

**In re: EXCEL CORPORATION.  
P. & S. Docket No. 99-0010.  
Decision and Order.  
Filed January 30, 2003.**

**P&S – Unfair or deceptive practice – Livestock purchase – Carcass merit basis – Purposes of the Packers and Stockyards Act – Broad authority conferred by the Packers and Stockyards Act – Notification to sellers of details of purchase contract – Notification to sellers of grading to be used – “Grading” defined – Advisory rules – Substantive rules – Sanction – Cease and desist order – Discovery of witness names – Arbitration order – Vague regulation – Credibility determinations – Cross appeal – Second appeal petition.**

The Judicial Officer (JO) affirmed the decision of Chief Administrative Law Judge (ALJ) James W. Hunt: (1) concluding Respondent failed to make known to hog producers the change in the formula to estimate lean percent prior to purchase of hogs on a carcass merit basis from those producers in violation of 7 U.S.C. § 192(a) and 9 C.F.R. § 201.99(a); and (2) ordering Respondent to cease and desist from failing to comply with 7 C.F.R. § 201.99(a). The JO rejected Respondent’s contention that the Packers and Stockyards Act must be narrowly construed stating the Packers and Stockyards Act is remedial legislation that should be liberally construed to effectuate its purposes. The JO stated two of the primary purposes of the Packers and Stockyards Act are to prevent economic harm to livestock producers and to maintain open and free competition. Respondent impeded competition by failing to make known to producers the change in the formula it used to estimate lean percent of hogs, a factor that affected the amount Respondent paid for hogs. The JO also rejected Respondent’s contention that 7 C.F.R. § 201.99 was an advisory regulation that did not have the force and effect of law. Further, the JO rejected Respondent’s contention that 7 C.F.R. § 201.99(a) was vague, stating the regulation put Respondent on notice that it is required to make known to hog producers a change in the formula to estimate lean percent. The JO stated the formula to estimate lean percent is part of the grading process and the regulation explicitly requires packers to notify producers of “the grading to be used.” The JO agreed with Complainant’s contention that, under the Rules of Practice (7 C.F.R. § 1.140(a)(1)(iv)), Complainant was not required to provide Respondent the names of anticipated witnesses. The JO found the Chief ALJ’s cease and desist order did not bear a reasonable relation to the unlawful practice the Chief ALJ found to exist and the Chief ALJ’s order that Respondent agree to submit the matter to arbitration with hog producers was not a sanction authorized by the Packers and Stockyards Act. However, the JO rejected Complainant’s contention that the Chief ALJ’s failure to assess a severe civil penalty was error. The JO rejected Respondent’s request that he reverse the Chief ALJ’s credibility determination with respect to one of the witnesses, stating the JO gives great weight to the credibility determinations of administrative law judges and there was no basis to reverse the Chief ALJ’s credibility determination. Finally, the JO refused to consider the new issues raised in Respondent’s response to Complainant’s appeal petition stating, under the Rules of Practice (7 C.F.R. § 1.145(b)), a party who has previously filed an appeal petition must limit the response to supporting or opposing the other party’s appeal petition.

Patrice H. Harps and Eric Paul, for Complainant.  
John R. Fleder and Brett T. Schwemer, and Jeff P. DeGraffenreid, for Respondent.  
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.  
*Decision and Order issued by William G. Jenson, Judicial Officer.*

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**PROCEDURAL HISTORY**

Harold W. Davis, Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a “Complaint and Notice of Hearing” on April 9, 1999. Complainant instituted this proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229) [hereinafter the Packers and Stockyards Act]; the regulations issued under the Packers and Stockyards Act [hereinafter the Regulations] (9 C.F.R. §§ 201.1-.200); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice]. On April 21, 1999, Complainant filed an “Amended Complaint and Notice of Hearing” [hereinafter Amended Complaint].

Complainant alleges that, during the period between October 23, 1997, and June 1, 1998, Excel Corporation [hereinafter Respondent] violated section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) and section 201.99 of the Regulations (9 C.F.R. § 201.99) by failing to make known to hog producers a change in the formula used to estimate lean percent in hogs, prior to Respondent’s purchasing hogs on a carcass grade, carcass weight, or carcass grade and weight basis. Complainant alleges that, as a result of the change in the formula to estimate lean percent in hogs, Respondent paid hog producers approximately \$1,839,000 less for approximately 19,942 lots of hogs than Respondent would have paid if Respondent had not changed the formula. (Amended Compl. ¶¶ II-III.) On May 18, 1999, Respondent filed an “Answer” denying the material allegations of the Amended Complaint.<sup>1</sup>

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<sup>1</sup>On March 29, 2001, Complainant moved to revise the Amended Complaint to conform to the evidence (Tr. 2260). Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] granted Complainant’s motion in part allowing Complainant to revise the period during which Respondent’s violations of the Packers and Stockyards Act and the Regulations allegedly occurred and Complainant’s alleged estimated harm to hog producers caused by Respondent’s change in the formula used to estimate lean percent in hogs (Tr. 2260-87). The revised Amended Complaint alleges Respondent violated section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) and section 201.99 of the Regulations (9 C.F.R. § 201.99) during the period between October 23, 1997, and July 20, 1998, and alleges additional economic harm incurred by hog producers as a result of Respondent’s change of the formula used to estimate lean percent in hogs. On May 7, (continued...)

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The Chief ALJ presided over a hearing on July 18-21 and July 25-28, 2000, in Wichita, Kansas; September 25-27, 2000, in Chicago, Illinois; and March 27-29, 2001, in Wichita, Kansas. Patrice H. Harps and Eric Paul, Office of the General Counsel, United States Department of Agriculture, represented Complainant. John R. Fleder, Brett T. Schwemer, and Jeff P. DeGraffenreid represented Respondent.

On July 16, 2001, Complainant filed "Complainant's Proposed Findings of Fact, Conclusions of Law, and Proposed Order" [hereinafter Complainant's Post-Hearing Brief] and Respondent filed "Excel Corporation's Post-Hearing Opening Brief" [hereinafter Respondent's Post-Hearing Brief]. On September 4, 2001, Complainant filed "Complainant's Brief in Reply to Respondent's Post-Hearing Opening Brief" [hereinafter Complainant's Post-Hearing Reply Brief] and Respondent filed "Excel Corporation's Post-Hearing Reply Brief" [hereinafter Respondent's Post-Hearing Reply Brief].

On February 7, 2002, the Chief ALJ issued a "Decision and Order" [hereinafter Initial Decision and Order]: (1) finding Respondent failed to notify hog producers of an October 1997 change in the formula Respondent used to estimate lean percent in hogs prior to changing the formula; (2) concluding Respondent violated section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) and section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) when Respondent failed to notify hog producers of the change in the formula used to estimate lean percent in hogs; (3) ordered Respondent to cease and desist from failing to notify livestock sellers of any change in the formula used to estimate lean percent; and (4) ordered Respondent to submit to arbitration with hog producers who sold hogs to Respondent between October 1997 and July 1998 under Respondent's changed formula to estimate lean percent, who may have received less money for their hogs than the hog producers would have received under the old formula, and who have not otherwise been compensated or resolved the matter by agreement with Respondent (Initial Decision and Order at 26-27).

On March 13, 2002, Complainant filed "Complainant's Appeal of Certain Procedural Rulings Issued by Chief Administrative Law Judge Hunt" [hereinafter Complainant's Appeal of Procedural Rulings], "Complainant's

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<sup>1</sup>(...continued)

2001, Respondent filed "Excel Corporation's Answer to Revised Amended Complaint" which denies the material allegations of Complainant's revised Amended Complaint.

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Petition of Appeal” [hereinafter Complainant’s Appeal Petition], and “Complainant’s Brief in Support of Its Petition of Appeal” [hereinafter Complainant’s Appeal Brief]. On March 13, 2002, Respondent filed “Excel Corporation’s Appeal Petition and Brief” [hereinafter Respondent’s Appeal Petition]. On June 6, 2002, Complainant filed “Complainant’s Response to Excel Corporation’s Appeal Petition and Brief” [hereinafter Complainant’s Response]. On June 6, 2002, Respondent filed “Excel Corporation’s Response to Complainant’s Appeal Petition” [hereinafter Respondent’s Response to Complainant’s Appeal]. On June 28, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I disagree with the Chief ALJ’s finding that Respondent violated a new duty established in this proceeding and the Chief ALJ’s order that Respondent submit to arbitration. However, I agree with many of the Chief ALJ’s findings of fact, the Chief ALJ’s conclusion that Respondent violated section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) and section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)), and the Chief ALJ’s imposition of a cease and desist order. Therefore, except for significant modifications to the Chief ALJ’s discussion and other minor modifications, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Chief ALJ’s Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ’s discussion of sanction, as restated.

Complainant’s exhibits are designated by “CX.” Respondent’s exhibits are designated by “RX.” Transcript references are designated by “Tr.”

**APPLICABLE STATUTORY AND REGULATORY PROVISIONS**

7 U.S.C.:

**TITLE 7—AGRICULTURE**

.....

**CHAPTER 9—PACKERS AND STOCKYARDS**

.....

**SUBCHAPTER II—PACKERS GENERALLY**

**PART A—GENERAL PROVISIONS**

**§ 191. “Packer” defined**

When used in this chapter the term “packer” means any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer, or distributor in commerce.

**§ 192. Unlawful practices enumerated**

It shall be unlawful for any packer with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device[.]

. . . .

**§ 193. Procedure before Secretary for violations**

**(a) Complaint; hearing; intervention**

Whenever the Secretary has reason to believe that any packer has violated or is violating any provision of this subchapter, he shall cause a complaint in writing to be served upon the packer, stating his charges in that respect, and requiring the packer to attend and testify at a hearing at a time and place designated therein, at least thirty days after the service of such complaint; and at such time and place there shall be afforded the packer a reasonable opportunity to be informed as to the evidence introduced against him (including the right of cross-examination), and to be heard in person or by counsel and through witnesses, under such regulations as the Secretary may prescribe. . . .

**(b) Report and order; penalty**

If, after such hearing, the Secretary finds that the packer has violated or is violating any provisions of this subchapter covered by the charges, he shall make a report in writing in which he shall state his findings as to the facts, and shall issue and cause to be served on the packer an order

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requiring such packer to cease and desist from continuing such violation. The testimony taken at the hearing shall be reduced to writing and filed in the records of the Department of Agriculture. The Secretary may also assess a civil penalty of not more than \$10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business. If, after the lapse of the period allowed for appeal or after the affirmance of such penalty, the person against whom the civil penalty is assessed fails to pay such penalty, the Secretary may refer the matter to the Attorney General who may recover such penalty by an action in the appropriate district court of the United States.

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**SUBCHAPTER V—GENERAL PROVISIONS**

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**§ 223. Responsibility of principal for act or omission of agent**

When construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any packer, any live poultry dealer, stockyard owner, market agency, or dealer, within the scope of his employment or office, shall in every case also be deemed the act, omission, or failure of such packer, any live poultry dealer, stockyard owner, market agency, or dealer, as well as that of such agent, officer, or other person.

**§ 228. Authority of Secretary**

**(a) Rules, regulations, and expenditures; appropriations**

The Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter and may cooperate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency, or political subdivision thereof, or any person[.]

7 U.S.C. §§ 191, 192(a), 193(a)-(b), 223, 228(a).

28 U.S.C.:

**TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE**

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**PART VI—PARTICULAR PROCEEDINGS**

....

**CHAPTER 163—FINES, PENALTIES AND FORFEITURES**

**§ 2461. Mode of recovery**

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**FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT**

**SHORT TITLE**

SECTION 1. This Act may be cited as the “Federal Civil Penalties Inflation Adjustment Act of 1990”

**FINDINGS AND PURPOSE**

SEC. 2. (a) FINDINGS.—The Congress finds that—

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE.—The purpose of this Act is to establish a mechanism that shall—

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

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DEFINITIONS

SEC. 3. For purposes of this Act, the term—

(1) “agency” means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) “civil monetary penalty” means any penalty, fine, or other sanction that—

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) “Consumer Price Index” means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION  
ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter—

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.], the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the Occupational Safety and Health Act of 1970 [20 U.S.C. 651 et seq.], or the Social Security Act [42 U.S.C. 301 et seq.], by the inflation adjustment described under section 5 of this Act [bracketed material in original]; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL  
MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.—The inflation adjustment under section 4

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shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest—

- (1) multiple of \$10 in the case of penalties less than or equal to \$100;
- (2) multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000;
- (3) multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000;
- (4) multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000;
- (5) multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and
- (6) multiple of \$25,000 in the case of penalties greater than \$200,000.

