April 5, 2022

Bruce Summers,
Administrator
Agricultural Marketing Service
U.S. Department of Agriculture
1400 Independence Avenue SW
Washington, DC 20250
AMSAdministratorOffice@usda.gov

Re: U.S. Department of Agriculture, Proposed Rulemaking, Unfair Practices in Violation of the Packers and Stockyards Act, RIN: 0581-AE05

Dear Mr. Summers:

We are a collection of organizations that advocate on behalf of farmers, ranchers, and workers across the United States. The U.S. Department of Agriculture has stated publicly that it intends to publish proposed rules this year to address certain issues related to Packers and Stockyards Act ("PSA" or the "Act"), 7 U.S.C. § 192. We write today with respect to encourage the Department to clarify via regulation that proving a violation of Sections 202(a) or (b) of the PSA, 7 U.S.C. § 192(a), does not require a showing of actual or likely harm to competition. Such a regulation would enhance enforcement of the PSA, is the most correct interpretation of the statute, and should be followed by any courts that consider the question.[1]

Regulatory Background

Congress enacted the PSA in 1921 "to comprehensively regulate packers, stockyards, marketing agents and dealers." *Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co.*, 498 F.2d 925, 297 (10th Cir. 1974). The "chief evil" that Congress sought to regulate was "the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer, who buys." *Stafford v. Wallace*, 258 U.S. 495, 514–15 (1922). Congress also sought to combat "exorbitant charges, duplication of commissions, [and] deceptive practices in respect of prices." *Id.* Because the Act is remedial in nature, it should be liberally construed to "further its life and fully effectuate its public purpose." *Bruhn's Freezer Meats of Chicago, Inc. v. USDA*, 438 F.2d 1332, 1336 (8th Cir. 1971).

Section 202 of the Act declares that "[i]t shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in

[1] We anticipate providing additional input on the planned rulemaking in the future, in particular outlining our views as to the Department's anticipated rulemaking regarding what constitutes an "undue or unreasonable preference or advantage" under Section 202(b) of the PSA. We appreciate the assistance of Democracy Forward Foundation in preparing this letter.

unmanufactured form, or for any live poultry dealer with respect to live poultry, to," among other things:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
(b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or
(c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or
(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or
(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or
(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or
(g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by [the previous] subdivisions.

7 U.S.C. § 192.

The Act authorizes the Department to issue implementing regulations. *Id.* § 228. And in 2008, Congress directed the Department to "promulgate regulations… to establish criteria that the Secretary will consider in determining … whether an undue or unreasonable preference or advantage has occurred." *See* Pub. L. No. 110-246, § 11006(1) (2008). To meet that mandate, and to further clarify the types of conduct that constitutes a violation of either Section 202(a) or (b) of the PSA, the Department in 2010 published a Notice of Proposed Rulemaking ("NPRM"). That NPRM proposed two key additions to the Department's regulations under the PSA.

First, the Department proposed to codify its "longstanding" interpretation of the PSA—that proving a violation of either Section 202(a) or (b) does not require a showing of actual, or likely, harm to competition. 75 Fed. Reg. 35,338, 35,340 (June 22, 2010). The Department explained that it proposed this provision, in part, in response to three court decisions that had failed to defer to the Department's interpretation—an interpretation that previously had only been set forth in a variety of amicus briefs. *Id.* at 35,341.

Second, the Department proposed a regulation to confirm "the broad coverage of section 202(a)," including "examples of conduct deemed unfair." *Id.* at 35,342. This proposed regulation, the Department explained, was a response to hearing from "growers and producers"

that they "are sometimes at a distinct disadvantage in negotiating the terms of an agreement" with dealers and packers; that dealers and packers have "exert[ed] their disproportionate positions of power by misleading or retaliating against" growers and producers; and that growers and producers are often forced to "acquiesce" to packers' and dealers' "terms for entering into a contract or growing arrangement, or acquiesce to unfair conduct[,] in order to continue in business." *Id.*

In 2016, the Department issued an Interim Final Rule ("IFR") and another NPRM. The IFR codified the Department's longstanding view that "in some cases, a violation of Section 202(a) or (b) can be proven without proof of predatory intent, competitive injury, or likelihood of competitive injury," 81 Fed. Reg. 92,566, 92,567 (Dec. 20, 2016), explaining that this understanding "is consistent with the language and structure of the … Act, as well as its legislative history and purposes." *Id*. And the NPRM once again proposed regulations, with minor alterations based on comments the Department had received, to establish criteria that the Secretary would consider in determining whether a violation of Section 202(b) had occurred and to confirm the broad nature of Section 202(a). *Id.* at 92,704–07.

