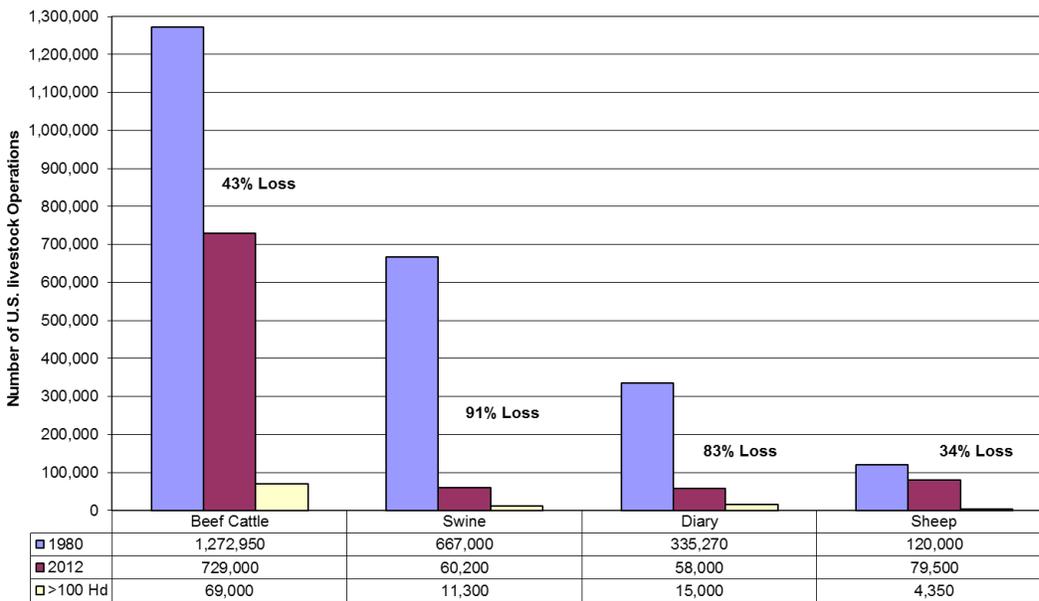
Sincerely,



Bill Bullard

Attachments: 5 Charts

Loss of U.S. Livestock Operations 1980-2012

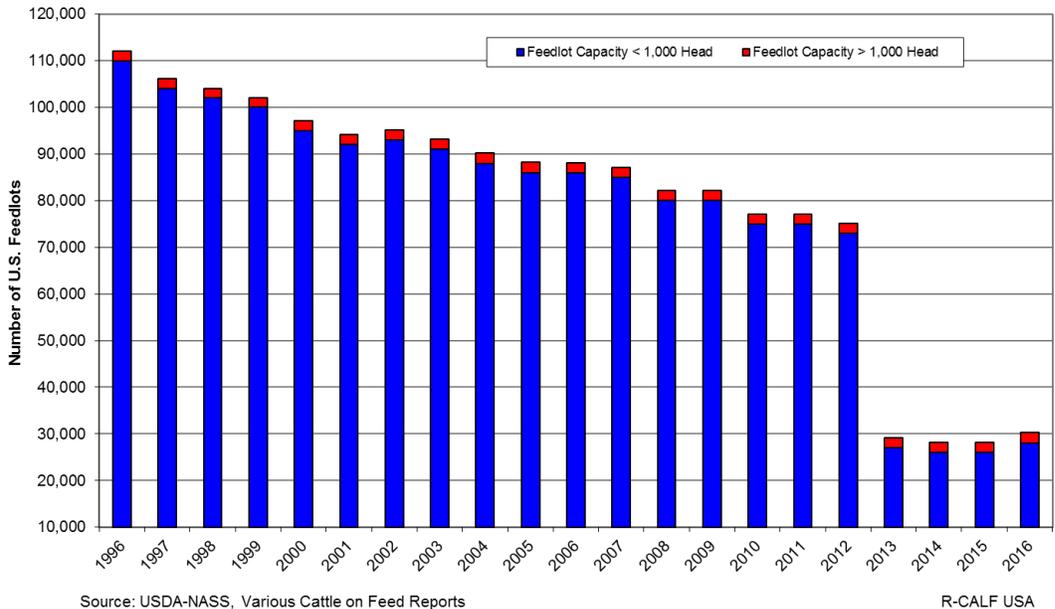


Source: USDA-NASS

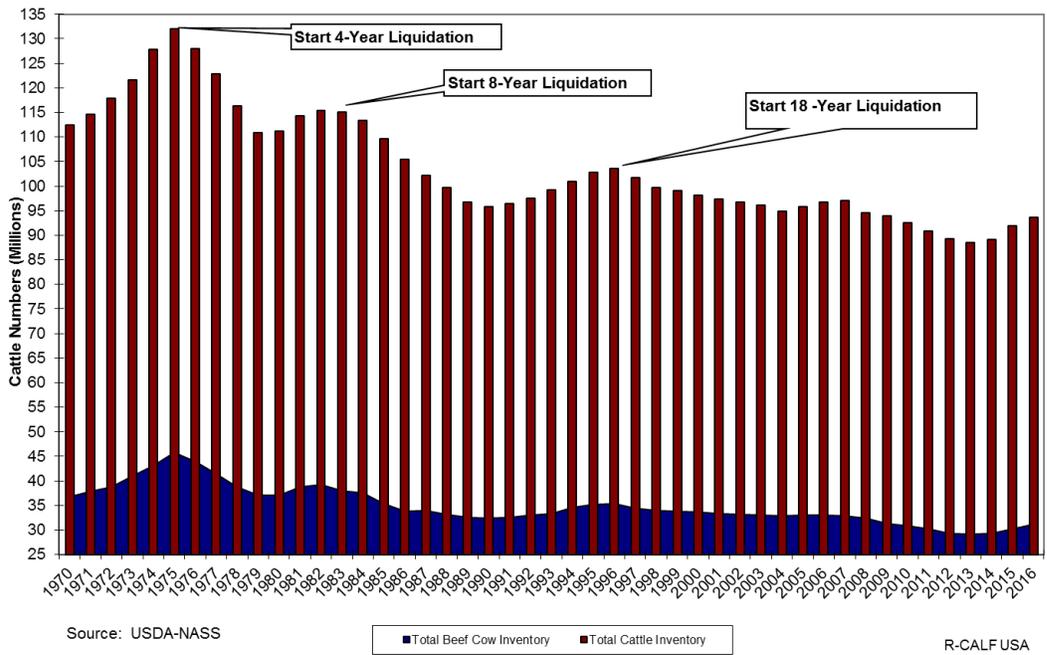
Type of Livestock Operations

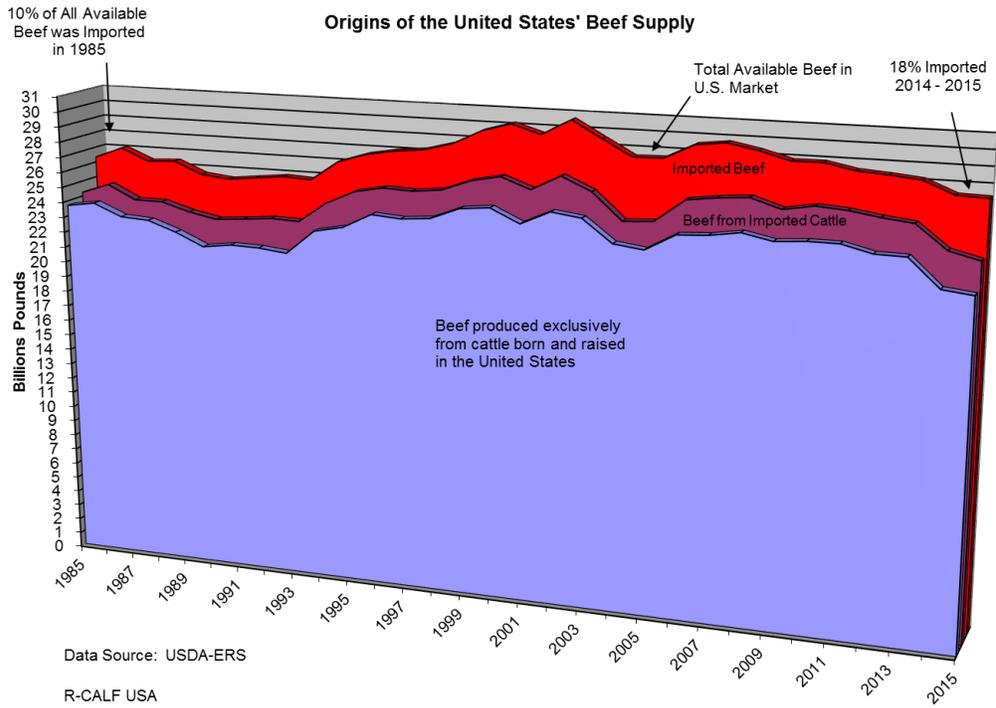
R-CALF USA

**Decline in Numbers of U.S. Feedlots
1996-2016