(b) DEFINITION.—For purposes of subsection (a), the term “cost-of-living adjustment” means the percentage (if any) for each civil monetary penalty by which—

- (1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds
- (2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.—The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 note.

7 C.F.R.:

**TITLE 7—AGRICULTURE**

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**SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE**

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**PART 3—DEBT MANAGEMENT**

....

**Subpart E—Adjusted Civil Monetary Penalties**

**§ 3.91 Adjusted civil monetary penalties.**

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties—*....

....

(6) *Grain Inspection Service, Packers and Stockyards Administration.* (i) Civil penalty for a packer violation, codified at 7 U.S.C. 193(b), has a maximum of \$11,000.

7 C.F.R. § 3.91(a), (b)(6)(i).

9 C.F.R.:

**TITLE—ANIMALS AND ANIMAL PRODUCTS**

....

**CHAPTER II—GRAIN INSPECTION, PACKERS AND  
STOCKYARDS ADMINISTRATION  
(PACKERS AND STOCKYARDS PROGRAMS),  
DEPARTMENT OF AGRICULTURE**

....

**PART 201—REGULATION UNDER THE PACKERS  
AND STOCKYARDS ACT**

....

**GENERAL**

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**§ 201.99 Purchase of livestock by packers on a carcass grade,  
carcass weight, or carcass grade and weight basis.**

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(a) Each packer purchasing livestock on a carcass grade, carcass weight, or carcass grade and weight basis shall, prior to such purchase, make known to the seller, or to his duly authorized agent, the details of the purchase contract. Such details shall include, when applicable, expected date and place of slaughter, carcass price, condemnation terms, description of the carcass trim, grading to be used, accounting, and any special conditions.

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(e) Settlement and final payment for livestock purchased by a packer on a USDA carcass grade shall be on an official (final—not preliminary) grade. If settlement and final payment are based upon any grades other than official USDA grades, such other grades shall be set forth in detailed written specifications which shall be made available to the seller or his duly authorized agent.

9 C.F.R. § 201.99(a), (e).

**CHIEF ADMINISTRATIVE LAW JUDGE'S  
INITIAL DECISION AND ORDER  
(AS RESTATED)**

**Statement of the Case**

Respondent, a packer, buys livestock for slaughter which Respondent then manufactures into meat products for sale in commerce. Respondent's corporate address is P.O. Box 2519, Wichita, Kansas 67201. Respondent is estimated to be the fourth or fifth largest hog slaughterer in the United States. (Answer ¶ 2; Tr. 2329.)

Respondent acquires hogs from approximately 2,000 hog producers (Tr. 1548). The record does not indicate the total number of hogs processed by Respondent, but at one of its three facilities, Respondent slaughters up to 10,000 hogs a day (RX 55 at 1; Tr. 132). Respondent buys some animals on a "spot" market basis, that is, the price is negotiated for that particular lot of hogs. Respondent obtains other hogs through short-term and long-term contracts whereby producers agree to sell a given number of hogs to Respondent for a set base price. Not all contracts are in writing. (Tr. 128.)

Most hogs are sold to Respondent under its "carcass merit" program which rewards producers who raise hogs having a high percent of lean meat. Hogs with a high percent of lean meat have a higher market value than hogs with a

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low percent of lean meat. The process by which Respondent purchases hogs under its carcass merit program starts with a hog producer delivering hogs to one of Respondent's buying stations where the hogs are put into a holding pen, tattooed for identification, given a lot number, weighed, and inspected. The hogs are then transported to one of Respondent's slaughtering facilities. Respondent's hog slaughtering facilities are located in Beardstown, Illinois, Ottumwa, Iowa, and Marshall, Missouri. After a hog is killed, bled, eviscerated, de-haired, washed, and inspected, the carcass is evaluated for its estimated percentage of lean (red) meat. Respondent then applies this percentage figure to a pricing table called the "lean percent matrix" to determine whether the hog producer receives a discount for the carcass -- a deduction from the base price -- or a premium -- an addition to the base price. The higher the estimated lean percent the higher the premium.

Lean percent may be estimated by various methods. No industry standard exists for estimating lean percent. (Tr. 947.) The most accurate method (but also the most impractical method for large slaughtering operations) is to dissect a carcass and examine it for fat and lean meat content (Tr. 654, 671, 1500). Other less accurate methods of estimating lean percent are Ultrasound, ToBEC, AutoFom, and the Fat-O-Meat'er (RX 20). The method used by Respondent is the Fat-O-Meat'er (Tr. 61).

The Fat-O-Meat'er, developed in Denmark from a study of European hogs, has been used by Respondent for about 10 years. The Fat-O-Meat'er is a hand-held device with a probe that is inserted in the carcass. A light measures the difference between the loin-eye and back fat depth. A regression formula or equation embedded in the Fat-O-Meat'er, commonly referred to as the "Danish formula" ( $\text{Lean Meat} = 58.86 - 0.61 \times \text{Back Fat} + 0.12 \times \text{Loineye Depth}$ ), then uses this measurement to estimate the lean percent of the carcass. (CX 4 at 12.) A representative for SFK Technology, the company which manufactures the Fat-O-Meat'er, testified that the device is used worldwide and that it is a United States Department of Agriculture approved grading system. The SFK Technology representative said the Fat-O-Meat'er is used by 32 United States packers, but he did not know how many rely solely on the Danish formula to estimate lean percent. He said the Fat-O-Meat'er provides data to a packer and the packer then determines how the information is used. Formulas vary from packer to packer with at least three packers using the Danish formula. Some packers use a hog's hot carcass weight (the weight after the slaughtering process is completed but before chilling) together with the Danish formula to estimate lean percent. (Tr. 60, 63, 76-77, 80, 1187-88.)

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Scott Eilert, research director for Respondent's Pork Division, and Gary Kohake, former president of Respondent's Pork Division, testified that they considered the Fat-O-Meat'er to be a grading system (Tr. 104-05, 948-49). Steve Meyer, an economist with the National Pork Producers Council,<sup>2</sup> testified that grading is a system to categorize carcasses and that an equation to estimate lean percent is part of the grading process (Tr. 654-79). David Meisinger, an assistant vice president with the National Pork Producers Council, opined that grading includes all carcass evaluation systems (Tr. 1498). The United States Department of Agriculture no longer has a grading system. Packers use their own grading systems to evaluate carcasses which, as discussed in this Decision and Order, *infra*, must be disclosed to producers.

After a producer's lot of hogs is evaluated for lean percent, a computer determines the payment the hog producer will receive. The check sent to the hog producer is accompanied by a "kill sheet." The kill sheet contains such pertinent information as the date and number of hogs purchased, trim loss, lean percent, and value of each hog. (CX 6 at 30; Tr. 252.) Hog producers benefit economically by raising and selling hogs with a high lean percent, and, as one of Respondent's representatives testified, the kill sheet tells a hog producer how his or her hogs "performed" (Tr. 140, 994, 1487).

Producers selling hogs to Respondent on a carcass merit basis were aware that Respondent used the Fat-O-Meat'er to estimate lean percent and that, based on the lean percent, the matrix determined the price the producers received (Tr. 430, 927, 1552). Respondent provided its buyers with an explanation of the formula that they could use to explain the formula to hog producers, and some hog producers were told the formula. However, Respondent did not generally inform hog producers of the details of the formula. (Tr. 314, 441, 769, 1071-72, 1084, 1208, 1481, 1522, 1604, 1648.)

Complainant was aware prior to 1997 that Respondent did not tell hog producers the formula. Complainant's May 12, 1993, audit report on Respondent's use of the Fat-O-Meat'er stated: "The formula to convert probe millimeter readings to percentage of lean is not relayed to producers." (RX 55

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<sup>2</sup>The National Pork Producers Council is a contractor with the National Pork Board which is funded under a United States Department of Agriculture program through an assessment on each hog sold. The mission of the National Pork Producers Council is to improve the profitability of hog producers and provide consumers with a lean, wholesome, and nutritious product. The National Pork Producers Council believes that accuracy in the evaluation and estimation of the lean percent of carcasses leads to better pricing for hog producers. (Tr. 668, 673, 1202, 1456, 1487-88, 1513-14.)

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at 2; Tr. 441, 445-46, 1604-05.) The record further indicates that other packers in the industry that used the Fat-O-Meat'er also did not tell producers about their formulas to estimate lean percent (Tr. 672, 1214, 1345, 1371-72, 1647-48, 2455). One packer developed a brochure explaining its formula but the record does not establish that the brochure had been prepared prior to the year 2000 or distributed to producers (Tr. 985-86).

In 1997, Respondent began an effort to improve the accuracy of the Fat-O-Meat'ers' Danish formula to estimate lean percent. Respondent estimated the Fat-O-Meat'ers' Danish formula was only about 72-73 percent accurate. (Tr. 909-10, 1633.) After studying various methods, Respondent adopted a formula developed by Purdue University and promoted by the National Pork Producers Council [hereinafter the Purdue formula]. The Purdue formula uses hot carcass weight as a variable with the Danish formula to estimate lean percent  $(2.827 + (.469 * \text{Hot Carcass Weight}) - (18.47 * \text{Backfat Depth} * .0393701) + (9.824 * \text{Loineye Depth} * .0393701) / \text{Hot Carcass Weight})$  (CX 6 at 13). The Purdue formula was estimated to improve the accuracy of the measurement of lean percent to about 90 percent (Tr. 910, 1771).

Respondent, knowing the formula change could affect the price it paid for hogs, considered the economic effect on hog producers of the use of the Purdue formula (Tr. 114-15). Respondent concluded, based on a study of 1.5 million hogs, that there would be only a "minimal impact" on hog producers (Tr. 910-12, 969, 1644-45, 1843). Dr. Eilert testified that, overall, "[s]ome hogs would receive a higher lean percent as measured by our new equation, and some hogs would receive a lower lean percent as measured by the new equation, and some would not change" (Tr. 966).

Respondent decided not to tell hog producers about the change in the formula because, while it was not a secret, company officials believed that the formula, like the processing methods and technology it used, was not a factor that interested hog producers or formed a basis for whether they sold hogs to Respondent (Tr. 1645-46, 1649, 1724-25). One of Respondent's procurement managers equated the formula change with using a more accurate scale (Tr. 1547-48). Another consideration was the corporate belief that hog producers who received more because of a change to a more accurate formula would be unhappy because they had been selling in the past under an inaccurate formula, while hog producers who received less because of the change would be upset (RX 47 at 2; Tr. 1689-93). Donald Brandt, formerly an assistant procurement manager at Respondent's Ottumwa, Iowa, slaughtering facility, testified that sometime in the fall of 1997 he overheard a telephone conversation

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between Gary Baack, the procurement manager at Respondent's Ottumwa, Iowa, slaughtering facility, Ted Fritz, the Beardstown, Illinois, procurement manager, and Richard Gallant, Respondent's vice president for procurement. Donald Brandt testified that, after the call, Baack told Brandt that hog producers were not to be told about the formula change. (Tr. 145-46.) Baack, however, testified that he was never told by Gallant not to tell hog producers about the formula change (Tr. 1044). Fritz testified Gallant had told him that there was no need to tell hog producers about the formula change but that he was never told to refrain from telling hog producers about the formula change (Tr. 1521). Gallant said he had called all his procurement managers in the fall of 1997 about the formula change, except for Baack, who was on vacation at the time (Tr. 1852).

Before implementing the formula change, Respondent examined its written contracts with hog producers to determine if any of the contracts required Respondent to provide notice of the formula change. Respondent concluded that none of the contracts that it reviewed required Respondent to notify hog producers of the formula change (Tr. 1396-98, 1848-50). However, Respondent's contract with Tyson Foods, which supplied the majority of the hogs for Respondent's Marshall, Missouri, slaughtering facility, provided that, while Respondent had the right to change its method of carcass evaluation, Respondent had to conduct statistically sound tests to verify that Tyson Foods did not suffer any adverse economic effects from the change. Further, the contract provided that, if Tyson Foods did suffer adverse economic effects, Tyson Foods could terminate the contract. (CX 10 at 283-84.) Respondent notified Tyson Foods of the formula change. When Tyson Foods objected to the change, Respondent did not use the Purdue formula to estimate the lean percent of Tyson Foods' hogs. (Tr. 746-51.) Respondent's contracts with some of the other hog producers, including Heartland Pork Enterprises, Inc., and Hog, Inc., contained a provision that was similar to the provision in Respondent's contract with Tyson Foods, except that these hog producers, while having the right to have the matter submitted to arbitration, did not have the option to terminate the contract. (CX 11 at 7, CX 12 at 11.) Respondent did not notify these hog producers or the others of its intention to change the formula (Tr. 314, 1075). Respondent implemented the formula change at its Ottumwa, Iowa, and Beardstown, Illinois, slaughtering facilities in October 1997 and at the Marshall, Missouri, slaughtering facility in April 1998 (Tr. 126).

