National Cattlemen's Beef Association

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NCBA BACKGROUNDER ON PROPOSED GIPSA COMPETITION RULE

BACKGROUND:

As part of the 2008 Farm Bill, language was included directing USDA's Grain Inspection, Packers and Stockyards Administration (GIPSA) to issue regulations regarding poultry and swine contracts; arbitration use in contracts; and to establish criteria for the Secretary to consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of the Packers and Stockyards Act. Nearly a year after the Congressionally mandated deadline for release, GIPSA finally released their proposed rule on June 22, 2010. Concerning to us is that many of the provisions in this rule are based on proposals and amendments that were defeated by Congress during debate on the 2008 Farm Bill. The components of this proposed rule hurt producers and could drastically change the way cattle are marketed in the United States.

REGULATION COMPONENTS AND CONCERNS TO CATTLEMEN:

- Under existing law, you must show that a packer or processor harmed the market by engaging in illegal actions such as collusion, price fixing, etc. This is known as showing "competitive injury." Under the new definitions included in the proposed rule, "competitive injury" and "likelihood of competitive injury" are re-defined and made so broad that mere accusations, without economic proof, will suffice for USDA or an individual to bring a lawsuit against a buyer (packer or processor). In this case, a producer need only say that he was treated "unfairly" to sue a packer or processor. There is no definition of what "fair" should be, and the term is so broad that no definition could be applied in the instance of cattle marketing because each producer has his own perception of what is "fair." This change contradicts the rulings of eight U.S. Circuit Courts of Appeals which have upheld the need to show competitive injury to the market before you can sue. This will be a bonanza for trial lawyers.

- This proposed rule requires buyers purchasing livestock through marketing arrangements (including forward contracts, formula contracts, production contracts or other marketing arrangements) to submit a sample copy of each unique type of contract or arrangement to GIPSA within 10 days of it being agreed to. GIPSA will review these arrangements and post them on their website. This takes away a fundamental American business right of allowing a willing buyer and a willing seller to negotiate a private business deal.

- Even though the proposed rule states that agreements posted on the GIPSA website will have confidential business information, trade secrets, and personally identifiable information removed; this only applies to the buyer. There is still no guarantee that your personal information would not be protected if somebody filed a Freedom of Information Act (FOIA) request with USDA. This invasion of privacy into your business could have lasting effects outside of just the markets.

- New criteria will be used by USDA to determine whether an undue or unreasonable preference or advantage was given to a cattle producer by a buyer. This will require buyers to justify every single penny difference they offer to one producer over another. It will also require them to make similar offers to all livestock producers. Inadequate (as to be decided by GIPSA, but not currently defined) justification for a price differential would give cattle producers yet another way to bring suit against another party. The government will decide what the "acceptable" or "standard" price, terms, and conditions are for livestock transactions – not the marketplace. It should also be noted that a known and trusted business relationship (you've done business with someone in the

past and have been pleased with how their cattle perform, or you base your agreement on volume of cattle) is no longer considered an acceptable justification for a pricing differential.

- The proposed rule bans packer-to-packer sales of livestock. This applies to individual packers and any affiliates or subsidiaries they might own. 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, this will have severe unintended consequences, especially to smaller packers and dealers. 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.

- Order buyers will only be able to represent one packer. This causes concern that the loss of efficiency of having one buyer for multiple packers will result in fewer buyers…not more. Fewer buyers means less competition. Don't be fooled to think that packers would pay the extra money for an exclusive buyer at each livestock barn in this country.

BOTTOM LINE:

Lost Opportunities and Lost Profits for Cattlemen:
NCBA members have concerns that the new liabilities associated with this proposed rule will likely cause buyers to withdraw marketing arrangements rather than run the risk of litigation, civil penalties, and potential revocation of their licenses. The threat of litigation by trial attorneys in regards to whether or not an arrangement is "fair" will reduce and inhibit the use of alternative marketing arrangements that put more money in producers' pockets

If marketing arrangements are greatly reduced, cattlemen are the losers because it takes away their ability and incentive to manage risks, finance production, and compete with one another to negotiate premiums. With alternative marketing arrangements being utilized by nearly 60 percent of the beef market, this will result in a huge shift in the way cattle are marketed. Over the years, cattlemen have responded to consumer demands by finding innovative ways to develop and market premium quality and branded products. These alternative marketing arrangements have allowed producers to get paid for the value they add. Without the contracted supply of cattle that meet the requirements of such programs, these programs become obsolete or severely reduced in size and scope. Even though the proposed rule does not directly ban the use of alternative marketing arrangements, the unintended consequences and trickle down effect will impact them.

The 2007 USDA GIPSA Livestock and Meat Marketing Study found that both producers and consumers would be worse off if alternative marketing arrangements were reduced or eliminated.. In fact, no segment of the beef industry, from the ranch to the consumer, benefits from the reduction or elimination of these marketing arrangements.

Loss of Privacy/Risk of Litigation:
The proposed rule requires packers to file copies of marketing arrangements with USDA. Packers may assert that some information is confidential and request that it not be released. However, cattlemen who are parties to the marketing arrangements do not have the same opportunity to claim privacy of contract. This means that producer confidential information may be posted on USDA's website for producer competitors to view. Because this proposed rule will make it easier to sue buyers, it is expected that cattlemen participating in the transactions will likely be drawn into the litigation.

Negative Restructuring of the Industry:
NCBA members believe the proposed rule's prohibition on packer-to-packer sales and the potential elimination of marketing arrangements will likely encourage consolidation rather that providing more opportunities for cattlemen. In order to meet consumer demand currently being met by the use of marketing arrangements, packers may choose to own their own livestock in larger numbers (Today, packers directly own less than 5 percent of the market) rather than risk litigation. This is yet another loss of opportunity for America's cattlemen.