

## **MISCONCEPTION**

**The provision on competitive injury would allow producers to sue companies without having to show competitive injury.**

## **EXPLANATION**

The proposed rule will bring clarity to an issue that caused problems for growers, packers and industry because key terms have been incompletely defined. To fully understand this issue, it is important to first be clear as to what competitive harm and the likelihood of competitive harm mean and how they impact. The proposed rule defines competitive injury and likelihood of competitive injury. Competitive injury occurs when an act or practice distorts competition in the market channel or marketplace. How a competitive injury manifests itself depends critically on whether the target of the act or practice is a competitor (*e.g.*, a packer harms other packers), or operates at a different level of the livestock or poultry production process (*e.g.*, a packer harms a producer).

The likelihood of competitive injury occurs when an act or practice raises rivals' costs, improperly forecloses competition in a large share of the market through exclusive dealing, restrains competition among packers, live poultry dealers or swine contractors or otherwise represents a misuse of market power to distort competition. The likelihood of competitive injury also occurs when a packer, swine contractor, or live poultry dealer wrongfully depresses prices paid to a producer or grower below market value or impairs the producer or grower's ability to compete with other producers or growers or to impair a producer's or grower's ability to receive the reasonable expected full economic value from a transaction in the market channel or marketplace.

The proposed rule embraces the concepts of competitive harm and likelihood of competitive harm in certain instances; the proposed rule states that whether proof of harm or the likelihood of harm to competition is necessary depends on the nature and circumstances of the challenged conduct.

If a producer filed a claim on matters dealing with practices that could cause competitive harm, such as manipulation of prices, the producer would need to show harm or the likelihood of harm to competition. But some unfair practices do not have any implication on competition for a marketing region. If a producer filed a claim on matters that do not involve competitive harm, such as retaliatory conduct, using inaccurate scales, or providing a grower sick birds, proof of competitive injury or the likelihood of competitive injury would not apply. Such a requirement would be like having a car stolen, but before the police act, one would need to prove how the theft of the car impacts all of the neighbors. As detailed in the proposed rule, USDA feels this standard thwarts the purposes of the Act.

## MISCONCEPTION

**The proposed rule will cause increased litigation due to the provision on competitive injury or harm.**

## EXPLANATION

The lack of clarity on the issue of competitive injury currently causes litigation. The proposed rule seeks to clarify the issue and is intended to reduce litigation.

One of the reasons the courts in recent years have ruled that proof of competitive injury or harm is necessary is because the Department has not articulated its position in regulation.

Out of the twelve Circuit Courts of Appeal, seven circuits have *not* made clear rulings that affirmatively require a finding of harm to competition or likely harm to competition for a violation of the Act. Also, several district courts have held that an anticompetitive effect is *not* necessary to establish a claim for a violation of the Act.

## MISCONCEPTION

**The provision on packer to packer sales will eliminate marketing agreements or other value added activities and take away the incentive to produce meat products that consumers prefer.**

## EXPLANATION

The proposed rule seeks to prevent collusion and price manipulation caused by the sharing of pricing information between packers. It does not ban packers from owning their own livestock. When a packer sells livestock to another packer, the information signals important market information about price and supply levels. With high levels of consolidation and vertical integration, firms may be able to affect the prices of sales on the open market. In recent years, the open market has become thinner and more volatile. This open market helps determine the price of most formula contracts.

There is nothing in this provision that limits or eliminates marketing agreements. Instead, the proposed rule would provide integrity in the market to prevent manipulation of prices on the open market and in marketing agreements.

## MISCONCEPTION

**The packer to packer provision will now require packers to sell livestock across the country to other packers willing to buy livestock.**

## EXPLANATION

The proposed rule prohibits only direct sales of livestock between packers. A packer could sell to individuals, market agencies, dealers or other buyers.

## MISCONCEPTION

**Poultry Growers and Swine Production Contract Growers would be guaranteed a return of 80 percent with their production contracts.**

#### **EXPLANATION**

Under the proposed rule, producers are to be offered production contracts with a sufficient period of time that provide the opportunity to recoup up to 80 percent of the cost of their capital investment. Producers would not be guaranteed an 80 percent return on investment. This rule would not affect provisions in production contracts to deal with poor performers such as termination for cause.

#### **MISCONCEPTION**

**Companies will no longer be allowed to provide premiums to producers.**

#### **EXPLANATION**

There is no provision in the proposed rule that would limit or eliminate the ability of companies to provide premiums to reward producers for providing certain quantity or quality of livestock.

The proposed rule simply requires that if differential pricing is offered, the packer, swine contractor, or live poultry dealer must maintain records to document the business justification for that pricing arrangement. The documents that would be required by this provision are those documents containing information typically used by the regulated entity.

#### **MISCONCEPTION**

**The proposed rule take away producers' ability to maintain the privacy of business transactions because all transactions will have to be reviewed by GIPSA and then posted on a government website open to public access.**

#### **EXPLANATION**

There is nothing in the proposed rule that suggests GIPSA would review all business transactions, nor require that all these transactions be made available on its website.

To increase transparency, GIPSA is proposing that packers, swine contractors, and live poultry dealers provide sample contracts and poultry growing arrangements to GIPSA. In return, GIPSA will make these sample contracts available on its website. The proposal requires the submission of sample contracts, not every transaction.

Any trade secrets, confidential business information and personally identifiable information submitted would be removed and not made available on GIPSA's website.