About 50 percent of the producers supplying hogs to Respondent always sold to Respondent (Tr. 1588-89). Others sold trial lots to Respondent and to other packers to determine where they could get the best price (Tr. 662,

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1179-80, 1192, 1379, 1587). Hog producers who sold hogs to Respondent were in locations which enabled them to sell hogs to a number of packers, including Respondent (Tr. 1068, 1186, 1240-41, 1368-69). All packers appear to base the prices they pay for hogs on base price, lean percent, and a matrix (Tr. 1103-04, 1379-80, 1589-90). The result for a hog producer, as one testified, was that “[u]nfortunately, it’s not straightforward and it’s not really an apples and oranges comparison within the industry. Every packer has a slightly different grading program. They use slightly different means of getting to the same point for the end value. And so it’s just not a cut and dry answer, yes or no, that one pays more than the other. It depends on the base price and the grade premiums, and you add all those together to determine where is the best place to market the hogs.” (Tr. 1103.) Thus, for a hog producer, “net dollars per hog is [the] main concern.” (Tr. 1380.)

Beginning in late 1997, after the formula change was implemented, some hog producers noticed a difference in the prices they were receiving for the hogs they sold to Respondent. They discovered this difference in price by comparing Respondent’s prices with those of other packers or even with the price they received at Respondent’s Marshall, Missouri, slaughtering facility, which did not change to the Purdue formula until April 1998. Hog producers who kept records from information on their kill sheets for past sales also knew the price they should receive for the quality of their hogs. (Tr. 141-43, 148, 406, 772, 1074-76, 1328, 1361-63, 1379, 1591, 1593-95.)

One hog producer estimated the change to be a deficiency of about \$1.25 a head (Tr. 1086-87). Hog producers initially thought the change might be attributable to a seasonal fluctuation or a change in operations (Tr. 319, 1075). Hog producers also began asking Respondent’s managers at its slaughtering facilities about the matter (Tr. 141-43, 1075-77, 1201). The record indicates that hog producers who asked were told about the formula change (Tr. 402, 1202). Hog producers who were told about the formula change included Hog, Inc., a cooperative with over 100 members. Respondent faxed Hog, Inc., a copy of the Purdue formula in February 1998 after Hog, Inc., contacted Respondent. (CX 11 at 21; Tr. 1075-77, 1411.) Gene Fangmann, the procurement manager at Respondent’s Marshall, Missouri, slaughtering facility, testified that he notified all the hog buyers under his supervision by telephone of the formula change in April 1998 after the change was implemented at that slaughtering facility (Tr. 1619).

Also, in April 1998, the Grain Inspection, Packers and Stockyards Administration [hereinafter GIPSA], initiated what appears to have been a

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routine investigation of Respondent's use of the Fat-O-Meat'er. The record indicates that the Packers and Stockyards Administration<sup>3</sup> had started these Fat-O-Meat'er investigations, or audits, of the industry in 1993 at the National Pork Producers Council's request. A National Pork Producers Council representative testified that, prior to 1992, the Packers and Stockyards Administration lacked a working knowledge of the Fat-O-Meat'er which, while relatively new, was a device the industry was beginning to use as part of the purchasing process. The National Pork Producers Council requested in 1992 that the Packers and Stockyards Administration develop a program to monitor the use of the Fat-O-Meat'er and that hog producers be made aware of the way lean percent is estimated. (Tr. 1307-13, 1496.)

In 1993, the Packers and Stockyards Administration instituted a program to monitor the use of the Fat-O-Meter (Tr. 2459-60). The Packers and Stockyards Administration conducted its first investigation of Respondent that year to "review the accuracy of Excel's Fat-o-Meat'er; proper application of the payment formula; and the proper application of the Fat-o-Meat'er" (RX 55 at 1). As noted in this Decision and Order, *supra*, the Packers and Stockyards Administration's report of the 1993 audit states that the Fat-O-Meat'er formula used by Respondent was not relayed to hog producers (RX 55 at 2). The Packers and Stockyards Administration made a similar comment in its 1994 report (RX 57 at 3). Gene Fangmann, the manager at Respondent's Ottumwa, Iowa, facility at that time, testified that when asked by investigators in 1994 if hog producers were told the formula and he replied that hog producers had not been told of the formula, the investigators responded that their audit indicated that "everything was up to snuff" and "looks fine" (Tr. 1604-05). The Packers and Stockyards Administration and GIPSA conducted four audits between 1993 and 1997. Bryce Wilke, one of the investigators in 1994, testified that neither the Packers and Stockyards Administration nor GIPSA found violations as a result of these Fat-O-Meat'er investigations. (Tr. 217, 288.)

Bryce Wilke, while conducting the 1998 audit, found the prices that hog producers should have been paid using the Danish formula were not those that appeared on the kill sheets. Richard Gallant, Respondent's vice president for procurement, told Bryce Wilke that Respondent had changed the formula.

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<sup>3</sup>Pursuant to title II of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (7 U.S.C. §§ 6901-7014), effective October 20, 1994, the Secretary of Agriculture: (1) abolished the Packers and Stockyards Administration; and (2) established GIPSA which was assigned responsibility for all programs and activities formerly performed by the Packers and Stockyards Administration (59 Fed. Reg. 66,517-19 (Dec. 27, 1994)).

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(Tr. 255-56, 403, 1856.) Bryce Wilke then learned from some hog producers that they had not been told that the formula had been changed (Tr. 441).

Bryce Wilke stated he believed that, under the Regulations, Respondent was required to disclose its formula for lean percent to hog producers and he was of the same belief when he prepared the report in 1994 which noted that Respondent had not disclosed the formula to hog producers (Tr. 439-41). He did not tell Respondent at the time that he believed the failure to disclose the formula was a violation of the Regulations (Tr. 441, 1604-05). Bryce Wilke explained that, as an investigator, he is an information gatherer and prepares reports and that his superiors have the responsibility to determine whether a violation was committed (Tr. 446). When asked about the 1994 report, Bryce Wilke's superior, Jay Johnson, supervisor of the GIPSA Des Moines Regional Office, testified that "[t]here are many times that we may find a violation and not file a formal administrative action. I do not know if the conclusion was made that there were no violations." (Tr. 2456.)

In 1997, Respondent was unaware of any requirement to notify hog producers of the formula or its change when not requested (Tr. 1653, 1861-64). The National Pork Producers Council was also unaware of any requirement to notify hog producers of the formula or its change when not requested (Tr. 1481-82). Complainant argued that the Packers and Stockyards Administration had given Respondent such notice in a 1992 letter that stated "Regulation 201.99 issued under the provisions of the Packers and Stockyards Act (1921, as amended) requires that a packer make known to the seller, prior to the purchase the details of the purchase contract, and then provide a true written account of such purchase including all information affecting final payment and accounting." This letter relates to a matter of accounting for lost or misidentified hog carcasses rather than to the Fat-O-Meat'er. (CX 17.)

As a result of the 1998 investigation, Complainant decided that Respondent's failure to disclose its change of the formula to hog producers prior to the purchase of hogs from those producers, was a violation of section 201.99 of the Regulations (9 C.F.R. § 201.99). Respondent was told of the alleged violation in June 1998 (Tr. 1857-58). In July 1998, Respondent sent a letter to hog producers notifying them that the formula had been changed (Tr. 1400). Respondent also adjusted the matrix so that hog producers received the same price under the Purdue formula as they would have received had Respondent used the Danish formula. Respondent said that it received no complaints from hog producers and that no hog producer stopped selling hogs to Respondent because of the formula change (Tr. 1045-46, 1586-88, 1601-03). However,

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among hog producers there was a mixed reaction. Some hog producers favored the change to a more accurate formula, some hog producers were indifferent, and some hog producers were upset with Respondent's failure to notify them of the change in the formula. (Tr. 1046-47, 1084-85, 1091, 1099-1101, 1158-61, 1203-07, 1365-67.)

Respondent reached a settlement with Heartland Pork Enterprises, Inc., and Hog, Inc., on their contract dispute relating to the formula change. Respondent sent checks to other hog producers in amounts Respondent calculated were the differences between what the hog producers received under the Purdue formula and what they would have received under the Danish formula from the time of the formula change to the date they were notified of the formula change. Respondent did not try to recover from those hog producers who were paid more because of the formula change. (RX 51; Tr. 1006-07.)

Complainant determined that the difference in the estimate of lean percent between the Purdue formula and the Danish formula was about 1 percent (CX 9 at 160; Tr. 735). Complainant estimated that 87 percent of the hog producers received less and 13 percent of the hog producers received more because of the formula change. Complainant also estimated that Respondent paid hog producers \$1,841,585.34 less using the Purdue formula than Respondent would have paid hog producers had it continued to use the Danish formula, or an average of approximately \$90.20 less per lot. (CX 9; Tr. 814-21.)

When Respondent responded that it had paid hog producers \$3,093,581 (including interest at 5.85 percent) as the difference between the Purdue formula and the Danish formula (RX 51), Complainant recalculated its estimate and determined that Respondent had still underpaid hog producers by \$635,345.52 and that some hog producers had not received a payment (Tr. 2051).

Complainant seeks a cease and desist order and the assessment of an \$8,000,000 civil penalty against Respondent (Complainant's Post-Hearing Brief at 96-98).

### **Discussion**

The issues in this proceeding are: (1) whether Respondent had a duty under section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) and section 201.99 of the Regulations (9 C.F.R. § 201.99) to notify hog producers when it changed its formula for estimating lean percent; and (2) if Respondent had a duty to notify hog producers when it changed its formula for estimating lean percent, what sanction is appropriate for a violation of that duty. The salient facts are not in dispute. The parties are in agreement that Respondent

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did not tell all hog producers when it changed the formula to estimate lean percent and did not disclose details of the formula to all hog producers.

Complainant's theory expressed in the Amended Complaint is that the Fat-O-Meat'er's formula to estimate lean percent is a method to calculate the purchase price of hogs and that Respondent violated section 201.99 of the Regulations (9 C.F.R. § 201.99) when it failed to notify hog producers of the changed formula because "every packer must make known to sellers the details of purchase contracts, including the calculation of price, prior to purchasing hogs on a carcass grade, carcass weight, or carcass grade and weight (i.e., carcass merit) basis (9 C.F.R. § 201.99)" (Amended Compl. ¶ III). Complainant argues that the formula, as a method to estimate lean percent, is an "essential element" of the "grading to be used" by Respondent and that "it is extremely important that the producer know the process and elements involved in estimating the lean percent of each hog. The price depends on it. Without this information the price cannot be 'discovered' by the producer . . . ; the producer cannot determine or estimate the price offered by one packer in order to compare it to the price offered by another packer." (Complainant's Post-Hearing Brief at 42, 44.)

Complainant further contends Respondent had a contractual good faith duty to tell hog producers of any changes in the formula and Respondent had the duty under section 201.99(e) of the Regulations (9 C.F.R. § 201.99(e)) to provide hog producers, on request, detailed written specifications about the grades which are the bases for settlement and payment. Complainant alleges Respondent's action constitutes an unfair and deceptive practice in violation of section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) and caused hog producers to suffer substantial economic harm. (Complainant's Post-Hearing Brief at 44-56.)

Respondent denies it violated the Packers and Stockyards Act and the Regulations. Respondent contends: (1) Complainant has not met its burden of proving Respondent violated the Packers and Stockyards Act; (2) the Complaint was politically motivated; (3) Complainant's interpretation of the Packers and Stockyards Act is not entitled to deference; (4) the Packers and Stockyards Act must be narrowly construed; (5) section 201.99 of the Regulations (9 C.F.R. § 201.99) is not a substantive regulation and lacks the force and effect of law; (6) section 201.99 of the Regulations (9 C.F.R. § 201.99) is vague and does not refer to formulas to estimate lean percent or define "grading to be used"; (7) notice to hog producers of the formula change was a contractual matter; (8) hog producers did not care whether the formula was changed;

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(9) Respondent did not have a legal duty to notify hog producers of the formula change; (10) Respondent was not given prior warning or notice of Complainant's interpretation of the Packers and Stockyards Act and the Regulations or the penalty Complainant seeks; (11) the Packers and Stockyards Act does not authorize a penalty for a violation of the Regulations; (12) Complainant's proposed civil penalty is excessive and violates the Eighth Amendment to the Constitution of the United States; and (13) Complainant's proposed cease and desist order is not appropriate (Respondent's Post-Hearing Brief).

