Fighting for the U.S. Cattle Producer!
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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-FGIS-0008-RULEMAKING-0001, RIN 0580–AB27: Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act

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 proposed rule: *Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act* (Proposed Rule), published at 81 Fed. Reg., 92,703-92,723 (December 20, 2016).

R-CALF USA is a non-profit association that represents thousands of independent U.S. cattle farmers and ranchers 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 industry, a vital component 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.

R-CALF USA is generally supportive of the Proposed Rule but believes substantive amendments must be made to prevent the inadvertent nullification of the Packers and Stockyards Act of 1921 (P&S Act), which will occur if the agency adds a blanket defense never contemplated by Congress. As discussed in more detail below, the defense of a legitimate business justification is not mentioned in form or meaning anywhere in the P&S Act and it is, therefore, inappropriate for the agency to effectively amend the P&S Act by inserting such a defense in its implementing regulations, particularly since doing so undermines the very purpose of the P&S Act.

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 industry's 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 later in the 70s. 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 1981,[5] arguably restored and protected both the livestock industry's competitive processes as well as its competitors/participants (the nation's hundreds of thousands of disaggregated livestock producers) without the need to more fully invoke the P&S Act.

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[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/2013/04/130101UnderSiegeSDlAWrEVIEWBillBullard.pdf.

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 market[7]) and the packers began feeding and controlling cattle in earnest, representing an effective reacquisition of the industry's livestock marketing channels.[8]

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.

Specific Comments Regarding Proposed New Sections 201.210(a) through (c)

A. § 201.210(a) *Per se violation of section 202(a)*: R-CALF USA agrees with the language contained in the Proposed Rule regarding *per se* violations.

B. § 201.210(b) *Violation of section 202(a) regardless of harm to competition*: R-CALF USA strongly objects to GIPSA's effort to amend the P&S Act through agency regulations by granting an affirmative defense (the defense of a legitimate business justification) to packers that violate the unfair practices section (section 202(a)) of the

[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).
[9] *See, e.g.,* attached chart, "Loss of U.S. livestock Operations," *infra*, at 9.
[10] *See, e.g*., attached chart, "Decline in Number of U.S. Feedlots," *infra*, at 9.
[11] *See, e.g.,* attached chart, "Disruption of U.S. Cattle Cycle," *infra*, at 10.
[12] *See, e.g.,* attached chart, "Origins of the United States' Beef Supply," *infra*, at 10.
[13] *See, e.g.,* attached chart, "Returns to U.S. Cattle Feeders," *infra*, at 11.

P&S Act. If Congress had intended to allow packers to engage in unfair and deceptive practices under certain circumstances, it would have stated so. In fact, Congress did so state with respect to the prohibition against discrimination that certain acts of discrimination would be allowed. Congress did this by limiting its prohibition regarding discrimination to only discrimination that is also "unjust[]." Thus, for the agency or a court to determine if an alleged act of discrimination is "unjust[]," the trier must first determine if the facts establish a *prima facia* case of discrimination; and then the trier is obligated to apply a second test – a test of whether the discrimination rose to the level of being an "unjust[]" act of discrimination. By contrast, Congress did not establish such a two-test standard when it prohibited acts or practices that were "deceptive" or "unfair."

In addition, Congress purposefully applied the adjective "any" to describe the full scope of "unfair," "unjustly discriminatory," or "deceptive" practices or devices that are prohibited under the P&S Act. (*See* section 202(a)). Should GIPSA attempt to limit practices or devices that are "unfair," "unjustly discriminatory," or "deceptive" only to those that the agency or a court determines are not associated with a legitimate business justification, then Congress' explicit directive will be subverted.

Indeed, it is unconscionable that the GIPSA would allow itself or a court to entertain a legitimate business justification defense if the facts of a controversy or complaint established that a packer had, for example, retaliated against a producer in response to the producer's lawful communication (§ 201.210(b)(1)); limited a producer's rights or remedies afforded by law (§ 201.210(b)(2)); failed to provide required records, disclosures and notices to poultry producers (§§ 201.210(b)(3-4)); or, failed to ensure accurate scales and weighing of livestock (§ 201.210(b)(8)) and the accuracy of livestock evaluation systems (§ 201.210(b)(9)).