In 2017, the Department withdrew both documents—it rescinded the IFR and abandoned the 2016 NPRM. *See* 82 Fed. Reg. 48,594, 48,602 (Oct. 18, 2017). In their place, the Department issued *another* NPRM, which proposed limited and vague criteria that the Department would use in evaluating whether there had been a violation of Section 202(b), 85 Fed. Reg. 1771 (Jan. 13, 2020). It finalized that proposed rule later the same year, 85 Fed. Reg. 79,779 (Dec. 11, 2020). Neither the NPRM nor the final rule addressed the issue of competitive injury, leaving the Department's longstanding understanding undisturbed, but also uncodified.

Although the 2016 IFR was consistent with the Department's longstanding interpretation, *see* 82 Fed. Reg. at 48,596 & n.1, the Department had not previously addressed the question via rulemaking. Accordingly, and in the absence of such an interpretation that carries the force of law, multiple courts of appeal have held to the contrary—in cases to which the United States was not a party—requiring a showing of competitive harm and noting that it need not defer to Department views expressed in amicus briefs or policy statements. *See, e.g.*, *Been v. O.K. Industries, Inc.*, 495 F.3d 1217, 1226–27 (10th Cir. 2007). Accordingly, farmers and ranchers in those circuits are subject to a PSA enforcement scheme that is inconsistent with the meaning and purpose of the PSA.

The Department should promulgate a regulation clarifying that competitive harm need not be proven to establish a violation of Section 202(a) and (b).

We encourage the Department to do what it has proposed since 2010: promulgate a regulation stating explicitly that competitive harm need not be proved to establish a violation of Section 202(a) or (b) of the PSA. Codifying this interpretation in regulation would have meaningful benefits by enhancing the potential for effective PSA enforcement.[2] For example,

[2] Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 81 Fed. Reg. 92,566, 92,588 (Dec. 20, 2016).

enforcement would be possible in situations in which farmers suffer real harm, but the scale is too small to prove harm to competition generally. As the Department previously explained, such enhanced enforcement:

> [i]n turn, will reduce instances of unfair, unjustly discriminatory, or deceptive practices or devices and undue or unreasonable preferences, advantages, prejudices, or disadvantages and increased efficiencies in the marketplace. The benefit of additional enforcement of the P&S Act will accrue to all segments of the value chain in the production of livestock and poultry, and ultimately to consumers.

81 Fed. Reg. at 92,588.

The decision in 2017 to rescind the IFR, which codified this longstanding Department's interpretation of the PSA, was incorrect. The following discussion outlines the legal arguments supporting the prior interpretation and explains why courts (even those that have declined to defer to the Department on this issue in this past) would likely defer to that interpretation, were it set forth in regulation.

A. The Department's longstanding interpretation is consistent with the text of the PSA.

Statutory interpretation begins, of course, with the text, and when the text is clear, "the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. United States*, 540 U.S. 526, 534 (2004). While our view is that the relevant statutory text is clear, we acknowledge that not all courts agree. But those courts that declined to follow our interpretation, typically did not do so on the ground that the PSA was unambiguous as to the statutory meaning. *See*, *e.g.*, *Wheeler v. Pilgrim's Pride Corp*., 591 F.3d 355, 362–63 (5th Cir. 2009). In such scenarios, an agency's permissible interpretation is entitled to deference. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). As we discuss below, regardless of whether a court views the PSA as clearly not requiring proof of competitive injury, such an interpretation is at the very least, reasonable.

