June 21, 2021

Dr. Melissa R. Bailey
Agricultural Marketing Service
United States Department of Agriculture
Room 2055–S
STOP 0201
1400 Independence Avenue SW
Washington, DC 20250-0201

Re: Supply Chains for the Production of Agricultural Commodities and Food Products; Document Number AMS–TM–21–003; April 21, 2021; 86 *Fed. Reg*. 20652.

Dear Dr. Bailey:

The North American Meat Institute (NAMI or the Meat Institute) submits these comments regarding the above-referenced notice and request for comments (notice). The Meat Institute is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products. NAMI members include more than 350 meat packing and processing companies, large and small, and account for more than 95 percent of United States output of meat and poultry products. The Meat Institute provides regulatory, scientific, legislative, public relations, and educational services to the meat and poultry packing and processing industry. The notice's scope is exceptionally broad and NAMI's comments will focus on certain elements of the notice; especially regarding resiliency and the capacity of the meat industry supply chains.[1]

The pandemic that began in 2020 and continues today may be the ultimate black swan event. But its occurrence does not automatically mean the system needs to be torn down and rebuilt. The pandemic has spawned some new bad ideas, and resurrected other bad ideas, seemingly without recognizing certain economic realities.

[1] 86 *Fed. Reg*. at 20653.

The U.S. Meat Industry is Efficient and Affords Americans the Benefit of Spending Less of their Personal Disposable Income on Food than any other Country in the World.

Notwithstanding some popular perspectives being espoused about supply chains, particularly the meat the industry's response to significant "black swan" events, *e.g*., the Holcomb fire and the recent cybersecurity attack, plus the COVID-19 pandemic, the facts support the conclusion the industry fared reasonably well in extraordinary circumstances. One can argue the market worked as one would expect and suggestions that the government needs to step in and "do something" may be trying to fix something that is not broken.[2]

Before trying to "fix" something it is prudent to look back and acknowledge the benefits that flow from the system as it exists. In 2019, Americans spent an average of 9.5 percent of their disposable personal incomes on food—divided between food at home (4.9 percent) and food away from home (4.6 percent). Between 1960 and 1998, the share of disposable personal income spent on total food by Americans, on average, fell from 17.0 to 10.1 percent, driven by a declining share of income spent on food at home.[3] Indeed, Americans spend less of their disposable personal income on food than any other country in the world. This remarkable drop is attributable largely to systemic efficiencies that allow food processors to offer food to consumers at lower prices.

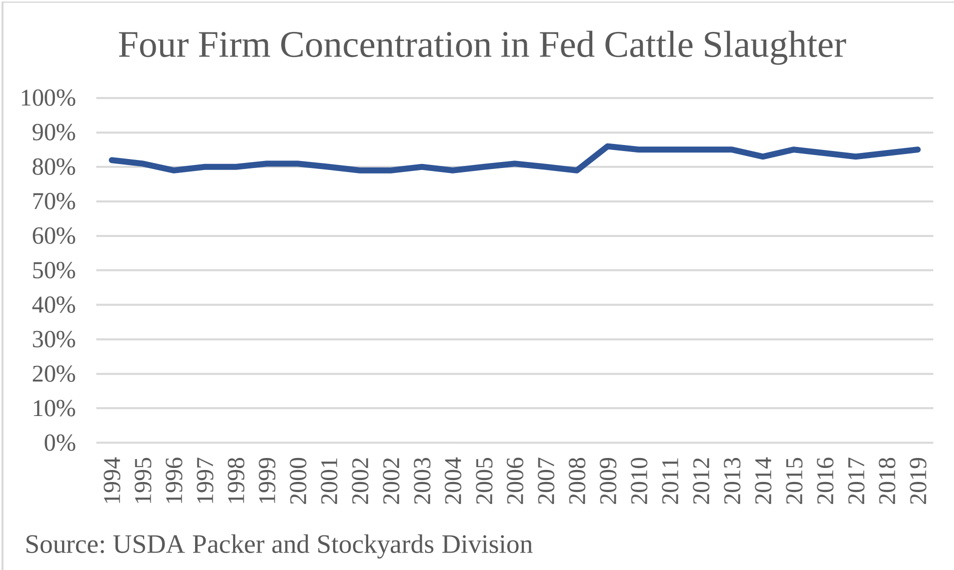
Comments about Increasing Consolidation and Concentration are Misplaced.