The sponsors of the bill later enacted as the Packers and Stockyards Act (H.R. 6230) described the bill as one of the most comprehensive regulatory measures ever considered.<sup>4</sup> Similarly, the House Report applicable to the bill describes the bill as giving the Secretary of Agriculture broad authority, as follows:

A careful study of the bill, will, I am sure, convince one that it, and existing laws, give the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards and all activities connected therewith; that it is a 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).

The Conference Report applicable to H.R. 6230 states "Congress intends to exercise, in the bill, the fullest control of packers and stockyards which the Constitution permits[.]" H.R. Conf. Rep. No. 67-324, at 3 (1921).

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<sup>4</sup>61 Cong. Rec. 1801 (1921) (By Mr. Haugen: "Undoubtedly it is a most far-reaching measure and extends further than any previous law into the regulation of private business, with the exception of war emergency measures, and possibly the interstate commerce act."); 61 Cong. Rec. 4783 (1921) (By Mr. Haugen: "It gives the Secretary of Agriculture complete visitorial, inquisitorial, supervisory, and regulatory power over the packers and stockyards. It extends over every ramification of the packers and stockyard transactions in connection with the packing business. It provides for ample court review. The bill is designed to supervise and regulate and thus safeguard the public and all elements of the packing industry, from the producer to the consumer, without injury or to destroy any unit in it. It is the most far-reaching measure and extends further than any previous law into the regulation of private business—with few exceptions, the war emergency measure and possibly the interstate commerce act.").

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Further, Congress has repeatedly broadened the Secretary of Agriculture's authority under the Packers and Stockyards Act.<sup>5</sup> The primary purpose of the Packers and Stockyards Act was described in a House Report, in connection with a major amendment of the Packers and Stockyards Act enacted in 1958, as follows:

The Packers and Stockyards Act was enacted by Congress in 1921. The primary purpose of this Act 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 in the marketing of meats, poultry, etc. 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.<sup>6</sup>

H.R. Rep. No. 85-1048, at 1 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5213.

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<sup>5</sup>For example, in 1924, the Packers and Stockyards Act was broadened to authorize the Secretary of Agriculture to suspend registrants and require bonds of registrants (Act of June 5, 1924, Pub. L. No. 201, 43 Stat. 460 (codified at 7 U.S.C. § 204)). The Packers and Stockyards Act was broadened to cover live poultry dealers or handlers in 1935 (Act of Aug. 14, 1935, Pub. L. No. 272, § 503, 49 Stat. 649 (codified at 7 U.S.C. §§ 192, 218b, 221, 223)). In 1958, the Packers and Stockyards Act was broadened to give the Secretary of Agriculture “jurisdiction over all livestock marketing involved in interstate commerce including country buying of livestock and auction markets, regardless of size” (H.R. Rep. No. 85-1048, at 5 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5212, 5216). In 1976, the Packers and Stockyards Act was broadened to authorize packer-bonding, temporary injunctions, and civil penalties; to require prompt payment of packers, market agencies, and dealers; and to eliminate the requirement that the Secretary of Agriculture prove that each violation occurred “in commerce” (Act of Sept. 13, 1976, Pub. L. No. 94-410, 90 Stat. 1249).

<sup>6</sup>*Accord In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121, 1130-31 (1996); *In re Chatham Area Auction, Cooperative, Inc.*, 49 Agric. Dec. 1043, 1056-57 (1990); *In re Ozark County Cattle Co.*, 49 Agric. Dec. 336, 360 (1990); *In re Victor L. Kent & Sons, Inc.*, 47 Agric. Dec. 692, 717 (1988); *In re Gary Chastain*, 47 Agric. Dec. 395, 420 (1988), *aff'd per curiam*, 860 F.2d 1086 (8th Cir. 1988) (unpublished), *printed in* 47 Agric. Dec. 1395 (1988); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 299 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re Sterling Colorado Beef Co.*, 39 Agric. Dec. 184, 233-34 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); Donald A. Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and 1989 Cum. Supp.)

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Courts that have examined the Packers and Stockyards Act have uniformly described the Packers and Stockyards Act as constituting a broader grant of authority to regulate than previous legislation.<sup>7</sup> Moreover, the Packers and Stockyards Act is remedial legislation and should be liberally construed to effectuate its purposes.<sup>8</sup> The purposes of the Packers and Stockyards Act are varied. Two of the primary purposes of the Packers and Stockyards Act are to prevent economic harm to livestock producers and to maintain open and free competition.<sup>9</sup>

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<sup>7</sup>*See, e.g., Swift & Co. v. United States*, 393 F.2d 246, 253 (7th Cir. 1968) (stating the statutory prohibitions of section 202 of the Packers and Stockyards Act are broader and more far-reaching than the Sherman Antitrust Act or even section 5 of the Federal Trade Commission Act); *Swift & Co. v. United States*, 308 F.2d 849, 853 (7th Cir. 1962) (stating the legislative history shows Congress understood that section 202 of the Packers and Stockyards Act is broader in scope than antecedent legislation, such as the Sherman Antitrust Act, section 2 of the Clayton Act, section 5 of the Federal Trade Commission Act, and section 3 of the Interstate Commerce Act); *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961) (stating from the legislative history it is a fair inference that, in the opinion of Congress, section 2 of the Clayton Act, section 5 of the Federal Trade Commission Act, and the prohibitions in the Sherman Antitrust Act were not broad enough to the meet the public needs as to business practices of packers; section 202(a) and (b) of the Packers and Stockyards Act was enacted for the purpose of going further than prior legislation in the prohibiting of certain trade practices which Congress considered were not consonant with the public interest).

<sup>8</sup>*Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 214 (8th Cir. 1985); *Rice v. Wilcox*, 630 F.2d 586, 589 (8th Cir. 1980); *Travelers Indem. Co. v. Manley Cattle Co.*, 553 F.2d 943, 945 (5th Cir. 1977); *Central Coast Meats v. United States Dep't of Agric.*, 541 F.2d 1325, 1328 (9th Cir. 1976); *Glover Livestock Comm'n Co. v. Hardin*, 454 F.2d 109, 111 (8th Cir. 1972), *rev'd on other grounds*, 411 U.S. 182 (1973); *Bruhn's Freezer Meats of Chicago, Inc. v. United States Dep't of Agric.*, 438 F.2d 1332, 1336 (8th Cir. 1971); *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Bowman v. United States Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966); *Lich v. Cornhusker Casualty Co.*, 774 F. Supp. 1216, 1221 (D. Neb. 1991); *Cook v. Hartford Accident & Indem. Co.*, 657 F. Supp. 762, 767 (D. Neb. 1987) (memorandum opinion); *Gerace v. Utica Veal Co.*, 580 F. Supp. 1465, 1470 (N.D.N.Y. 1984) (memorandum decision); *Pennsylvania Agric. Coop. Mktg. Ass'n v. Ezra Martin Co.*, 495 F. Supp. 565, 570 (M.D. Pa. 1980) (memorandum opinion); *Arnold Livestock Sales Co. v. Pearson*, 383 F. Supp. 1319, 1323 (D. Neb. 1974) (memorandum opinion); *Folsom-Third Street Meat Co. v. Freeman*, 307 F. Supp. 222, 225 (N.D. Cal. 1969); *In re Frosty Morn Meats, Inc.*, 7 B.R. 988, 1013 (Bankr. M.D. Tenn. 1980); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121, 1132 (1996); *In re ITT Continental Baking Co.*, 44 Agric. Dec. 748, 799 (1985).

<sup>9</sup>*See Mahon v. Stowers*, 416 U.S. 100, 106 (1974) (per curiam) (stating the chief evil at which the Packers and Stockyards Act is aimed is 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 (continued...))

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<sup>9</sup>(...continued)

to the consumer who buys); *Denver Union Stock Yard Co. v. Producers Livestock Mktg. Ass'n*, 356 U.S. 282, 289 (1958) (stating the Packers and Stockyards Act is aimed at all monopoly practices, of which discrimination is one); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1460 (8th Cir. 1995) (stating the Packers and Stockyards Act has its origins in antecedent antitrust legislation and primarily prevents conduct which injures competition); *Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 214 (8th Cir. 1985) (stating the Packers and Stockyards Act gives the Secretary of Agriculture broad authority to deal with any practices that inhibit the fair trading of livestock by stockyards, marketing agencies, and dealers); *Rice v. Wilcox*, 630 F.2d 586, 590 (8th Cir. 1980) (stating one purpose of the Packers and Stockyards Act is to protect the owner and shipper of livestock and to free the owner from fear that the channels 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); *Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978) (stating one purpose of the Packers and Stockyards Act is to assure fair trade practices in the livestock marketing industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock); *Solomon Valley Feedlot, Inc. v. Butz*, 557 F.2d 717, 718 (10th Cir. 1977) (stating one purpose of the Packers and Stockyards Act is to make sure that farmers and ranchers receive true market value for their livestock and to protect consumers from unfair practices in the marketing of meat products); *Pacific Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369 (7th Cir. 1976) (stating the Packers and Stockyards Act is a statute prohibiting a variety of unfair business practices which adversely affect competition); *Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co.*, 498 F.2d 925, 927 (10th Cir. 1974) (stating the chief evil sought to be prevented or corrected by the Packers and Stockyards Act is monopolistic practices in the livestock industry); *Glover Livestock Comm'n Co. v. Hardin*, 454 F.2d 109, 111 (8th Cir. 1972) (stating the purpose of the Packers and Stockyards Act is to prevent economic harm to producers and consumers), *rev'd on other grounds*, 411 U.S. 182 (1973); *Bruhn's Freezer Meats of Chicago, Inc. v. United States Dep't of Agric.*, 438 F.2d 1332, 1337-38 (8th Cir. 1971) (stating the purpose of the Packers and Stockyards Act is to assure fair trade practices in the livestock-marketing and meat-packing industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats and other products); *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968) (stating the purpose of the Packers and Stockyards Act is to prevent economic harm to producers and consumers); *United States Fidelity & Guaranty Co. v. Quinn Brothers of Jackson, Inc.*, 384 F.2d 241, 245 (5th Cir. 1967) (stating one of the basic objectives of the Packers and Stockyards Act is to impose upon stockyards the nature of public utilities, including the protection for the consuming public that inheres in the nature of a public utility); *Safeway Stores, Inc. v. Freeman*, 369 F.2d 952, 956 (D.C. Cir. 1966) (stating the purpose of the Packers and Stockyards Act is to prevent economic harm to the growers and consumers through the concentration in a few hands of the economic function of the middle man); *Bowman v. United States Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966) (stating one of the purposes of the Packers and Stockyards Act is to ensure proper handling of shipper's funds and their proper transmission to the shipper); *United States v. Donahue Bros., Inc.*, 59 F.2d 1019, 1023 (8th Cir. 1932) (stating one purpose of the Packers and Stockyards Act is to protect the owner and shipper of livestock and to free the owner from fear that the channels through which his product passed, through discrimination, exploitation,