Section 202(a) makes it unlawful for a packer, swine contractor, or live poultry dealer to "[e]ngage in or use *any* unfair, unjustly discriminatory, or deceptive practice or device." 7 U.S.C. § 192(a) (emphasis added). Section 202(b) similarly makes it unlawful for the same entities to "make or give *any* undue or unreasonable preference or advantage to *any* particular person or locality in *any* respect, or subject *any* particular person or locality to *any* undue or unreasonable prejudice or disadvantage in *any* respect." *Id.* § 192(b) (emphasis added).

Nothing in the language of either provision limits their application to practices or devices that adversely affect competition as a whole. To the contrary, Congress's repeated use of the modifier "any" suggests that these subsections be interpreted broadly. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 10 (2011) (noting that the phrase "any complaint" "suggests a broad interpretation"). Indeed, the Supreme Court has repeatedly noted

that "read naturally, the word 'any' has an expansive meaning." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)); *see also Negusie v. Holder*, 555 U.S. 511, 547 (2009) (interpreting broadly a statute that repeatedly used the "broad statutory language" of "any").

The broad application of subsections 202(a) and (b) is further confirmed when those subsections are read in context with the broader statutory scheme, because their breadth contrasts notably with the more limited scope of the following subsections. *See Yates v. United States*, 574 U.S. 528, 543 (2015) (statutory language must be read in context). The four subsections immediately following (a) and (b) set forth specific types of conduct that is prohibited—but each explicitly limits its prohibition to conduct that harms, or is likely to harm, competition. *See* 7 U.S.C. § 192(c) (prohibits certain conduct that "has the tendency or effect of restraining commerce or of creating a monopoly"); *id.* §§ 192(d), (e) (prohibiting certain conduct that has the effect of "manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce"); *id.* § 192(f) (prohibiting certain conduct that would "manipulate or control prices"). It is, of course, a basic principle of statutory interpretation that "differences in language … convey differences in meaning." *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2071 (2018). And that canon applies with even greater force when applied to provisions that are parallel and enacted "in the same provision of the same Act." *United States v. Granderson*, 511 U.S. 39, 63 (1988) (Kennedy, J., concurring).

Accordingly, Congress's explicit choice not to limit conduct prohibited by subsections (a) and (b) in the same manner as the following subsections must be given effect. *See Wheeler*, 591 F.3d at 377 (Garza, J., dissenting) ("The most natural reading [of Section 202 of the PSA] is that those subsections with the 'restraining commerce' language require a competitive injury and those without it do not."). After all, subsections (c)-(f) make clear that when Congress intends to limit PSA violations to conduct that harms, or is likely to harm, competition, it knows how to do so. *See Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 176 (1994) (when it is clear that Congress knows how to address a specific concept, that concept should not be read into broad statutory language).

Indeed, it is unclear what subsections (a) and (b) would mean if they were interpreted to require a showing of actual or likely harm to competition. That is because the statute already prohibits "any course of business or … any act" that has the purpose or effect of "restraining commerce." 7 U.S.C. § 192(e). If a competitive harm requirement is inferred into subsections (a) and (b), the conduct there prohibited would be subsumed into that prohibited by subsection (e)—rendering subsections (a) and (b) unnecessary and thus running afoul of the Supreme Court's admonition that one should not "adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law," *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011); *see also Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

Moreover, identical language has been interpreted to not require competitive injury in other parts of the PSA, as well as in the Federal Trade Commission Act ("FTC Act"). In the

PSA, courts have held that Section 312, which prohibits certain entities not otherwise covered by Section 202 from engaging in "any unfair, unjustly discriminatory, or deceptive practice or device," 7 U.S.C. § 213(a), does not require a showing of competitive injury. *See Spencer Livestock Comm'n Co. v. USDA*, 841 F.2d 1451, 1455 (9th Cir. 1988) (Section 312 covers "a deceptive practice, whether or not it harmed consumers or competitors"); *Wheeler*, 591 F.3d at 376 & n.5 (5th Cir. 2009) (en banc) (Garza, J., dissenting); *see also* 75 Fed. Reg. at 35,340 & n.24. Similarly, the Supreme Court has held that parallel language in Section 5 of the FTC Act, 15 U.S.C. § 45(a)(1), does not import a competitive injury requirement. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (finding that conduct could be unlawful even though it did not have "anticompetitive consequences after the manner of the antitrust laws"); *see also Batson v. Live Nation Ent., Inc.*, 746 F.3d 827, 830 (7th Cir. 2014) (recognizing continued validity of *Sperry*). To give effect to the "standard principle of statutory construction" that "identical words and phrases within the same statute should normally be given the same meaning," *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007), Sections 202(a) and (b) of the PSA should be read not to require a showing of competitive injury.