It is R-CALF USA's position and belief that the conduct, practices and actions enumerated in §§ 201.210(b)(1-9) constitute clear violations of section 202(a) of the P&S Act and if the facts of a specific controversy or complaint establish that a packer was engaged in such unlawful actions, then the affected producer should be made whole and the packer should be subject to remedial sanctions. Only with respect to allegations of unjustly discriminatory actions would the trier of fact have discretion to further evaluate the *prima facia* finding of discrimination by subjecting that finding to a subtest to determine if the discrimination was just or unjust. Congress accorded GIPSA no comparable authority to impose such a subtest on findings of "unfair" or "deceptive" as the Proposed Rule attempts to do by inserting a legitimate business justification as an affirmative defense for engaging in conduct, actions and practices that violate the P&S Act.

C. § 201.210(c) *Conduct or action that harms competition*: For all the reasons stated above, R-CALF USA believes it is entirely inappropriate for GIPSA to insert an affirmative "legitimate business justification" defense anywhere in the rules promulgated to implement section 202(a) of the P&S Act. In addition to the above-stated reasons for rejecting such a defense, the requirement that a trier must not find a legitimate business

justification when ruling that certain conduct or actions that harms or is likely to harm competition violates the P&S Act runs afoul of the language in the P&S Act intended to prevent harms or likelihood of harm to competition. Whereas sections 202(a) and (b) of the P&S Act specifically address fair practices, sections 202 (c) through (f) specifically address harms or likelihood of harms to competition, *i.e*., apportioning supply, restraining commerce, creating monopolies, or controlling prices. The Proposed Rule appropriately proposes to designate conduct or action that expressly violate sections (c) through (f) as also being a violation of section 202(a).

However, and importantly, sections 202(c) through (f) do not require a showing of intent when identifying a violation. Indeed, the P&S Act expressly states, *e.g*., that "[e]ngag[ing] in any course of business . . . **with the effect** of manipulating or controlling prices, or of creating a monopoly" is a violation of the P&S Act (emphasis added). (Section 202(e)). These prohibited "effect[s]" are recognized standards for determining harms or likelihood of harm to competition.

By applying the proposed legitimate business justification defense to sections 202(c) through (f) as a precondition for determining whether a violation of those subsections constitute a violation of section 202(a), GIPSA is improperly amending the P&S Act by inserting a requirement to show intent (or, in this case, a lack of intent) before a violation can be found. The Proposed Rule does this by affording packers the opportunity to demonstrate that its *prima facia* violation of sections 202(a) through (f) occurred incidental to its effort to achieve a legitimate business objective.

For the foregoing reasons, the agency's inclusion of a legitimate business justification defense in the section of the Proposed Rule that implements section 202(a) of the P&S Act would materially amend and subvert the P&S Act. R-CALF USA urges the GIPSA to delete any references to any legitimate business justification in the section of its Proposed Rule that implements section 202(a) of the P&S Act.

As a final note, the inclusion of a legitimate business justification is completely inappropriate because the terms "unfair," "unjustly discriminatory," and "deceptive" on the one hand; and the phrase "legitimate business justification" on the other are mutually exclusive. It would be a shock to the English language, for example, to interpret an "unfair" act as ever being "legitimate," or that an "unjust[]" act can be "justif[ied]," or that a deceptive act could ever be either "legitimate" or "justif[ied]. The addition of such a defense is nonsensical.