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<sup>9</sup>(...continued)

overreaching, manipulation, or other unfair practices, might not return to him a fair return for his product); *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197, 200 (E.D.N.C. 1996) (stating the Packers and Stockyards Act was enacted to regulate the business of packers by forbidding them from engaging in unfair, discriminatory, or deceptive practices in interstate commerce, subjecting any person to unreasonable prejudice in interstate commerce, or doing any of a number of acts to control prices or establish a monopoly in the business); *Pennsylvania Agric. Coop. Mktg. Ass'n v. Ezra Martin Co.*, 495 F. Supp. 565, 570 (M.D. Pa. 1980) (memorandum opinion) (stating one purpose of the Packers and Stockyards Act is to give all possible protection to suppliers of livestock); *United States v. Hulings*, 484 F. Supp. 562, 567 (D. Kan. 1980) (memorandum opinion) (stating one purpose of the Packers and Stockyards Act is to protect farmers and ranchers from receiving less than fair market value for their livestock and to protect consumers from unfair practices); *Guenther v. Morehead*, 272 F. Supp. 721, 725-26 (S.D. Iowa 1967) (stating the thrust of the Packers and Stockyards Act is in the direction of stemming monopolistic tendencies in business; the unrestricted free flow of livestock is to be preserved by the elimination of certain unjust and deceptive practices disruptive to such traffic; the Packers and Stockyards Act deals with undesirable modes of business conduct by livestock concerns which are made possible by the disproportionate bargaining position of such businesses); *De Vries v. Sig Ellingson & Co.*, 100 F. Supp. 781, 786 (D. Minn. 1951) (stating the Packers and Stockyards Act was passed for the purposes of eliminating evils that had developed in marketing livestock in the public stockyards of the nation; controlling prices to prevent monopoly; eliminating unfair, discriminatory, and deceptive practices in the meat industry; and regulating rates for services rendered in connection with livestock sales), *aff'd*, 199 F.2d 677 (8th Cir. 1952), *cert. denied*, 344 U.S. 934 (1953); *Midwest Farmers, Inc. v. United States*, 64 F. Supp. 91, 95 (D. Minn. 1945) (stating by the Packers and Stockyards Act, Congress sought to eliminate the unfair and monopolistic practices that existed; one of the chief objectives of the Packers and Stockyards Act is to stop collusion of packers and market agencies; Congress made an effort to provide a market where farmers could sell livestock and where they could obtain actual value as determined by prices established at competitive bidding); *Bowles v. Albert Glauser, Inc.*, 61 F. Supp. 428, 429 (E.D. Mo. 1945) (stating government supervision of public stockyards has for one of its purposes the maintenance of open and free competition among buyers, aided by sellers' representatives); *In re Petersen*, 51 B.R. 486, 488 (Bankr. D. Kan. 1985) (memorandum opinion) (stating one purpose of the Packers and Stockyards Act is to ensure proper handling of shippers' funds and their proper transmission to shippers); *In re Farmers & Ranchers Livestock Auction, Inc.*, 46 B.R. 781, 793 (Bankr. E.D. Ark. 1984) (memorandum opinion) (stating one of the primary purposes of the Packers and Stockyards Act and its regulations is to protect the welfare of the public by assuring that the sellers and buyers who are customers of the market agencies and dealers are not victims of unfair trade practices); *In re Ozark County Cattle Co.*, 49 Agric. Dec. 336, 360 (1990) (stating the primary objective of the Packers and Stockyards Act is to safeguard farmers and ranchers against receiving less than the true value of their livestock); *In re Victor L. Kent & Sons, Inc.*, 47 Agric. Dec. 692, 717 (1988) (stating the primary purpose of the Packers and Stockyards Act is to assure not only fair competition, but also, fair trade practices in livestock marketing and meat packing); Harold M. Carter, *The Packers and Stockyards Act*, 10 Harl, *Agricultural Law* § 71.05 (1983) (stating among the more important purposes of the Packers and Stockyards Act are to prohibit particular circumstances which might result in a monopoly and

(continued...)

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The Secretary of Agriculture has authority under the Packers and Stockyards Act to issue regulations to implement the Packers and Stockyards Act.<sup>10</sup> In 1967, the Packers and Stockyards Administration published in the *Federal Register* a notice of proposed rulemaking relating to the purchase of livestock by packers on a carcass grade, carcass weight, or carcass grade and weight basis (32 Fed. Reg. 7858 (May 30, 1967)). After receiving and considering comments from interested parties, the Packers and Stockyards Administration adopted the proposed rule as section 201.99 of the Regulations (9 C.F.R. § 201.99) (33 Fed. Reg. 2760 (Feb. 9, 1968)).

Section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) provides that prior to purchasing livestock a packer shall make known to the seller “details of the purchase contract” such as “carcass price” and the “grading to be used.” Section 201.99(e) of the Regulations (9 C.F.R. § 201.99(e)) provides the added requirement that if payment is based on any grade other than official United States Department of Agriculture grades, the packer shall make available to the seller detailed written specifications of such grades.

The Packers and Stockyards Administration provided answers to questions by industry members on the new regulations. On the matter of the details about grading a packer was to provide to producers (sellers), it said:

*Q. Does the buyer have to furnish the seller on each transaction a set of written specifications for his house grades if they agree to use house grades?*

*A. A set of detailed written standards must be established for each*

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<sup>9</sup>(...continued)

to induce healthy competition; prevent potential injury by stopping unlawful practices in their incipiency; prevent economic harm to livestock and poultry producers and consumers and to protect them against certain deleterious practices of middlemen; assure fair trade practices in order to safeguard livestock producers against receiving less than the true value of livestock as well as to protect consumers against unfair meat marketing practices; insure proper handling of funds due sellers for the sale of their livestock; assure reasonable rates and charges by stockyard owners and market agencies in connection with the sale of livestock; and assure free and unburdened flow of livestock through the marketing system unencumbered by monopoly or other unfair, unjustly discriminatory, or deceptive practices).

<sup>10</sup>7 U.S.C. § 228(a).

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house grade used in this type of marketing. These must be kept on file by the packer and made available to the seller or his duly authorized agent for review upon request. It is not necessary to furnish a copy of these standards to each seller or his duly authorized agent, but they must be available for their inspection.

RX 50 at 71.

The Packers and Stockyards Administration also announced that section 201.99 of the Regulations (9 C.F.R. § 201.99) “sets forth the official position of the Packers and Stockyards Administration that to engage in the practices prohibited by the regulation is a violation of the statute.” (RX 50 at 35.)

However, at the time section 201.99 of the Regulations (9 C.F.R. § 201.99) took effect in 1968, regulations promulgated under the Packers and Stockyards Act were advisory only.<sup>11</sup> Then, in 1974, the Packers and Stockyards Administration stated that it could issue substantive regulations (i.e., regulations having the force and effect of law) as well as advisory regulations and that whether a particular regulation was advisory or substantive was to be determined on a case-by-case basis.<sup>12</sup> In 1984, the Packers and Stockyards Administration reviewed section 201.99 of the Regulations (9 C.F.R. § 201.99), and stated that, except for a proviso in section 201.99(d) of the Regulations (9 C.F.R. § 201.99(d)) (not relevant to this proceeding), it was retaining section 201.99 of the Regulations (9 C.F.R. § 201.99) because the reasons in 1968 for adopting the section “remain equally valid today.” (49 Fed. Reg. 37,371 (Sept. 24, 1984).)

Complainant contends section 201.99 of the Regulations (9 C.F.R. § 201.99) is a substantive rule that the Packers and Stockyards Administration and GIPSA have enforced many times. Complainant states that, since 1986, the Packers and Stockyards Administration and GIPSA have filed 30 complaints alleging violations of section 201.99 of the Regulations (9 C.F.R. § 201.99), with most dealing with false weighing. (Complainant’s Post-Hearing Brief at 56-61.) Respondent contends that because section 201.99 of the Regulations (9 C.F.R. § 201.99) was adopted in 1968, when such regulations were considered advisory, the regulation continues to be advisory and therefore non-binding

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<sup>11</sup>*In re Finger Lakes Livestock Exchange, Inc.*, 48 Agric. Dec. 390, 400 n.3 (1989).

<sup>12</sup>*In re Wilkes County Stock Yard, Inc.*, 48 Agric. Dec. 1015, 1039-40 (1989).

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(Respondent's Post-Hearing Brief at 47).

Although promulgated in 1968, section 201.99 of the Regulations (9 C.F.R. § 201.99) was adopted after notice of proposed rulemaking was published in the *Federal Register* as required by the Administrative Procedure Act. Section 201.99 of the Regulations (9 C.F.R. § 201.99) "legislates" a new standard of conduct for packers relating to disclosure of information rather than merely explaining the meaning of the Packers and Stockyards Act. Non-compliance with section 201.99 of the Regulations (9 C.F.R. § 201.99) is a violation of the Packers and Stockyards Act, and the Packers and Stockyards Administration considered and specifically retained the regulation in 1984. In these circumstances, I find section 201.99 of the Regulations (9 C.F.R. § 201.99) is a substantive rule having the force and effect of law.

Respondent argues the Packers and Stockyards Act was not designed to upset the traditional principles of freedom of contract and contends notice of the formula change was a contractual rather than a legal matter between Respondent and hog producers who sold hogs to Respondent (Respondent's Post-Hearing Brief at 22-23).

Congress intended the Packers and Stockyards Act to provide the Secretary of Agriculture with broad authority to regulate private business, as follows:

[The Packers and Stockyards Act] gives the Secretary complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards, and all activities connected therewith.

....

Undoubtedly, [the Packers and Stockyards Act] is a most far-reaching measure and extends further than any previous law into the regulation of private business, with the exception of war emergency measures, and possibly the interstate commerce act.

61 Cong. Rec. 1801 (1921).

I find nothing in the Packers and Stockyards Act, the legislative history connected with the Packers and Stockyards Act, or the cases cited by Respondent to indicate that traditional principles of freedom of contract limit the Secretary of Agriculture's broad authority to regulate packers under the Packers and Stockyards Act. Thus, packers have the freedom to contract provided the terms of their contracts do not violate the Packers and Stockyards Act or the Regulations. Packers cannot avoid statutory or regulatory obligations

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by contract. Section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) requires each packer purchasing livestock on a carcass merit basis, prior to the purchase, to make known to the seller the details of the purchase contract, including the grading to be used. The formula Respondent uses to estimate lean percent is a part of “grading” within the meaning of section 201.99 of the Regulations (9 C.F.R. § 201.99) as it is an element of Respondent’s carcass evaluation process. Respondent’s legal obligation under section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) and section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) is not affected by Respondent’s contracts with hog producers.

Respondent also argues that institution of the Complaint was politically motivated (Respondent’s Post-Hearing Brief at 18-19; Respondent’s Post-Hearing Reply Brief at 61-62). Complainant has discretion, regardless of motive, to be selective in the enforcement of the Packers and Stockyards Act. Complainant’s motives are immaterial as long as Complainant’s action is not arbitrary.<sup>13</sup> I do not find that institution of this proceeding was arbitrary. Rather, I find Complainant’s stated concern for the impact on hog producers of technological changes that affect the prices hog producers receive consistent with Complainant’s congressionally mandated mission to prevent economic harm to producers and to maintain open and free competition.

Respondent further argues section 201.99 of the Regulations (9 C.F.R. § 201.99) is too vague to be enforceable. Respondent contends section 201.99 of the Regulations (9 C.F.R. § 201.99) does not define formula, grading, or calculation of price, and Respondent was entitled to notice from Complainant that Respondent had a duty to tell hog producers that it was changing the formula Respondent used to estimate lean percent. (Respondent’s Post-Hearing Brief at 38-44.)

Section 201.99 of the Regulations (9 C.F.R. § 201.99) is not vague or ambiguous. The record is clear that all parties considered the Fat-O-Meat’er to be a form of grading. The formula Respondent used to estimate lean percent was also a part of the “grading” within the meaning of section 201.99 of the Regulations (9 C.F.R. § 201.99) as it was an element of Respondent’s carcass evaluation process. Section 201.99 of the Regulations (9 C.F.R. § 201.99) explicitly provides that packers purchasing livestock on a carcass merit basis must make known to the seller the grading to be used prior to the purchase.

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<sup>13</sup>*In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1385 (1979), *aff’d per curiam*, 630 F.2d 370 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981).

**Sanction**

Complainant seeks an \$8,000,000 civil penalty. Complainant contends this civil penalty is necessary because of the great economic harm done to hog producers when Respondent “unilaterally” changed the formula for estimating lean percent (Tr. 2323). Complainant contends the measure of economic harm is the difference between the amount hog producers were paid when Respondent used the Purdue formula and the amount hog producers would have been paid had Respondent continued to use the Danish formula. However, Complainant’s method of measuring economic harm to hog producers is not necessarily the most accurate method of measuring the harm caused by Respondent’s failure to notify hog producers of the change in the formula.

Respondent has the right (unless a contract provides otherwise) to “unilaterally” change the formula to estimate lean percent as long as Respondent notifies hog producers of the formula change prior to purchasing hogs on a carcass merit basis from those producers. Since Respondent, or any other packer, has the right, after notice, to alter the price it pays by changing its formula for estimating lean percent, hog producers would not be legally harmed by the change.

Hog producers can compare prices and choose to continue to sell to Respondent or sell to Respondent’s competitors. However, Respondent impeded that choice in this case when it made an unannounced change in the formula. Respondent altered the price it offered hog producers without the hog producers knowing that the price structure had changed. Had hog producers been alerted to the change, they could have shopped their hogs to other packers to determine if they could obtain a better price for their hogs than Respondent’s price under its changed formula. As Complainant states, the purpose of section 201.99 of the Regulations (9 C.F.R. § 201.99) “is to provide some basic level of similarity to allow sellers to evaluate different purchase offers” (Complainant’s Post-Hearing Brief at 91). The assessment of economic harm to hog producers because of the change would therefore have been whatever higher market price they might have been able to obtain from Respondent’s competitors. Complainant, however, offered no evidence on the prices that hog producers could have received from other packers. The true extent of the economic harm to hog producers who sold hogs to Respondent on a carcass merit basis is therefore unknown. However, at the very least, Respondent’s failure to notify hog producers of the change in the formula to estimate lean percent impeded competition.

