FOOD MARKETING INSTITUTE

November 22, 2010

Tess Butler
GIPSA, USDA
1400 Independence Ave., NW
Room 1643-S
Washington, DC 20250-3604

Re: Proposed Rule: Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act[1]

RIN 0580-AB07

Dear Ms. Butler:

The Food Marketing Institute (FMI) appreciates the opportunity to respond to the Grain Inspection, Packers and Stockyards Administration's (GIPSA) request for comments on the proposed rule Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act (the proposed rule).

FMI is the national trade association that conducts programs in public affairs, food safety, research, education and industry relations on behalf of its 1,500 member companies – food retailers and wholesalers – in the United States and around the world. FMI's members in the United States operate approximately 26,000 retail food stores and 14,000 pharmacies. Their combined annual sales volume of $680 billion represents three-quarters of all retail food store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms, and independent supermarkets. Our international membership includes 200 companies from more than 50 countries. FMI's associate members include the supplier partners of its retail and wholesale members.

Title XI of the Food, Conservation and Energy Act of 2008 (Farm Bill) directed the Secretary of Agriculture to "promulgate regulations with respect to the . . . Packers and Stockyards Act to establish criteria that the Secretary will consider in determining (1) whether an undue or unreasonable preference or advantage has occurred in violation of such Act," among other things.[2]

[1] 75 Fed. Reg. 35338 (June 22, 2010).
[2] Pub. L. 110-246.

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FMI is concerned that the proposed rule goes beyond the scope of the Farm Bill and will have significant negative consequences for the supermarket industry and consumers. The proposed rule effectively waives a necessary element in a Packers and Stockyards Act[3] (PSA) case—a showing of competitive injury—which could threaten the viability of marketing agreements by making them more vulnerable to frivolous litigation. These marketing agreements have allowed retailers to respond to consumer demands for high quality, good value meats through branded meat programs. We urge GIPSA to withdraw and reissue the proposed rule within the scope of the Farm Bill and craft it in such a way so as not to jeopardize marketing agreements.

Marketing Agreements Result in Quality, Value and Enhanced Food Safety for Consumers

The meat department is a core component of most supermarkets today. Competition is fierce in the grocery industry and meat is a key point of differentiation as supermarkets battle to win over consumers. According to FMI's most recent annual industry report, emphasis on perishables was the number one point of differentiation for all supermarkets[4] and the most frequently offered amenity to consumers was having a butcher available to cut fresh meat to order.[5] This emphasis on meat is a clear response to consumer demands. FMI's most recent annual consumer report once again found that having high quality meat is one of the most important factors for shoppers in selecting a store.[6] As low prices have become an ever more important factor for consumers in recent years,[7] [8] consumers have been demanding the best value for their dollar. Marketing agreements between packers and producers have allowed supermarkets to satisfy consumer demands for high quality, good value fresh meat through branded meat programs. In these programs, retailers establish criteria for consistency, quality, grade, breed and other factors. The agreements help to enhance informed decision making for the consumer. Another benefit of branded meat programs is food safety. Traceback is facilitated when there is a defined process for identifying suppliers through marketing agreements. Additionally, some retailers utilize single-source suppliers which greatly enhances traceability. Some retailers have developed their own brand of fresh meats, while other branded fresh meats are sold among various retailers. These branded meats are an important point of differentiation in the ultra-competitive supermarket industry.

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[3] 7 U.S.C. § 181 et. seq.
[4] Food Marketing Institute, 2010 The Food Retailing Industry Speaks.
[5] Id.
[6] Food Marketing Institute, 2010 U.S. Grocery Shopper Trends.
[7] Id.
[8] "With retail prices down across proteins, meat consumption measured in tonnage was up significantly in 2009, but the dollars are lagging behind as shoppers opt for cheaper cuts . . . More consumers are cooking at home versus eating out, leading to an increase in meat purchases at supermarkets and other retail outlets." Food Marketing Institute, 2010 The Power of Meat, p. 3.

In order for branded meat programs to succeed, retailers need a reliable supply of meat with consistent quality. To develop consumer loyalty, these branded meats must be available to shoppers day-in and day-out. Marketing agreements ensure that retailers and packers get a steady and consistent supply of cattle that meet the qualifications of store-branded programs.

Indeed, the 2007 RTI study commissioned by GIPSA found that: "Many meat packers and livestock producers obtain benefits through the use of AMAs, including . . . assurance of quality and consistency of quality."[9] The study determined that marketing agreements are associated with higher quality meats and restrictions on the use of marketing agreements for the sale of livestock to meat packers would make meat more expensive for consumers.