At least for the meat industry, claims about increasing consolidation and concentration demonstrate little awareness of the industry's history. The meat industry, particularly the beef packing industry, has been and continues to be one of the most highly scrutinized industries when it comes to antitrust review. The four firm packer concentration ratio in beef packing and pork packing is monitored by the Packers and Stockyards Division (P&S) of the Agricultural Marketing Service. Not only does P&S monitor the industry, any potential merger or acquisition regulators believe threatens "too much market power" that could "yield less competition" and be "ripe for market abuse" is subject to review by the Justice Department or the Federal Trade Commission. The last proposed merger of two the "big four" fed cattle slaughterers occurred in 2008 – and it was blocked by the

[2] *Economic Reasons for What was Observed in Fed Cattle and Beef Markets During the Spring of 2020,* Steve Koontz, Department of Agricultural & Resource Economics, Colorado State University, may 28, 2020.

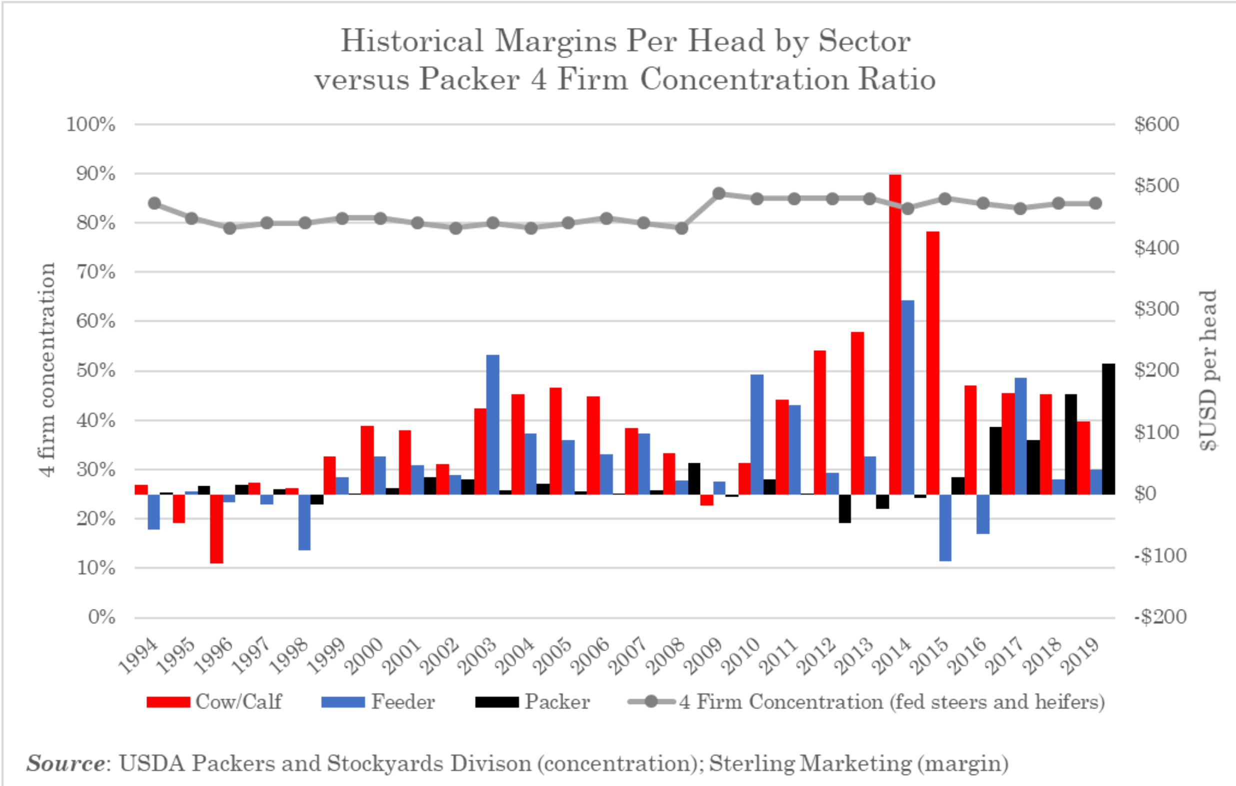
[3] https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/food-prices-and-spending/

Department of Justice. The fact is, the four-firm concentration ratio in fed cattle beef packing has not changed meaningfully in more than 25 years.