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Even assuming the measure of economic harm to hog producers is, as Complainant maintains, the difference in the price Respondent paid to hog producers when Respondent used the Purdue formula and the price Respondent would have paid these same producers had Respondent used the Danish formula, this harm was still minimized. Respondent has paid the difference to many of the hog producers, with interest. Furthermore, Respondent voluntarily sought to come into compliance with section 201.99 of the Regulations (9 C.F.R. § 201.99) immediately after GIPSA brought the violations to Respondent's attention. I accordingly find that a monetary penalty is not appropriate in the circumstances of this case.

Complainant argues Respondent also violated section 201.99(e) of the Regulations (9 C.F.R. § 201.99(e)) when Respondent failed to tell Heartland Pork Enterprises, Inc., of the "when and why" of the formula change. Although Complainant did not specifically allege this violation in the Amended Complaint or the revised Amended Complaint, I consider the argument under the general allegation in the revised Amended Complaint that Respondent violated section 201.99 of the Regulations (9 C.F.R. § 201.99) when Respondent failed to notify hog producers of the change in the formula to estimate lean percent. Complainant, however, does not specify in its allegation what details of the "when and why" Respondent failed to disclose. The allegation is therefore too ambiguous to serve as a basis for a finding of a violation.

Complainant also contends Respondent's agreement with Tyson Foods to exempt Tyson Foods from the formula change constituted disparate treatment of other hog producers who had agreements with Respondent similar to Respondent's agreement with Tyson Foods. Complainant did not allege disparate treatment in the Amended Complaint or the revised Amended Complaint. I therefore do not find this to be a violation. I also do not find that Respondent's use of the Purdue formula, which the record indicates more accurately estimates lean percent than the Danish formula, constitutes a false statement.

Complainant further contends Respondent's failure to notify hog producers of the formula change violated its good faith duty to hog producers to notify them of changes in the terms of their contracts. However, Complainant acknowledges that he did not allege in the Amended Complaint that a breach of contract was a violation of the Packers and Stockyards Act (Complainant's Post-Hearing Reply Brief at 15). Accordingly, as it was not alleged in the Amended Complaint or the revised Amended Complaint, I do not find a violation based on an alleged breach of contract.

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Complainant seeks a “broad” cease and desist order. An order must bear a “reasonable relation to the unlawful practice found to exist.” *Swift & Company v. United States*, 317 F.2d 53, 56 (7th Cir. 1963). The Order therefore reflects the conduct found unlawful in this Decision and Order.

**ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER**

**Complainant’s Appeal of Procedural Rulings**

Complainant raises two issues in Complainant’s Appeal of Procedural Rulings. First, Complainant contends the Chief ALJ erred when he ordered Complainant to provide Respondent with the names of Complainant’s potential producer witnesses prior to the scheduled hearing date (Complainant’s Appeal of Procedural Rulings at 1-3).

On July 10, 2000, the Chief ALJ issued a ruling requiring Complainant to provide Respondent with the names of all of Complainant’s “proposed witnesses by Monday, August 10” (Summary of Teleconferences and Rulings at 2). The Chief ALJ does not identify the year in which Complainant is required to provide Respondent with the names of Complainant’s proposed witnesses. The first year, after the Chief ALJ issued the July 10, 2000, Summary of Teleconferences and Rulings, in which August 10 falls on a Monday is 2009. However, based on the record before me, I do not find the Chief ALJ required Complainant to provide Respondent with the names of Complainant’s proposed witnesses by Monday, August 10, 2009. Instead, I infer the Chief ALJ ordered Complainant to provide Respondent with the names of all Complainant’s proposed witnesses either by Monday, August 7, 2000, or by Thursday, August 10, 2000.

The July 10, 2000, Summary of Teleconferences and Rulings establishes that the scheduled date of hearing was July 18, 2000 (Summary of Teleconferences and Rulings at 1), and the transcripts establish that the hearing was conducted on July 18, 19, 20, 21, 25, 26, 27, and 28, 2000; September 25, 26, and 27, 2000; and March 27, 28, and 29, 2001. Therefore, the Chief ALJ required Complainant to provide Respondent with the names of Complainant’s proposed witnesses after 8 days of the 14-day hearing had been completed.

Section 1.140(a)(1)(iv) of the Rules of Practice provides that an administrative law judge may order the parties to furnish a list of anticipated witnesses, but a party need not furnish the names of anticipated witnesses, as follows:

**§ 1.140 Conferences and procedure.**

(a) *Purpose and scope.* (1) Upon motion of a party or upon the Judge's own motion, the Judge may direct the parties or their counsel to attend a conference at any reasonable time, prior to or during the course of the hearing, when the Judge finds that the proceeding would be expedited by a conference. Reasonable notice of the time, place, and manner of the conference shall be given. The Judge may order each of the parties to furnish at or subsequent to the conference any or all of the following:

.....

(iv) A list of anticipated witnesses who will testify on behalf of the party. At the discretion of the party furnishing such list of witnesses, the names of the witnesses need not be furnished if they are otherwise identified in some meaningful way such as a short statement of the type of evidence they will offer.

7 C.F.R. § 1.140(a)(1)(iv).

Under section 1.140(a)(1)(iv) of the Rules of Practice (7 C.F.R. § 1.140(a)(1)(iv)), each party has discretion to identify anticipated witnesses in any way the party deems appropriate so long as the anticipated witnesses are identified in some meaningful way. A party need not provide a reason for refusing to furnish the name of an anticipated witness. Under the Rules of Practice, an administrative law judge may not order a party to name anticipated witnesses who will testify on behalf of the party; an administrative law judge may merely order a party to identify anticipated witnesses in a meaningful way.

On August 25, 1999, Administrative Law Judge Edwin S. Bernstein ordered Complainant to provide Respondent's attorneys with a witness list, "including brief summaries of the witnesses' proposed testimonies" (August 25, 1999, Summary of Telephone Conference at 1). On November 16, 1999, Complainant filed Complainant's List of Anticipated Witnesses which identifies by name, position, and address 19 of Complainant's anticipated witnesses and provides a statement of the testimony to be given by these 19 anticipated witnesses. In addition, Complainant lists unnamed anticipated witnesses, as follows:

**Pork Producers**

Various Locations In Illinois, Iowa and Missouri

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These unnamed witnesses consist of a group of approximately seven (7) to fifteen (15) pork producers from whom Respondent purchased hogs during the period of alleged violations. These producers are expected to testify regarding their business dealings with Respondent, including when each became aware of the formula change, and the effect of Respondent's formula change on their businesses.

Complainant's List of Anticipated Witnesses at 5.

I find Complainant identified these unnamed anticipated witnesses in a meaningful way. Therefore, I conclude the Chief ALJ erred when he ordered Complainant to provide Respondent with the names of these anticipated witnesses. However, I find the Chief ALJ's error harmless.

Second, Complainant contends the Chief ALJ erroneously denied Complainant's "Motion for Ruling that Respondent Failed to Comply with the Presiding ALJ's *Subpoena Duces Tecum*" on the ground that Complainant did not file the motion timely (Complainant's Appeal of Procedural Rulings at 3-4).

On July 16, 2001, Complainant filed a "Motion for Ruling that Respondent Failed to Comply with the Presiding ALJ's *Subpoena Duces Tecum*" requesting that the Chief ALJ find Respondent failed to comply with a *subpoena duces tecum* issued by the Chief ALJ on September 13, 2000. On January 28, 2002, the Chief ALJ denied Complainant's "Motion for Ruling that Respondent Failed to Comply with the Presiding ALJ's *Subpoena Duces Tecum*" stating Complainant filed the motion almost 4 months after the close of the hearing and concluding Complainant did not file the motion timely (Order Granting in Part and Denying in Part Complainant's Procedural Motions--Order Correcting Transcript at 2).

The Rules of Practice contain no restriction on the time for filing motions, except motions concerning the complaint.<sup>14</sup> Complainant's "Motion for Ruling that Respondent Failed to Comply with the Presiding ALJ's *Subpoena Duces Tecum*" does not concern the Complaint, the Amended Complaint, or the revised Amended Complaint. Therefore, I agree with Complainant's contention that the Chief ALJ's basis for denying Complainant's "Motion for Ruling that Respondent Failed to Comply with the Presiding ALJ's *Subpoena Duces Tecum*" is error. However, I find the Chief ALJ's error harmless.

Complainant requests that I consider Complainant's "Motion for Ruling that

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<sup>14</sup>See 7 C.F.R. § 1.143(b)(2).

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Respondent Failed to Comply with the Presiding ALJ's *Subpoena Duces Tecum*" on the merits (Complainant's Appeal of Procedural Rulings at 4). Complainant's only request in Complainant's "Motion for Ruling that Respondent Failed to Comply with the Presiding ALJ's *Subpoena Duces Tecum*" is that the Chief ALJ find Respondent failed to comply with the September 13, 2000, *subpoena duces tecum* (Motion for Ruling that Respondent Failed to Comply with the Presiding ALJ's *Subpoena Duces Tecum* at 7).

Randy Krueger, one of Respondent's employees assigned to respond to the September 13, 2000, *subpoena duces tecum*, testified that Respondent inadvertently failed to provide Complainant one file that was responsive to the September 13, 2000, *subpoena duces tecum* (Tr. 2215-16). Based on Randy Krueger's testimony, I find Respondent failed to provide all of the documents responsive to the September 13, 2000, *subpoena duces tecum*.

#### **Complainant's Appeal Petition**

Complainant raises five issues in Complainant's Appeal Petition. First, Complainant contends the Chief ALJ erroneously failed to conclude that Respondent's failure, prior to the purchase of hogs on a carcass merit basis, to notify hog producers of the change in the grading to be used in purchase transactions is a violation of section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) (Complainant's Appeal Brief at 7-11).

I disagree with Complainant's contention that the Chief ALJ failed to conclude that Respondent violated section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)). The Chief ALJ found the Fat-O-Meat'er, the Danish formula, and the Purdue formula are all "grading to be used" as that term is used in section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) (Initial Decision and Order at 26). Moreover, the Chief ALJ concluded Respondent violated section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)), as follows:

Respondent, Excel Corporation, violated section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)[]) and section 202(a) of the Packers and Stockyards Act, as amended (7 U.S.C. § 192(a)), when it failed to notify producers of the change in the formula to estimate lean percent.

Initial Decision and Order at 27.

Second, Complainant contends the Chief ALJ's conclusion that Respondent violated a new duty, established in this proceeding, to disclose the lean percent

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formula to hog producers prior to purchase, whether requested or not, is not warranted in the facts of this case (Complainant's Appeal Brief at 11-17).

I agree with Complainant's contention that the Chief ALJ erroneously found that Respondent violated a new duty, established in this proceeding. Section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) provides that each packer purchasing livestock on a carcass merit basis shall, prior to the purchase, make known to the seller the details of the purchase contract, including the grading to be used. The Chief ALJ found the Fat-O-Meat'er, the Danish formula, and the Purdue formula are all "grading to be used" as that term is used in section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) (Initial Decision and Order at 26).

The Packers and Stockyards Administration adopted section 201.99 of the Regulations (9 C.F.R. § 201.99) in 1968 (33 Fed. Reg. 2760 (Feb. 9, 1968)). The Packers and Stockyards Administration also announced that section 201.99 of the Regulations (9 C.F.R. § 201.99) "sets forth the official position of the Packers and Stockyards Administration that to engage in the practices prohibited by the regulation is a violation of the statute." (RX 50 at 35.)

However, at the time section 201.99 of the Regulations (9 C.F.R. § 201.99) took effect in 1968, regulations promulgated under the Packers and Stockyards Act were advisory only.<sup>15</sup> Then, in 1974, the Packers and Stockyards Administration stated that it could issue substantive regulations (i.e., regulations having the force and effect of law) as well as advisory regulations and that whether a particular regulation was advisory or substantive was to be determined on a case-by-case basis.<sup>16</sup> In 1984, the Packers and Stockyards Administration reviewed section 201.99 of the Regulations (9 C.F.R. § 201.99), and stated that, except for a proviso in section 201.99(d) of the Regulations (9 C.F.R. § 201.99(d)) (not relevant to this proceeding), it was retaining section 201.99 of the Regulations (9 C.F.R. § 201.99) because the reasons in 1968 for adopting the section "remain equally valid today." (49 Fed. Reg. 37,371 (Sept. 24, 1984).) Therefore, I disagree with the Chief ALJ's finding that Respondent violated a new duty established in this proceeding. Instead, I find Respondent's duty to disclose to hog producers that it was changing the formula used to estimate lean percent, prior to Respondent's purchase of hogs on a carcass merit basis, was embodied in a regulation in 1968, which regulation has had the force

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<sup>15</sup>See note 11.