Additional Recommendations for Improving Proposed New Section 201.210

A. In addition to the prohibited practices or devices enumerated above, R-CALF USA is aware of numerous other ongoing practices by the highly concentrated packers (whose unprecedented market shares accord them the power to act as market gatekeepers and kingmakers) that should be declared unfair, unjustly discriminatory, or deceptive because they effectively harm single livestock sellers or small groups of livestock sellers who

have no recourse other than the P&S Act to either prevent such harm in the first instance or to be made whole after experiencing harm. Such additional practices and devices that should be prohibited include:

1. Refusing to buy cattle on a live-weight basis and then refusing to allow the cattle seller to observe the packers' carcass evaluation process during which the packer may apply steep discounts based on unverifiable and questionable factors.
2. Refusing to take timely delivery of finished cattle and, instead, requiring cattle feeders to overfeed cattle to increase production tonnage but with the effect of transferring the risk of overfeeding to the cattle feeder.
3. Discounting prices paid to livestock sellers for their cattle but selling the resulting beef from those cattle for full value.
4. Refusing to offer cash prices to cattle sellers and, instead, requiring the sellers to market their cattle through contractual arrangements.
5. Demanding that cattle sellers adopt specific production practices that are wholly unrelated to beef quality as a condition to granting market access. An example of this would be a requirement for third-party verification that the cattle never drank directly from a stream, river or other waterway.
6. Refusing to allow U.S. cattle sellers to unload cattle at a packing plant even when first-in-line until after all foreign cattle are first unloaded, which causes the domestic cattle sellers to experience excessive shrink.
7. Refusing to provide cattle sellers with grade and yield data when the packer collects that data for all cattle slaughtered and shares that data with other cattle sellers.

Specific Comments Regarding Proposed Section 201.211(a) through (f)

The copy of the P&S Act available on the GIPSA website at https://www.gipsa.usda.gov/laws/law/PS_act.pdf states on page 3, footnote 3 that section 202(b) (7 U.S.C. 192 (b)) was "temporarily" amended on Oct. 22, 1999 and the temporary amendment was set to terminate on September 30, 2010. Per the footnote, the 1999 amendment "struck out 'whatsoever' after 'locality in any respect' and after 'disadvantage in any respect' in subsection (b)." This notational disclosure makes clear that the "permanent" P&S Act passed by Congress prior to the "temporary" amendment – hence the underlying P&S Act – unequivocally prohibits "any" undue or unreasonable preference or advantage and "any" undue or unreasonable prejudice or disadvantage *without regard to the intent of the perpetrator of such prohibited acts.*

In fact, the plain language of this prohibition, even without reinserting the temporarily ousted "whatsoever[s]" makes clear that this provision protects any single person or small group of persons who are affected by unreasonable preferences or advantages. The statutory language does this regardless of whether the actions or conduct harms competition or is likely to harm competition. It also provides protection regardless of the intent of the perpetrator – *i.e.*, regardless of whether the perpetrator claims to have a legitimate business justification for engaging in such prohibited actions or conduct.

A. §§ 201.211(a-d) (f): R-CALF USA agrees with the language in the Proposed Rule regarding new sections 201.211(a-d) and (f).

B. § 201.211(e): R-CALF USA strongly believes it is inappropriate and inconsistent with the statutory language to offer packers that engage in the granting of "any" undue or unreasonable preferences or advantages or "any" undue or unreasonable prejudice or disadvantage the affirmative defense of a legitimate business justification for engaging in such unlawful acts. First, the statute already requires a two-part test: after a *prima facia* finding that a packer has made or given a preference or advantage to a person or has subjected a person to prejudice or disadvantage, the trier must then move onto the second test to determine if such a *prima facia* finding was "undue" or "unreasonable." Second, if GIPSA offers a defense of a legitimate business justification, doing so would inappropriately substitute Congress' chosen adjectives "undue" and "unreasonable" with GIPSA's new phrase. "a legitimate business justification." Third, if GIPSA does this it materially shifts the packers' burden of proof from establishing that their conduct was not undue or unreasonable to simply establishing that they had a legitimate business justification. Fourth, the effect of this inclusion is that *every* investigation into preferences or advantages will ultimately be focused on whether there exists a legitimate business justification; and if the trier believes there is, then that determination will trump any allegations that the unlawful conduct was undue or unreasonable, with those terms relegated as superfluous. Thus, including a legitimate business justification as an affirmative defense to unlawful preferences or advantage effectively subverts the language of the statute with a high likelihood that "undue" or "unreasonable" preferences or advantages would not only never be found when faced with claims of a legitimate business justifications, but also, would never even be weighed or measured because whatever severity that may be attached to those terms would be irrelevant in the face of any legitimate business justification.