B. The Department's longstanding interpretation is consistent with the history and purpose of the PSA.

As described in a House Report accompanying the PSA, Congress intended it to be the "most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act." H.R. Rep. No. 67-77, at 2 (1921). As stated in the conference report on the bill, "Congress intends to exercise in the bill, the fullest control of packers and stockyards which the Constitution permits." H.R. Rep. No. 67-324, at 3, 5–6 (1921) (Conf. Rep.). As one court of appeals has explained, "[t]he legislative history showed Congress understood [the PSA] were broader in scope than antecedent legislation such as the Sherman Antitrust Act, sec. 2 of the Clayton Act, 15 U.S.C.A. § 13, sec. 5 of the Federal Trade Commission Act, 15 U.S.C.A. § 45 and sec. 3 of the Interstate Commerce Act, 49 U.S.C.A. § 3." *Swift & Co. v. United States*, 308 F.2d 849, 853 (7th Cir. 1962).

Since the time of the PSA's enactment, Congress has continued to emphasize the broad scope of the Act, and has evinced its intent for Sections 202(a) and (b) to prohibit conduct beyond that which negatively impacts competition, focusing as well, for example, on the impact on producers. For example, in 1935 Congress amended the PSA to subject live poultry dealers to sections 202(a) and (b), and, in so doing, explained that "[t]he handling of the great volume of live poultry … is attendant with various unfair, deceptive, and fraudulent practices and devices, resulting in the producers sustaining sundry losses and receiving prices far below the reasonable value of their live poultry." Pub. L. 74-272, 49 Stat. 648, 648 (1935). Similarly, in 1958, the House Committee Report accompanying other amendments to the PSA stated:

> The primary purpose of [PSA] is to assure fair competition *and* fair trade practices in livestock marketing and in the meatpacking industry. The objective is to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices…. *Protection is also provided to members* of the livestock marketing

> and meat industries from unfair, deceptive, unjustly discriminatory, *and* monopolistic practices of competitors, large *or small*.
> …
>
> The act provides that meatpackers subject to its provisions shall not engage in practices that restrain commerce or create a monopoly…. *They are also prohibited from engaging in any unfair, deceptive, or unjustly discriminatory practice or device* in the conduct of their business.

H.R. Rep. No. 85-1048, at 1–2 (1957) (emphasis added).

In accordance with this legislative history, many courts have recognized that the purposes of the PSA are not limited to acts that harmed competition. *See, e.g.*, *Stafford*, 258 U.S. at 513–14 (describing the purposes of the PSA to "forbid[] [packers] to engage in unfair, discriminatory, or deceptive practices, … *or* to do any of a number of acts to control prices or establish a monopoly in the business" (emphasis added)); *Spencer Livestock Comm'n Co.*, 841 F.2d at 1455 ("[The PSA] was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics."); *United States v. Perdue Farms, Inc.*, 680 F.2d 277, 280 (2d Cir. 1982) ("As originally enacted in 1921, the purpose of the [PSA] was to combat anticompetitive *and* unfair practices in the highly concentrated meat packing industry." (emphasis added)); *United States v. Donahue Bros.*, 59 F.2d 1019, 1023 (8th Cir. 1932) ("One of the purposes of [the PSA] was to protect the owner and shipper of live stock, and to free him from the fear that the channel through which his product passed, through discrimination, exploitation, overreaching, manipulation, or other unfair practices, might not return to him a fair return for his product."); *see also Bruhn's Freezer Meats*, 438 F.2d at 1336–37 (PSA is remedial legislation and should be construed broadly); *Bowman v. USDA*, 363 F.2d 81, 85 (5th Cir. 1966) (same).