Branded Meats Have Helped Revitalize Consumer Demand

Marketing agreements have also benefitted producers as they have played a role in stemming the decades long decline of beef consumption. From 1979 to 1998, demand for beef declined 50 percent.[10] The decline in demand has been attributed to four key factors desired by consumers. Two of these factors were "high-quality products for a favorable eating experience" and "products that offer a positive eating experience consistently."[11] Marketing agreements allow retailers to provide to consumers consistent, high-quality meats through branding programs. The reversal of this decline in demand for beef can be attributed to growth in brands among other things.[12] Quality is the number one factor cited by consumers as likely to prompt increased meat purchases at retail.[13] Branded meats produced through marketing agreements are bringing many consumers back to the meat case with higher quality offerings. Currently, estimates suggest 40 to 50 percent of all beef sold is branded with national or store ("house") brands.[14] The desire of the consumer to shop by brand continues to grow, and the potential exists for this to reach 75 percent of beef sales;[15] however, if the proposed rule becomes final, branding programs would be jeopardized, which risks triggering another decline in beef consumption.

The Proposed Rule Threatens Branded Meat Programs

Marketing agreements are essential to the existence of branded meat programs. FMI has concerns that the proposed rule could threaten the use of marketing agreements in turn jeopardizing the viability of branded meat programs.

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[9] 2007 GIPSA Livestock and Meat Marketing Study, prepared by RTI International (January 2007).
[10] Purcell, W.D. 1998. A primer on beef demand. Research bull. Research Inst. on Livestock Pricing and Agricultural and Applied Economics. Virginia Tech, Blacksburg, VA.
[11] Id.
[12] Id.
[13] Food Marketing Institute, 2010 The Power of Meat.
[14] Blach, R. 2008. Feeding industry structure. Cattle-Fax Res. Report.
[15] L.R. Corah, Development of a corn-based beef industry, Certified Angus Beef LLC, Wooster, OH.

GIPSA states in the proposed rule that a plaintiff seeking to establish a claim under subsections 202(a) or 202(b) of the PSA need not demonstrate competitive injury or likelihood of competitive injury. Under existing law a showing of competitive injury or likelihood of competitive injury is required to establish such a claim. By lessening the burden a potential plaintiff must meet to prevail in a PSA lawsuit, the threat of liability will likely cause many packers to consider abandoning or limiting the use of marketing agreements which would risk eliminating branded meat programs that have benefitted consumers with consistent, high-quality meats. This would increase packers' liability to producers to defend frivolous claims concerning payments to animals.

GIPSA is Improperly Bypassing the Judiciary

GIPSA's assertion in the proposed rule that a plaintiff seeking to establish a claim under subsections 202(a) or 202(b) of the PSA need not demonstrate competitive injury or the likelihood of competitive injury conflicts with the precedent set by decisions from eight separate federal appellate courts.[16] In the most recent decision in May 2010, the 6th Circuit stated that the "tide has become a tidal wave" concerning these rulings.[17] The fact that the PSA may serve goals in addition to the protection of competition does not give GIPSA license to ignore that goal. GIPSA itself acknowledges that the primary purpose of the Act is to assure fair competition and fair trade practices.

GIPSA contends that the courts should afford deference to its interpretation of the PSA. However the courts too have rejected this argument. In rejecting the agency's claim for deference, the Eleventh Circuit stated "Congress plainly intended to prohibit only those unfair, discriminatory or deceptive practices adversely affecting competition."[18] Thus, "a contrary interpretation of Section 202(a) deserves no deference."[19]

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[16] *Armor & Co. v. U.S.*, 402 F. 2d 712 (7th Cir. 1968); *Farrow v. USDA*, 760 F.2d 211 (8th Cir. 1985); *Dejong Packing Co. v. USDA*, 618 F.2d 1329 (9th Cir. 1980); *Goldsboro Milling Co.,* 1998 WL 709324, *Been v. O.K. Indus., Inc.,* 495 F.3d 1217 (10th Cir. 2007); *London v. Fiedale Farms Corp.*, 410 F.3d 1295 (11th Cir. 2005); *Wheeler v. Pilgrim's Pride Corp.*, 591 F. 3d 355 (5th Cir. 2009); *Terry v. Tyson Farms, Inc.* No. 08-5577 (6th Cir. 2010).

[17] The tide has now become a tidal wave, with the recent issuance of the Fifth Circuit Court of Appeals' *en banc* decision in *Wheeler v. Pilgrim's Pride Corp*., 591 F.3d 355 (5th Cir. 2009) (*en banc*), in which that court joined the ranks of all other federal appellate courts that have addressed this precise issue when it held that "the purpose of the Packers and Stockyards Act of 1921 is to protect competition and, therefore, only those practices that will likely affect competition adversely violate the Act." *Wheeler*, 591 F.3d at 357. All told, seven circuits – the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits – have now weighed in on this issue, with unanimous results. *Terry v. Tyson Farms, Inc.* No. 08-5577 (6th Cir. 2010).

[18] *London*, 410 F.3d at 1304.

[19] *Id*.

Thank you for considering these comments. If you have any questions please contact me at (202) 452-8444.

Sincerely,

Erik R. Lieberman
Regulatory Counsel