Here are some hypothetical examples where the purpose of section 202(b) of the P&S Act, which is to ensure that all livestock sellers have reasonable and comparable access to the highly concentrated marketplace, would be upended by the inclusion of a legitimate business justification as an affirmative defense to otherwise unlawful conduct or actions:

1. Granting Cattle Feeder A a cost-plus contract in which the packer agrees to pay all costs plus a reasonable profit regardless of market prices to achieve the packer's seemingly legitimate business objective of obtaining a dependable and orderly supply of cattle. Cattle Feeder B, however, also sells cattle to the packer but is not afforded such an advantage (*i.e.*, insulation from the vagaries of the competitive market) because the packer does not need all the cattle produced in both feedlots. In a volatile market, Cattle Feeder B could be forced out of business while Cattle Feeder A prospers.

2. Granting Cattle Feeder A a stop-loss contract that guarantees the feeder will never lose more than a pre-established dollar amount in the event of depressed market

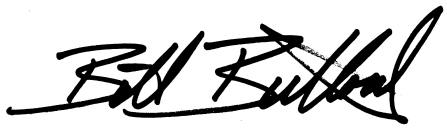
prices to achieve the packer's seemingly legitimate business objective of preferring Cattle Feeder A's genetics. Cattle Feeder B who sells comparable quality cattle with different genetics, however, is not afforded such an advantage (*i.e.*, insurance against depressed prices) because Cattle Feeder B's genetics are not included in the packer's business model. In the event of a market downturn, Cattle Feeder B could be forced out of business while Cattle Feeder A easily rides out the storm.

3. Granting Cattle Feeder A other forms of market-insulating procurement options such as an across-the-board flat fee per head in addition to market price, ledger contracts that function like a line of credit when prices are low, or agreements to pay higher than market price even for lower quality cattle in return for delivery commitments, to achieve seemingly legitimate business objectives similar to those discussed in Items 1-2 above. In each of the above scenarios Cattle Feeder B assumes all inherent market risks while Cattle Feeder A is insulated from the full impact of those risks. This materially disadvantages Cattle Feeder B vis-à-vis Cattle Feeder A. Yet, under the Proposed Rule the packer may be able to continue offering such sweetheart deals to preferred cattle feeders and not to others under the pretext of having legitimate business justifications for doing so, while the actual effect and purpose is to ensure that the packers' preferred feedlots prosper and expand while all others eventually perish.

Conclusion

For the reasons set forth above R-CALF USA strongly opposes the agency's inclusion of a legitimate business justification as an affirmative defense to the unlawful practices enumerated in sections 202(a-b). If such a defense is included in the final rule, the P&S Act would be turned on its head and independent U.S. livestock producers would be permanently deprived of the protection Congress intended them to have. In addition, R-CALF USA urges the agency to include in its final rule the additional examples of unlawful practices listed above or, at the very least, ensure that those additional practices are covered under § 201.210 or § 201.211 of the final rule even if they are not expressly stated in the subsections.