In light of the Act's broad and remedial purpose, it is reasonable to interpret Sections 202(a) and (b) to not impose a competitive injury requirement.

C. Courts are likely to defer to the Department's interpretation.

The Department's primary substantive justification for the 2017 rescission of the IFR was its determination, at the time, that courts would be unlikely to give deference to the IFR. 82 Fed. Reg. at 48,597. This assessment was in error—the Department should reverse its 2017 determination, as it is permitted to do, and explain that, to the contrary, courts are likely to defer to its interpretation of Sections 202(a) and (b), to the extent they deem those sections ambiguous in meaning.

While we believe that the "unambiguous language" of Sections 202(a) and (b) establishes that those sections "do not require a showing of competitive injury," *Wheeler*, 591 F.3d at 372 (dissent), as mentioned, some courts have disagreed. In such a circumstance, the existence of a formal interpretation by the Department promulgated via notice and comment rulemaking makes it more likely that the court would adopt the Department's interpretation. Regulations

promulgated by an agency exercising its congressionally granted rule-making authority are entitled to deference under *Chevron,* 467 U.S. at 844. In contrast, an agency's interpretation that does not have force of law, such as being promulgated via notice and comment rulemaking, will not necessarily receive deference. *See, e.g., Gregory v. Ashcroft,* 501 U.S. 452 (1991) (refusing to defer to agency conclusion articulated only in the course of litigation, rather than in a deliberative exercise of interpretive authority); *Kaufman v. Nielsen*, 896 F.3d 475, 484 (D.C. Cir. 2018).

Since at least 1945, the Department "has consistently taken the position that" proving a Section 202(a) or (b) claim does not require a showing of competitive injury or likely competitive injury. *See In re Ozark Cnty. Cattle Co.*, 49 Agric. Dec. 336, 1990 WL 322891, at *20 & n.15 (USDA 1990) (citing cases dating back to 1945 demonstrating the Department's consistent position).[3] However, prior to 2016, the Department had not set forth its interpretation of Sections 202(a) and (b) in regulation. As a result, and as discussed above, several courts have refused to defer to the Department's interpretation and instead held that proof of actual, or likely, competitive injury is a requisite element of Sections 202(a) and (b). *See Wheeler*, 591 F.3d at 455 (en banc); *Been*, 495 F.3d 1217; *London v. Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir. 2005); *Terry v. Tyson Farms, Inc.*, 604 F.3d 272 (6th Cir. 2010). Indeed, one court was explicit that it refused to defer to the Department's interpretation—set forth, in that case, by way of an amicus brief—because amicus briefs "do not reflect the deliberate exercise of interpretive authority that regulations…demonstrate." *Been*, 495 F.3d at 1227 (citation omitted).

Recognizing this, the Department, when it initiated rulemaking in 2010—finalized in 2016—to set forth its interpretation in regulation, explained, "[t]o the extent [] courts failed to defer to USDA's interpretation of the statute because that interpretation had not previously been enshrined in a regulation, this new regulation may constitute a material change in circumstances that warrants judicial reexamination of the issue." 81 Fed. Reg. at 92,568. It further noted that two of the opinions were met with vigorous dissents. *Id.* at 92,568 & n.14 (citing *Wheeler*, 591 F.3d at 371–85 (Garza, J., dissenting); *Been*, 495 F.3d at 1238 (Hartz, J., concurring in part and dissenting in part)). When the Department reversed its position in 2017, it argued that "at least two federal circuits are unlikely to defer to USDA's interpretation," or Sections 202(a) and (b), 82 Fed. Reg. at 48,594, referring to the Fifth and Eleventh circuit decisions in *Wheeler* and *London*.