Nor has this ratio precluded any sector of the beef industry, cow-calf producers, feedlots, or packers, from enjoying positive margins generally. [4]

[4] *Meat and Poultry Facts*, 2019-2020 Data, Source: Sterling Marketing, Inc., January 2020, p. 21.



The chart shows no sector -- cow-calf, feedlot, or packer -- had positive margins every year. But the chart also highlights the fallacy that the four-firm concentration in the fed cattle industry precludes anyone other than packers from making money. For example, the four-firm ratio in 2014, when cow-calf and feedlot margins were at record highs, was the same as in 2017 when all three sectors showed positive margins. Through this 25-year window the cow-calf sector incurred negative margins the fewest number of years of the three.

<u>It's not just Capacity, but Livestock Inventories and the Ability to Utilize Capacity to Process those Inventories that Affect the Markets.</u>

That the pandemic affected the livestock and meat markets is indisputable. The limitations on processing cattle and hogs in some locations because of employee absences, either due to infection or absenteeism and sometimes due to government intervention that closed plants, undoubtedly caused a backlog. And that backlog came when livestock numbers were high and those large inventories have persisted. The calls for more capacity need to come with answers to many questions, including: who will build it; who will fund it; who will staff it; will there be sufficient livestock in years to come; among others?

Before the pandemic, for the first three months of 2020, cattle and calves on feed for the slaughter market in the United States for feedlots with capacity of 1,000 or more head was slightly above the first three months of 2019. The pandemic upset the market and the industry has been trying to catch up ever since. USDA reports the industry has the second highest cattle on feed inventory ever record for four straight months, February through May 2021. In short, there was a significant "kink in the chain" in 2020 and the industry is still trying to catch up.

Calls for the government to make the food system more resilient by ensuring there is more packing capacity ignore important considerations. First, in the hog industry more capacity has been added over the last several years in response to market forces. Significant harvest facilities have been opened in the last few years in Michigan, Missouri, and Iowa, with smaller plants also opening -- before the pandemic and in response to market forces. And just last week Wholestone Farms announced plans to build a packing facility in South Dakota.[5] In cattle, a plant recently opened and expansions and new facilities have been announced, all in response to market forces.