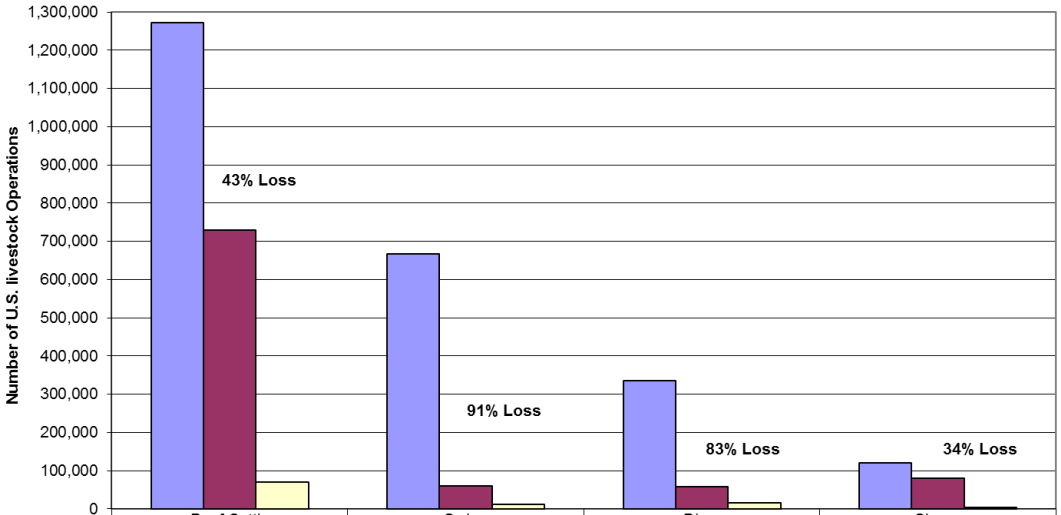
Sincerely,



Bill Bullard

Attachments: Charts 1-5

Loss of U.S. Livestock Operations 1980-2012



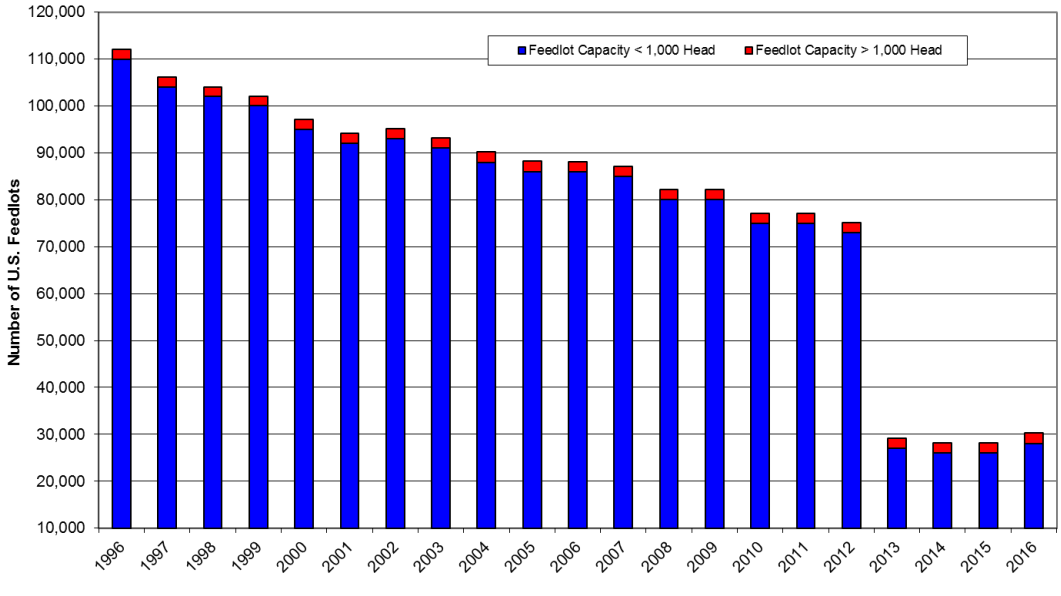
	Beef Cattle	Swine	Diary	Sheep
1980	1,272,950	667,000	335,270	120,000
2012	729,000	60,200	58,000	79,500
>100 Hd	69,000	11,300	15,000	4,350