That concern was misplaced. In support, the Department had invoked the Supreme Court's decision in *Brand X*, which held that where an appellate court has found a statute to have a clear, unambiguous meaning, *stare decisis* demands that that court not subsequently defer to an agency's contrary interpretation. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 984 (2005). But this reliance is misplaced because *Wheeler* and *London* did not conclude that the statute *unambiguously* required a showing of anticompetitive injury. Without

[3] *See also Been*, 495 F.3d at 1239 (dissent) ("it is worth noting that 26 years ago a treatise could report that the USDA 'has consistently taken the position that in order to prove that a practice violates the broad prohibitions in §§ 202(a) and (b) ... of the [PSA], it is not necessary to prove predatory intent, competitive injury, or likelihood of injury.'") (quoting 1 John H. Davidson et al., Agricultural Law § 3.47, at 244 (1981)).

such a finding, *Brand X* poses no barrier. If the statutory language is ambiguous, courts may defer (indeed should defer under *Chevron*) to a different interpretation of it based on a newly promulgated interpretation by the Department.

Indeed, the better reading of *Wheeler* and *London* is that that they found the PSA ambiguous on the question of whether anticompetitive injury must be proven. The Fifth Circuit was explicit that its conclusion rested, not on the Act's plain language, but rather on legislative history and case law: "We conclude that an anti-competitive effect is necessary for an actionable claim under the PSA *in light of the Act's history in Congress and its consistent interpretation by the other circuits*." *Wheeler*, 591 F.3d at 362 (emphasis added). And the court went further to emphasize the elasticity of the statutory text:

> We agree with the view [expressed in the dissent] that referring to outside sources *may be inappropriate when determining the meaning of an unambiguous statute*. It is appropriate and necessary here, however, where § 192(a) and (b) of the PSA employs the terms "unfair," "unjust," "undue," and "unreasonable." Which meaning of "fair," for example, do our dissenters choose in the four columns of Black's Law Dictionary, Ninth Edition? It is apparent that these words do not "extend to the outer limits of [their] definitional possibilities."

Id. at 362–63 (emphasis added) (quoting *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006)).

In fact, neither the Fifth Circuit's decision in *Wheeler*, nor the Eleventh Circuit's decision in *London* even purports to start with an analysis of the plain text of the PSA. In *Wheeler*, the court begins with a history of the case law addressing various issues arising under the PSA, and then makes an argument about congressional acquiescence. *Wheeler*, 591 F.3d at 357–62. And in *London*, the court turned immediately not to the text of the PSA, but to the "backdrop of corruption the Act was intended to prevent," the "legislative history," the Act's "antitrust ancestry," and "[p]olicy considerations." *London*, 410 F.3d at 1302–04; *see also Wheeler*, 591 F.3d at 379 (Garza, J., dissenting) (explaining that the opinions "reached beyond the PSA's clear and unambiguous text, choosing instead to be guided by its legislative history and policy considerations materials"). Neither circuit court would be required by *Brand X* to refuse to defer to the Department's articulation of its view of Section 202(a) in a newly promulgated regulation.

Courts that interpreted the PSA contrary to the Department's view did so, by and large, based on their assessment that the relevant language was ambiguous. As such, they would be free, and indeed should, defer to newly promulgated regulations codifying the Department's longstanding interpretation. *Brand X*, 545 U.S. at 982–83 ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."). As the Department correctly observed in 2016, such promulgation would be the kind of material change that would

warrant a court that had previously declined to defer to change its position. 81 Fed. Reg. at 92,568.[4]

In sum, it is likely that courts will defer to the Department's interpretation of Sections 202(a) and (b) if such interpretations were set forth in regulation. And given the reasonableness of the interpretation, as discussed above, the Department should proceed with adopting it formally.

CONCLUSION

We encourage the Department to proceed with the requested rulemaking promptly. If you have any questions, please contact Joe Maxwell, President of Farm Action, jmaxwell@farmaction.us.

Sincerely,

Farm Action
Open Markets Institute
United Food & Commercial Workers International Union
R-CALF USA
Western Organization of Resource Councils

Cc: Secretary of Agriculture Tom Vilsack, c/o Katharine Ferguson
Andy Green, Senior Advisor for Fair and Competitive Markets, USDA
Tim Wu, Special Assistant to the President for Technology and Competition Policy

[4] In any event, a prediction that one or two courts of appeal, out of a dozen, might continue to refuse deference does not justify abandoning an effort when the Department has the better legal interpretation of the relevant statute and compelling policy reasons for promulgating the requested regulation.