(loss of 81,887 feedlots in past 21 years)**



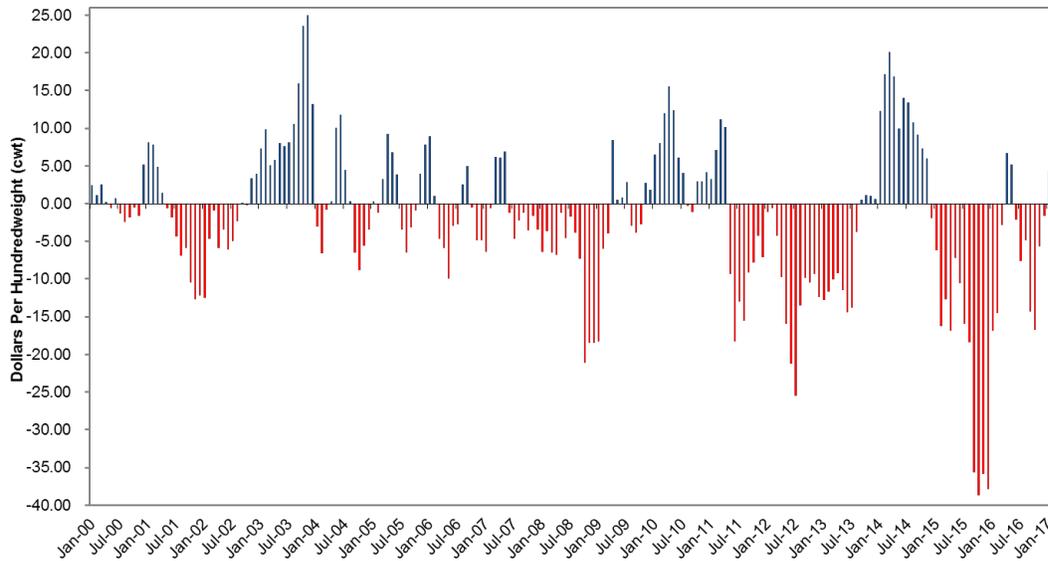
Disruption of U.S. Cattle Cycle





Returns to U.S. Cattle Feeders (Jan. 2000 - Feb. 2017)

Prolonged and Persistent Losses to Cattle Feeders (Ave. loss of \$27.17 per head per month)



Source: USDA-ERS High Plains Cattle Feeding Simulator

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