<sup>16</sup>See note 12.

and effect of law at least since 1984.

Third, Complainant contends the Chief ALJ's cease and desist order does not bear a reasonable relation to the unlawful practice the Chief ALJ found to exist, as follows:

The ALJ found that respondent violated a new duty by failing to provide the details of grading, (i.e., the formula) to producers prior to purchase. To properly address the violation that the ALJ states Respondent committed, the Order should require Respondent to cease and desist from failing to provide the details of any change in the formula used to estimate lean percent. As issued, the first sentence of the Order does not relate to the ALJ's finding that the Respondent violated a new duty to disclose the formula.

Complainant's Appeal Brief at 18 (emphasis in original).

A cease and desist order must bear a reasonable relation to the unlawful practice found to exist.<sup>17</sup> The Chief ALJ states "[d]etailed specifications about grading (i.e., the formula) must now be provided to producers pursuant to section 201.99(a)" of the Regulations (9 C.F.R. § 201.99(a)) (Initial Decision and Order at 20). The Chief ALJ ordered Respondent to "cease and desist from failing to notify livestock sellers . . . of the details of any change in the formula used to estimate lean meat percent." (Initial Decision and Order at 27.) I do not find that the Chief ALJ's cease and desist order bears a reasonable relation to the unlawful practice the Chief ALJ found to exist. I find Respondent's unlawful practice was Respondent's failure to make known to hog sellers that it was changing the formula to estimate lean percent prior to purchasing hogs on a carcass merit basis from those sellers. I have framed a cease and desist order which bears a reasonable relation to Respondent's unlawful practice.

Fourth, Complainant contends the Chief ALJ's order "seeks to impose requirements upon Respondent that are beyond the scope of the Secretary's authority" (Complainant's Appeal Brief at 17-19).

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<sup>17</sup>*FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *FTC v. National Lead Co.*, 352 U.S. 419, 429 (1957); *Standard Oil Company of California v. FTC*, 577 F.2d 653, 662 (9th Cir. 1978); *Thiret v. FTC*, 512 F.2d 176, 180-81 (10th Cir. 1975); *Spiegel, Inc. v. FTC*, 411 F.2d 481, 484-85 (7th Cir. 1969); *Swift & Co. v. United States*, 317 F.2d 53, 56 (7th Cir. 1963); *Gellman v. FTC*, 290 F.2d 666, 670 (8th Cir. 1961); *Carter Products, Inc. v. FTC*, 268 F.2d 461, 498 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959).

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The Chief ALJ's states in the Order:

**Order**

Upon receipt from Complainant of the names of sellers who sold hogs to Respondent between October 1997 and July 1998 under Respondent's changed formula and who may have received less than they would have received under the formula before it was changed and who have not otherwise been compensated or who otherwise have not resolved the matter through agreement with Respondent, Respondent shall promptly notify such sellers in writing that Respondent agrees to allow such sellers to submit the matter to arbitration for resolution.

Initial Decision and Order at 27.

Section 203(b) of the Packers and Stockyards Act (7 U.S.C. § 193(b)) sets forth the sanctions the Secretary of Agriculture may impose upon a packer found to have violated subchapter II of the Packers and Stockyards Act (7 U.S.C. §§ 191-198b). Section 203(b) of the Packers and Stockyards Act (7 U.S.C. § 193(b)) provides the Secretary of Agriculture shall issue an order requiring the packer to cease and desist from continuing the violation. Moreover, the Secretary of Agriculture may assess the packer a civil penalty of not more than \$10,000 for each violation of subchapter II of the Packers and Stockyards Act (7 U.S.C. §§ 191-198b). Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, by regulation effective September 2, 1997, adjusted the civil monetary penalty that may be assessed a packer under section 203(b) of the Packers and Stockyards Act (7 U.S.C. § 193(b)) by increasing the maximum civil penalty from \$10,000 to \$11,000.<sup>18</sup>

Section 203(b) of the Packers and Stockyards Act (7 U.S.C. § 193(b)) does not authorize restitution to hog producers as a sanction for violation of the Packers and Stockyards Act or the Regulations. Therefore, I agree with Complainant's contention that the Chief ALJ is not authorized by section 203(b) of the Packers and Stockyards Act (7 U.S.C. § 193(b)) to require Respondent to provide restitution to hog producers for the costs incurred by hog producers because of Respondent's violations of section 201.99(a) of the Regulations

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<sup>18</sup>62 Fed. Reg. 40,924-28 (July 31, 1997); 7 C.F.R. § 3.91(b)(6)(i).

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(9 C.F.R. § 201.99(a)). Accordingly, I do not adopt the portion of the Chief ALJ's Order that requires Respondent to notify sellers that Respondent agrees to allow sellers to submit the matter to arbitration for resolution.

Fifth, Complainant contends the Chief ALJ's failure to assess a severe civil penalty is error (Complainant's Appeal Brief at 19-25).

Section 203(b) of the Packers and Stockyards Act (7 U.S.C. § 193(b)) provides that when assessing a civil penalty for violations of subchapter II of the Packers and Stockyards Act (7 U.S.C. §§ 191-198b), the Secretary of Agriculture must consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business.

One of the fundamental purposes of the Packers and Stockyards Act is to protect sellers of livestock from unfair or deceptive practices of packers. Section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) is designed "to provide safeguards which are necessary in order to protect the interests of producers selling livestock to packers on a carcass grade, carcass weight, or carcass grade and weight basis" (33 Fed. Reg. 2760 (Feb. 9, 1968)) and "to assure that producers selling on a carcass basis are fully informed of the terms and conditions which apply to the sale and fairly treated" (48 Fed. Reg. 42,826 (Sept. 20, 1983)). Respondent violated section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) by failing to notify hog producers, prior to Respondent's purchase of hogs on a carcass merit basis, that it changed the formula used to estimate lean percent. Hog producers had agreed to sell hogs to Respondent knowing Respondent used the Fat-O-Meat'er as the grading system to estimate lean percent. The Danish formula was embedded in the Fat-O-Meat'er. When Respondent abandoned the Danish formula and adopted the Purdue formula, it changed the grading to be used and the manner in which payment to hog producers would be determined without informing hog producers. The record establishes that many hog producers who sold hogs to Respondent on a carcass merit basis during the period between October 23, 1997, and July 20, 1998, received less money for their hogs than they would have received had Respondent not changed the formula to estimate lean percent.

Respondent has the right to change the formula to estimate lean percent as long as Respondent notifies hog producers of the formula change prior to purchasing hogs on a carcass merit basis from those producers. Since Respondent has the right, after notice, to alter the price it pays by changing its formula for estimating lean percent, hog producers would not be legally harmed by the change itself.

Hog producers can compare prices and choose to continue to sell to

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Respondent or sell to Respondent's competitors. However, Respondent impeded that choice when it made an unannounced change in the formula. Respondent thereby altered the price it offered hog producers without the hog producers knowing that the price structure had changed. Had hog producers been alerted to the change, they could have shopped their hogs to other packers to determine if they could obtain a better price for their hogs than Respondent's price under its changed formula. Respondent's failure to notify hog producers of the change in the formula to estimate lean percent impeded competition. As Complainant states, the purpose of section 201.99 of the Regulations (9 C.F.R. § 201.99) "is to provide some basic level of similarity to allow sellers to evaluate different purchase offers" (Complainant's Post-Hearing Brief at 91). The assessment of harm to hog producers because of the change would therefore have been whatever higher market price they might have been able to obtain from Respondent's competitors. Therefore, I find Respondent's violation of section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) grave.

Further, the record establishes that the size of Respondent's business is large (RX 55; Tr. 131, 2329). Based on the size of Respondent's business, I do not find that the assessment of a substantial civil penalty would affect Respondent's ability to continue in business.

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. The administrative officials charged with the

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responsibility of administering the Packers and Stockyards Act recommend that I assess Respondent an \$8,000,000 civil penalty.

However, the recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.<sup>19</sup>

The purpose of an administrative sanction is to accomplish the remedial purposes of the Packers and Stockyards Act by deterring future similar violations of the Packers and Stockyards Act.<sup>20</sup> This case involves serious violations of the Packers and Stockyards Act and the Regulations. However, based on the record before me, I agree with the Chief ALJ's determination that a civil penalty is not appropriate in the circumstances of this case. I find Respondent's compliance with section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) immediately after GIPSA brought the violations to Respondent's attention and Respondent's payment, with interest, to many hog producers that received less for their hogs when Respondent used the Purdue formula than they would have received had Respondent used the Danish formula, indicate that a civil penalty is not necessary to deter Respondent from future violations of a

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<sup>19</sup>*In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 762-63 (2001), *appeal docketed*, No. 02-3006 (6th Cir. Jan. 3, 2002); *In re Karl Mitchell*, 60 Agric. Dec. 91, 130 (2001), *aff'd*, 42 Fed. Appx. 991, 2002 WL 1941189 (9th Cir. Aug. 22, 2002); *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165, 190 n.8 (2001), *aff'd*, No. CIV F 015606 AWI SMS (E.D. Cal. May 18, 2001), *appeal docketed*, No. 02-15602 (9th Cir. Mar. 25, 2002); *In re Fred Hodgins*, 60 Agric. Dec. 73, 88 (2001) (Decision and Order on Remand), *aff'd*, 33 Fed. Appx. 784, 2002 WL 649102 (6th Cir. 2002) (unpublished); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 226-27 (2000), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001), *appeal withdrawn*, No. 01-6214 (2d Cir. Apr. 30, 2002); *In re James E. Stephens*, 58 Agric. Dec. 149, 182 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1604 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. 1498, 1514 (1998); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

<sup>20</sup>*In re Jim Aron*, 58 Agric. Dec. 451, 462 (1999).

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similar nature.

**Respondent's Appeal Petition**

Respondent raises seven issues in Respondent's Appeal Petition. First, Respondent contends the Chief ALJ erroneously concluded Respondent violated section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)). Respondent contends its failure to notify hog producers that it changed the formula to estimate lean percent, prior to Respondent's purchase of hogs on a carcass merit basis, is not an "unfair or deceptive practice" as that term is used in section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)). Respondent states the purpose of the Packers and Stockyards Act is to safeguard farmers and ranchers against receiving less than the true market value of their livestock and there was no evidence that any hog producer received less than true market value for his or her hogs. Respondent further asserts it changed the formula to estimate lean percent to improve the accuracy of the way Respondent paid hog producers and, once hog producers learned of Respondent's change of the formula, the hog producers did not care that the change had been made or that the change had been made without their knowledge. Respondent contends, "[u]nder these circumstances there is simply no theory or precedent for finding that the equation change amounted to an unfair or deceptive practice." (Respondent's Appeal Pet. at 11-13.)

I disagree with Respondent's contention that the Chief ALJ erroneously concluded Respondent violated section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)). While one of the purposes of the Packers and Stockyards Act is to safeguard farmers and ranchers against receiving less than true market value for their livestock, as Respondent contends, the purpose of the Packers and Stockyards Act is much broader than Respondent contends.

The sponsors of the bill later enacted as the Packers and Stockyards Act (H.R. 6230) described the bill as one of the most comprehensive regulatory measures ever considered.<sup>21</sup> Similarly, the House Report applicable to the bill describes the bill as giving the Secretary of Agriculture broad authority, as follows:

A careful study of the bill, will, I am sure, convince one that it, and existing laws, give the Secretary of Agriculture complete inquisitorial,

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<sup>21</sup>See note 4.

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visitorial, supervisory, and regulatory power over the packers, stockyards and all activities connected therewith; that it is a 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).

The Conference Report applicable to H.R. 6230 states “Congress intends to exercise, in the bill, the fullest control of packers and stockyards which the Constitution permits[.]” H.R. Conf. Rep. No. 67-324, at 3 (1921).