Type of Livestock Operations

Source: USDA-NASS

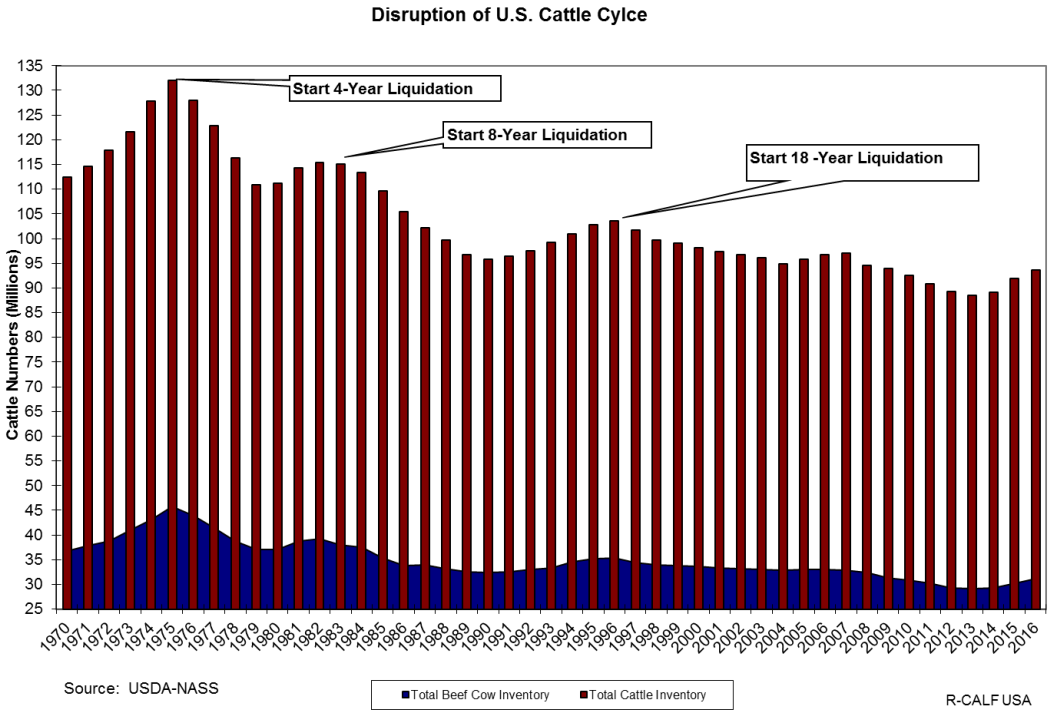
R-CALF USA

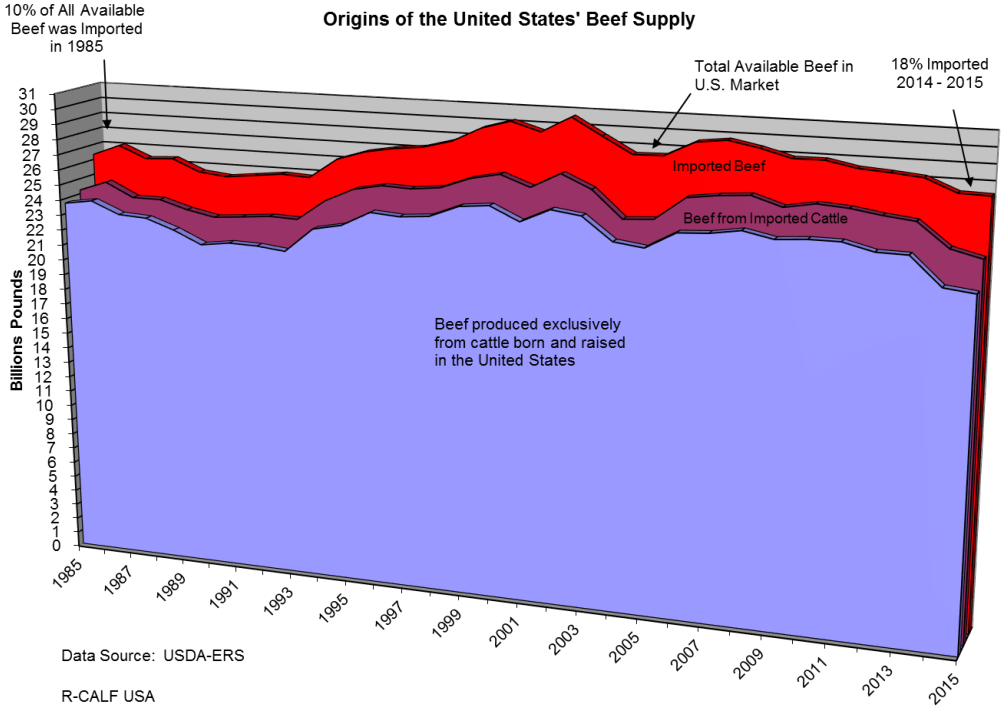
Decline in Numbers of U.S. Feedlots
1996-2016
(loss of 81,887 feedlots in past 21 years)