2020-2021 Publicly Announced Beef Packing Capacity Expansion

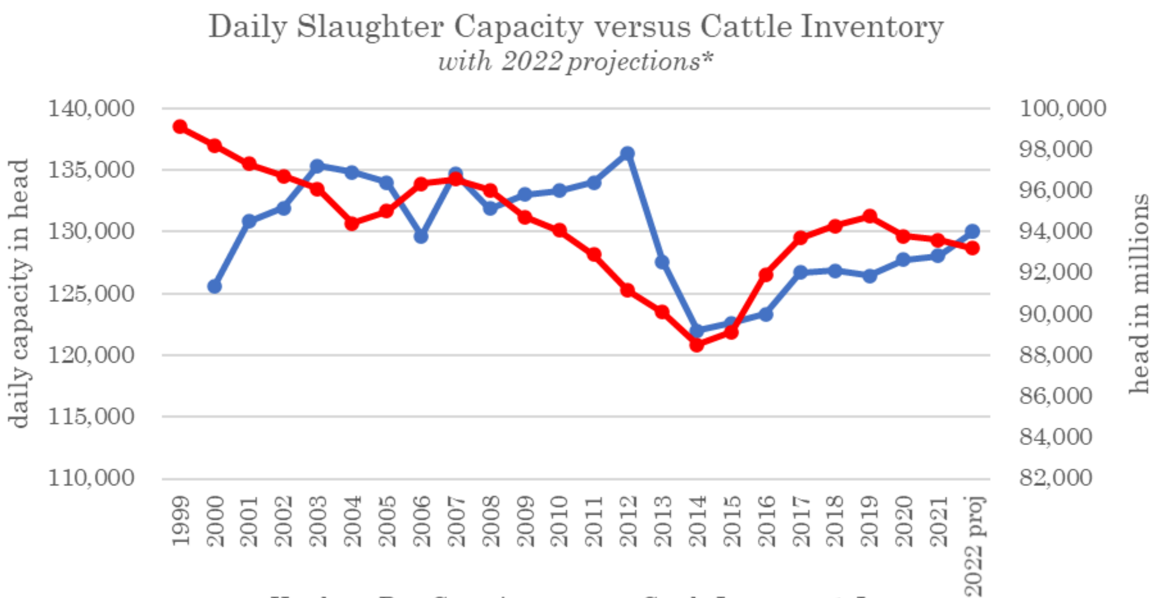
Packer	Announced		Capacity *hd/day*	State	Est Investment	Ownership	Est on-line
	Date	Action					
AgriBeef/ True West	Aug 2020	New Plant	500	ID		Producer	TBD
FPL	Oct 2020	Expansion	500	GA	$120 mln	FPL	Q42021
Iowa Premium/ National Beef	Mar 2021	Expansion	1,250	IA	$100 mln	National Beef	Q42022
Sustainable Beef	Mar 2021	New Plant	1,400	NE	$300 mln	Feeder	TBD
Missouri Prime	Mar 2021	Converted pork plant	500	MO		NexGen, feeders	Mar 2021
JBS	Jun 2021	Expansion	1,050	NE	$150 mln	JBS	Q42021
American Food Group	Jun 2021	New Plant		WI		AFG	TBD
TOTAL			5,200	***Source***: company press releases and news coverage			

These new entrants or company expansions were based on decisions to build or expand based on market conditions, not because of government intervention. This market-based reaction is exactly what cattle industry analysts have called for in

[5] https://www.prnewswire.com/news-releases/continuing-to-bring-the-consumer-closer-to-the-farmer-301311489.html

reports. As Rabobank said in September 2020, "An additional daily packing capacity of 5,000 to 6,000 head of fed cattle could restore the historical balance of fed cattle supplies and packing capacity and still allow for positive packer margins."[6]

The chart below provides some insight into the industry's response to market signals in terms of capacity and the size of the cattle herd. It also suggests adding considerably more capacity for the sake of capacity may be shortsighted.



** publicly announced capacity expansions; cattle inventory implied from USDA May 2021 Livestock Dairy &Poultry Outlook*

Second, calls for smaller, "regional" plants as a means to build "resiliency" into the system do not align with sound economic thinking. The Rabobank report said "While many have discussed the need for more geographically dispersed, smaller plants, adding packing capacity in the name of supply chain resiliency is unlikely to work. It must be driven by long-run economics."[7] Dr. Steve Koontz at Colorado State University expressed similar concerns about building capacity that is not used when not needed but built "just in case."[8]

Large harvest facilities that were shuttered or slowed substantially because of the pandemic affected livestock producers and generated significant media

[6] *The Case for Capacity; Can the US Beef Industry Expand packing Capacity?* Rabobank, Sept. 2020 at 1.
[7] *Id*. at 5.
[8] Koontz at 8.

attention last year. But COVID's reach was not limited to large packing plants. The Food and Environmental Reporting Network (FERN) reported almost 600 meat processing plants had employees infected with coronavirus. Given there are approximately 6,000 federally inspected establishments the number likely was higher.

And small and midsize companies endured many of the same challenges large companies faced, perhaps more so. For example, the pandemic's impact on foodservice has been well-documented and it is likely foodservice comprises a larger component of sales for small and mid-size plants than large harvest facilities.[9] The many restaurants that closed, either temporarily or permanently, affected establishments of all sizes because the products made for foodservice, their packaging, their size, *etc*. differ markedly from the products offered to consumers at retail. Creating smaller, regional harvest facilities will not address this issue. Given the significant impact on jobs, *etc*. the foodservice industry has on the economy, encouraging more in-home food consumption over away-from-home consumption seems counterproductive. Large harvest facilities were not the only plants affected; they just got most of the attention.