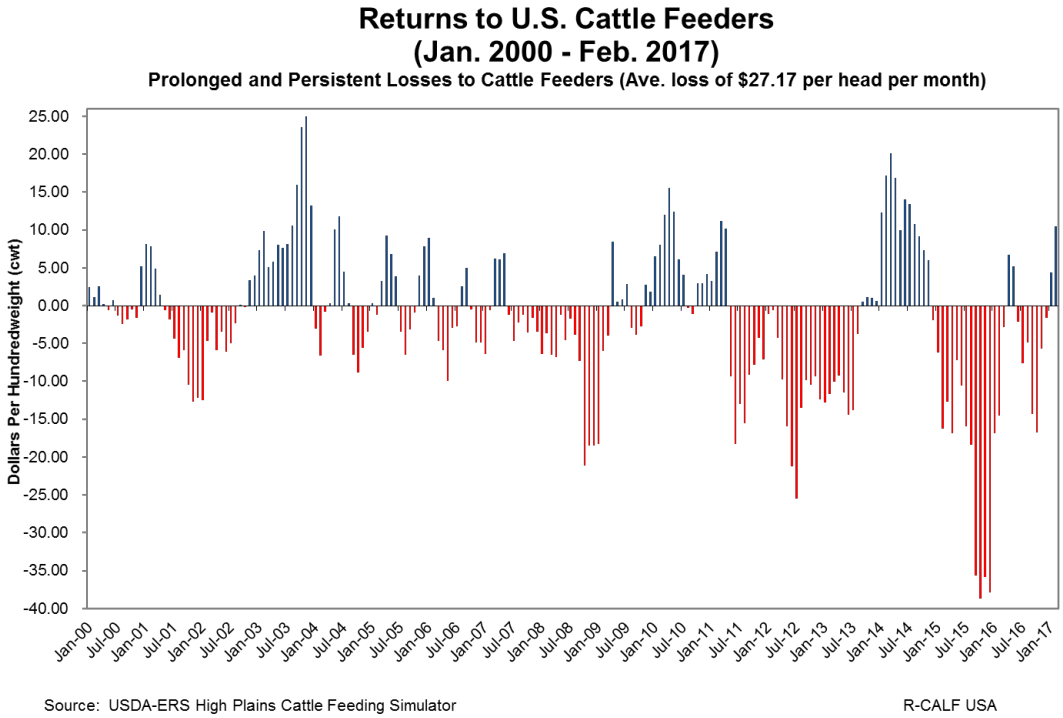


Source: USDA-NASS, Various Cattle on Feed Reports

R-CALF USA


Disruption of U.S. Cattle Cylce
Start 4-Year Liquidation
Start 8-Year Liquidation
Start 18 -Year Liquidation
Cattle Numbers (Millions)
Source: USDA-NASS
Total Beef Cow Inventory
Total Cattle Inventory
R-CALF USA


Origins of the United States' Beef Supply
10% of All Available Beef was Imported in 1985
Total Available Beef in U.S. Market
18% Imported 2014 - 2015
Imported Beef
Beef from Imported Cattle
Beef produced exclusively from cattle born and raised in the United States
Billions Pounds
Data Source: USDA-ERS
R-CALF USA


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)
Dollars Per Hundredweight (cwt)
25.00
20.00
15.00
10.00
5.00
0.00
-5.00
-10.00
-15.00
-20.00
-25.00
-30.00
-35.00
-40.00
Jan-00
Jul-00
Jan-01
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Jan-12
Jul-12
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Jan-17
Source: USDA-ERS High Plains Cattle Feeding Simulator
R-CALF USA