Demands for more harvest capacity also ignore another fundamental issue: a significant, perhaps the biggest, problem facing the meatpacking industry is labor, or the shortage of it. Labor challenges were not caused by the pandemic; COVID-19 only exacerbated the issue. During the height of the pandemic, meatpacker operations were limited by labor availability. That availability was affected by employees who became sick or infected, absenteeism caused by fear, and sometimes state or local health agencies. These issues, coupled with the challenges presented by the layout and nature of harvest facilities in particular that often make social distancing difficult led to slowing line speeds and reduced throughput. Looking forward, not only does industry need to be better prepared for future pandemics, but to aid the supply chain, USDA and other federal agencies and departments should work in coordination the National Governors Association and organizations representing state legislatures to create a more uniform, consistent response plan at the state and local level.[10] Doing so will help alleviate the challenges encountered by the "hodge podge" of enforcement actions, however well-intentioned, taken at the state and local level.

Beyond the challenges the pandemic created regarding labor availability, the meat industry has been facing a labor shortage for some time. Recent press reports discuss wage increases "across the board" of $3.00 an hour, and signing bonuses,

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[9] For example, the Economic Research Service reports "Food away-from-home accounted for 54.8 percent of total food expenditures, up from 50.1 percent in 2009." https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/food-prices-and-spending/?topicId=2b168260-a717-4708-a264-cb354e815c67 Half of beef consumption is away from home. Koontz paper page 4.
[10] See the work being done by the Critical Infrastructure Supply Chain Council.

moving bonuses, and retention bonuses. And a labor shortage remains with demand not only on processing lines but for warehouse workers, maintenance, etc. [11]

One issue highlighted in the footnoted story and repeated often is the adverse impact supplemental federal government unemployment payments are having on labor availability. In some states a worker can collect more money from state and federal unemployment benefits than they can make working in a meatpacking facility. Some governors have announced those supplemental payments will cease and they are scheduled to end this fall. Those federal supplements payments should be discontinued to encourage people to return to the workforce.

<u>Legislation that purportedly would "increase capacity" by allowing the shipment of state inspected products across state lines without meeting federal standards is ill-conceived.</u>

Much was made during the height of the pandemic about small, typically state inspected plants (if inspected) being overwhelmed by requests to process livestock and the subsequent calls, and bills introduced, to allow state inspected plants to ship across state lines. Those bills ignore the fact that there already exists a program, administered by the Food Safety and Inspection Service, that allows state inspected establishments to ship meat and poultry products across state lines – the Cooperative Interstate Shipment (CIS) program.

Nine states have elected to participate in the program, with two of those nine, Iowa and South Dakota, announced during the COVID-19 pandemic. CIS was created by Congress as part of the 2008 Farm Bill and ensures product moving in interstate commerce meets the requisite food safety standards. CIS also ensures level playing for companies that wish to sell in interstate commerce.

Assertions that meeting federal standards is too burdensome for small and very small plants ignore two fundamental points. First, food safety should be non-negotiable. Anyone wishing to sell in interstate commerce should be willing and able to meet the food safety and other consumer protection standards set by FSIS. Second, by definition the FSIS requirements are not too burdensome and the proof of that is the significant number of small and very small plants operating subject to federal inspection. There are approximately 6,000 federally inspected establishments and more than 5,000 of them are small or very small. If they can do it so can state inspected plants, and they can, as evidenced by the growing number of states participating in CIS.

[11] https://brownfieldagnews.com/news/missouri-beef-processor-on-labor-shortage/

<u>USDA's recent announcement it will resurrect Packers and Stockyards rules previously proposed will adversely affect consumers, producers, and packers.</u>

On June 11 USDA announced it planned to propose rules to "strengthen enforcement" of the Packers and Stockyards Act (PSA).[12] The concepts expressed in the press release and reported in the media are not new and were considered and rejected. If USDA proposes and ultimately adopts the rules as outlined in the press release, not only will they conflict with judicial precedent in eight federal appellate circuits, they will adversely affect consumers, livestock producers, and packers.

The judicial system's rejection of the concepts articulated in the press relase is best captured in the *en banc* decision from the United States Court of Appeals for the Fifth Circuit, *Wheeler v. Pilgrim's Pride Corp*. 591 F.3d 355 (5th Cir. 2009) (*en banc*), which began as follows.

> Once more a federal court is called to say 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. That is this holding. *Wheeler* 591 F.3d at 357.

Writing for the majority, Judge Reavley ended by saying:

> 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. … Given the clear antitrust context in which the PSA was passed, the placement of §192(a) and (b) among other subsections that clearly require anticompetitive intent or effect, and the nearly ninety years of circuit precedent, we find too that a failure to include the likelihood of an anticompetitive effect as a factor actually goes against the meaning of the statute. *Id*.

And the most recent circuit to address the issue, the Sixth Circuit, said it best.

> 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

[12] https://www.usda.gov/media/press-releases/2021/06/11/usda-begin-work-strengthen-enforcement-packers-and-stockyards-act

> 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, <u>with unanimous results</u>. *See Wheeler*, 591 F.3d 355; *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1230 (10th Cir. 2007); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006); *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005), *cert. denied*, 546 U.S. 1034 (2005); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *Philson v. Goldsboro Milling Co.*, Nos. 96-2542, 96-2631, 164 F.3d 625, 1998 WL 709324, at *4-5 (4th Cir. Oct. 5, 1998) (unpublished table decision); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985); *DeJong Packing Co. v. United States Dep't of Agric.*, 618 F.2d 1329, 1336-37 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980); and *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir. 1976).[13] (Emphasis added)

Setting aside the caselaw, it is beyond dispute that eliminating the need for a plaintiff to show injury to competition, or likely injury to competition, will encourage litigation, most of it likely specious litigation. That threat will cause packers to terminate or limit their use of alternative marketing agreements (AMAs), which are popular with producers and benefit consumer, producers, and packers.

The Research Triangle Institute conducted the definitive study about the use of and benefits that flow to all sectors regarding AMAs.[14] In its executive summary RTI said:

> Many meat packers and livestock producers obtain benefits through the use of AMAs, including management of costs, management of risk (market access and price risk), and assurance of quality and consistency of quality.[15]

RTI also said:

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[13] *Terry v. Tyson Farms, Inc.,* 604 F.3d 272, 277 (6th Cir. 2010)

[14] See United States Dept. of Agriculture. Grain Inspection, Packers and Stockyard Administration. *GIPSA Livestock and Meat Marketing Study*. Vol. 1. Research Triangle Park: RTI International, 2007

[15] *Id*. at ES-3.

> In aggregate, restrictions on the use of AMAs for sale of livestock to meat packers would have negative economic effects on livestock producers, meat packers, and consumers.[16]

RTI also found, for cattle, that

> Hypothetical reductions in AMAs, as represented by formula arrangements (marketing agreements and forward contracts) and packer ownership, are found to have a negative effect on producer and consumer surplus measures. … Over 10 years, a hypothetical 25% restriction in AMA volumes resulted in a decrease in cumulative present value of surplus of
>
> – 2.67% for feeder cattle producers,
>
> – 1.35% for fed cattle producers
>
> – 0.86% for wholesale beef producers (packers)
>
> and – 0.83% for beef consumers.

A hypothetical 100% restriction in AMA volumes resulted in a decrease in cumulative present value surplus of

> – 15.96% for feeder cattle producers,
>
> – 7.82% for fed cattle producers,
>
> – 5.24% for wholesale beef producers (packers), and
>
> – 4.56% for beef consumers.[17]

Similarly, for hogs RTI said:

> In analyzing the economic effects of hypothetical restrictions on the use of AMAs in the hog and pork industries, we found that hog producers would lose because of the offsetting effects of hogs diverted from AMAs to the spot market, consumers would lose as wholesale and retail pork prices rise, and packers would gain in the short run but neither gain nor lose in the long run.[18]

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[16] *Id*.
[17] *Id*. at ES-8-9.
[18] *Id*. at ES-13.

In short, advancing concepts that have been put forward in the past, conflict with well- established judicial precedent, and will have a negative impact on producers and consumers is not formula for enhancing resiliency in the supply chain.

*   *   *   *   *

The Meat Institute appreciates the opportunity to submit these comments. Please contact me if you have questions or would like to discuss the comments.

Respectfully submitted,

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