Further, Congress has repeatedly broadened the Secretary of Agriculture’s authority under the Packers and Stockyards Act.<sup>22</sup> The primary purpose of the Packers and Stockyards Act was described in a House Report, in connection with a major amendment of the Packers and Stockyards Act enacted in 1958, as follows:

The Packers and Stockyards Act was enacted by Congress in 1921. The primary purpose of this Act 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 in the marketing of meats, poultry, etc. 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.<sup>[23]</sup>

H.R. Rep. No. 85-1048, at 1 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5213.

Courts that have examined the Packers and Stockyards Act have uniformly described the Packers and Stockyards Act as constituting a broader grant of

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<sup>22</sup>See note 5.

<sup>23</sup>See note 6.

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authority to regulate than previous legislation.<sup>24</sup> Moreover, the Packers and Stockyards Act is remedial legislation and should be liberally construed to effectuate its purposes.<sup>25</sup> The purposes of the Packers and Stockyards Act are varied. Two of the primary purposes are to prevent economic harm to producers and to maintain open and free competition.<sup>26</sup>

The record establishes that most hog producers who sold hogs to Respondent received less for their hogs when Respondent used the Purdue formula to estimate lean percent than they would have received if Respondent had used the Danish formula (CX 37, CX 38). However, Respondent has the right (unless a contract provides otherwise) to change the formula to estimate lean percent as long as Respondent notifies hog producers of the formula change prior to purchasing hogs on a carcass merit basis from those producers. Since Respondent, or any other packer, has the right, after notice, to alter the price it pays by changing its formula for estimating lean percent, hog producers would not be legally harmed by the change.

Hog producers can compare prices and choose to continue to sell to Respondent or sell to Respondent's competitors. However, Respondent impeded that choice in this case when it made an unannounced change in the formula. Respondent altered the price it offered hog producers without the hog producers knowing that the price structure had changed. Had hog producers been alerted to the change, they could have shopped their hogs to other packers to determine if they could obtain a better price for their hogs than Respondent's price under its changed formula. As Complainant states, the purpose of section 201.99 of the Regulations (9 C.F.R. § 201.99) "is to provide some basic level of similarity to allow sellers to evaluate different purchase offers" (Complainant's Post-Hearing Brief at 91). The assessment of economic harm to hog producers because of the change would therefore have been whatever higher market price they might have been able to obtain from Respondent's competitors. Complainant, however, offered no evidence on the prices that hog producers could have received from other packers. The true extent of the economic harm to hog producers who sold hogs to Respondent on a carcass merit basis is therefore unknown. However, at the very least, Respondent's

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<sup>24</sup>See note 7.

<sup>25</sup>See note 8.

<sup>26</sup>See note 9.

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failure to notify hog producers of the change in the formula to estimate lean percent impeded competition. Thus, even if I found that Respondent paid hog producers “true market value” for their hogs, as Respondent contends, I would find that Respondent violated the Packers and Stockyards Act.

Moreover, I find Respondent’s argument that it changed the formula used to estimate lean percent merely to improve the accuracy of the estimate, irrelevant to the issue of whether Respondent violated the Packers and Stockyards Act. The merit of the Purdue formula is not the issue in this proceeding. The record indicates the Purdue formula more accurately estimates lean percent than the Danish formula and Respondent adopted the Purdue formula for the purpose of improving the accuracy of Respondent’s estimate of lean percent. However, it is Respondent’s failure to notify hog producers of the change in the formula that violates the Packers and Stockyards Act, not the change itself. I do not find Respondent’s purpose for changing the formula to estimate lean percent relevant to issue of whether Respondent violated the Packers and Stockyards Act when Respondent failed to notify hog producers that it was changing the formula to estimate lean percent.

Finally, I find Respondent’s argument that, when hog producers learned about the formula change, they did not care that the change had been made or that Respondent failed to inform them about the formula change, irrelevant to the issue of whether Respondent violated the Packers and Stockyards Act. Respondent cites no authority supporting its contention that the feelings of hog producers have a bearing on whether Respondent engaged in an unfair or deceptive practice under section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)), and I cannot find authority which supports Respondent’s contention. The determination as to whether Respondent violated section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) is made by the administrative law judge, the judicial officer, and, ultimately, the courts. The determination is not based on how livestock producers, who the Packers and Stockyards Act is designed to protect, view Respondent’s actions. Moreover, the record does not support Respondent’s assertion that hog producers did not care about Respondent’s change in the formula to estimate lean percent or Respondent’s failure to inform them about the formula change (Tr. 1046-47, 1084-85, 1091, 1099-1101, 1158-61, 1203-07, 1365-67).

Second, Respondent contends the Chief ALJ erroneously concluded Respondent violated section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)). Respondent states section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) does not mention (1) lean percent, (2) equations, or (3) changes made either to lean percent or to equations. Thus, Respondent argues section

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201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) does not give Respondent fair notice that, prior to purchasing hogs from producers, it is required to give those hog producers notice that it is changing the formula to estimate lean percent. Respondent further contends, as a matter of law, no cease and desist order can be issued where a respondent does not receive fair notice of what it is legally required to do and where the cease and desist order would place that same respondent at a competitive disadvantage. (Respondent's Appeal Pet. at 13-19.)

In order to satisfy constitutional due process requirements, a regulation must be sufficiently specific to give regulated parties notice of what conduct is required or prohibited.<sup>27</sup> I find section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) gives Respondent fair notice that it is required to make known to hog producers any change in the formula to estimate lean percent prior to Respondent's purchase of hogs on a carcass merit basis from those producers. Section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) provides that each packer purchasing livestock on a carcass merit basis shall, prior to the purchase, make known to the seller the details of the purchase contract. The regulation explicitly provides that those details include the "grading to be used." Generally, "grade" refers to quality and "grading" is an action or process of sorting (hogs) into categories according to quality.<sup>28</sup> Moreover, the record

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<sup>27</sup>*Freeman United Coal Mining Co. v. Federal Mine Safety & Health Review Comm'n*, 108 F.3d 358, 362 (D.C. Cir. 1997); *Thomas v. Hinson*, 74 F.3d 888, 889 (8th Cir. 1996); *Georgia Pacific Corp. v. Occupational Safety & Health Review Comm'n*, 25 F.3d 999, 1004-05 (11th Cir. 1994); *Throckmorton v. NTSB*, 963 F.2d 441, 444 (D.C. Cir. 1992); *The Great American Houseboat Co. v. United States*, 780 F.2d 741, 746 (9th Cir. 1986); *United States v. Sun & Sand Imports, Ltd.*, 725 F.2d 184, 187 (2d Cir. 1984).

<sup>28</sup>Merriam Webster's Collegiate Dictionary 505 (10th ed. 1997):

**grade** . . . **1 a** . . . (2): a position in a scale of ranks or qualities . . . **2 a** : a class of things of the same stage or degree[.]

The Oxford English Dictionary, vol. VI, 725, 727 (2d ed. 1991):

**grade** . . . .

**5. a.** In things: A degree of comparative quality or value. **b.** A class of things, constituted by having the same quality or value.

(continued...)

establishes that grading is a system to categorize carcasses and that a formula to estimate lean percent is part of the grading process (Tr. 654-79, 1498).

Respondent also contends section 201.99 of the Regulations (9 C.F.R. § 201.99) is vague and ambiguous (Respondent's Appeal Pet. at 26-31). However, Respondent's failure to notify hog producers of its change in the grading to be used violates express terms of section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)). Even though section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) does not contain the words "formula" or "equation" or the term "lean percent," the plain language of the regulation requires Respondent to notify hog producers of the "grading to be used" and the record establishes that the formula to estimate lean percent is a component of the grading Respondent used.

Respondent asserts the most telling evidence that section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) is vague is Complainant's inability to put forth a consistent and coherent interpretation of the regulation. Respondent contends Complainant has variously stated: (1) Respondent has a duty to notify hog producers of an equation change because anything that affects payments to hog producers must be disclosed to the hog producers; (2) Respondent is required to report any major change in program or anything that could affect the amount hog producers are paid; (3) calculation of price is a detail Respondent must make known to hog producers prior to purchase; (4) calculation of price and grading to be used are details Respondent must make known to hog producers prior to purchase; (5) Respondent must provide hog producers with anything that would have an effect on the items listed in section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)); and (6) Respondent must provide hog producers with information to show how the hogs purchased will be dressed and priced. (Respondent's Appeal Pet. at 29-31.)

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<sup>28</sup>(...continued)

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**grading** . . . .

**2. spec. a.** The action or process of sorting (produce) into grades according to quality.

*See also Consolidated Water Power & Paper Co. v. Bowles*, 146 F.2d 492, 495 (Emer. Ct. App. 1944) (stating the term "grade" is universally understood as referring to quality); *Taylor v. J.B. Hill Co.*, 189 P.2d 258, 259 (Cal. 1948) (stating "grade" deals with quality; it is a position in a scale of quality).

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The record establishes Complainant has continuously and consistently taken the position that Respondent violated section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) when Respondent failed to notify hog producers that it was changing the formula to estimate lean percent, prior to Respondent's purchase of hogs on a carcass merit basis from those producers. Further, Respondent's list of purportedly inconsistent interpretations of section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) appears to be nothing more than different ways of describing the requirements imposed on packers in section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)). The descriptions appear to be consistent with each other and the plain language of the regulation. Therefore, I reject Respondent's assertion that Complainant did not put forth a consistent and coherent interpretation of section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)).

Third, Respondent contends the Chief ALJ erroneously found Respondent's research director estimated that there would be a 1 percent difference between what producers received for their hogs when Respondent used the Danish formula and when Respondent used the Purdue formula (Respondent's Appeal Pet. at 19-20).

The Chief ALJ states Respondent's research director testified that Respondent estimated that there would be a 1 percent difference between what producers received for hogs when Respondent used the Danish formula and when Respondent used the Purdue formula, as follows:

Scott Eilert, Excel's research director, testified that the company estimated that there would be a one percent difference in what producers received between the Danish Formula and the new equation. . . . (Tr. 966.)

Initial Decision and Order at 5-6.

I examined page 966 of the transcript which the Chief ALJ cites as the basis for his paraphrase of Dr. Eilert's testimony. I find no testimony by Dr. Eilert that Respondent estimated there would be a 1 percent difference between the amount producers received for their hogs when Respondent used the Danish formula and when Respondent used the Purdue formula. Instead, Dr. Eilert answers a hypothetical question regarding a 1 percent change in lean percent posed by Complainant's counsel, as follows:

[BY MS. HARPS:]

Q. So is it your testimony that a 1 percent change in the lean percent would result in a minimal economic impact on the producer?

[BY DR. EILERT:]

A. If a producer -- if a given producer saw a 1 percent change in his lean point, regardless of the reason, yes, there would be an economic impact. And that 1 percent -- that economic impact would be -- could be an increase or could be a decrease.

Q. That's true. But it would be an economic impact, though?

A. Correct.

Tr. 966.

Moreover, I reviewed all of Dr. Eilert's testimony. I cannot locate any testimony by Dr. Eilert that Respondent estimated there would be a 1 percent difference between the amount producers received for their hogs when Respondent used the Danish formula and when Respondent used the Purdue formula. Therefore, I do not adopt the Chief ALJ's paraphrase of Dr. Eilert's testimony that appears on pages 5 and 6 of the Initial Decision and Order.

Fourth, Respondent contends the Chief ALJ erroneously found Respondent concluded that its agreement with Tyson Foods required Respondent to notify Tyson Foods of the formula change (Respondent's Appeal Pet. at 20).

The Chief ALJ found Respondent "concluded that its agreement with Tyson Foods, which supplied the majority of the hogs for [Respondent's] Marshall, Missouri, slaughtering facility, required that Tyson be notified of the formula change." (Initial Decision and Order at 6-7.) I cannot locate anything in the record supporting the Chief ALJ's finding that Respondent concluded that it was required by contract to notify Tyson Foods of the change in the formula to estimate lean percent. To the contrary, the record establishes Doug Ott, Respondent's employee responsible for contracts with hog producers, reviewed the contracts Respondent had with Tyson Foods and some of the other hog producers and concluded that Respondent was not required by contract to notify Tyson Foods or any other hog producer of the change in the formula to estimate lean percent (Tr. 1396-98, 1848-50). Therefore, I do not adopt the Chief ALJ's

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finding that Respondent concluded that its agreement with Tyson Foods required Respondent to notify Tyson Foods of the change in the formula to estimate lean percent.

Fifth, Respondent contends the Chief ALJ erroneously found producer reaction to Respondent's formula change was mixed. Respondent states the evidence demonstrates hog producers did not care that Respondent had changed the formula for estimating lean percent and did not care that Respondent failed to provide hog producers with prior notice of the change in the formula to estimate lean percent. (Respondent's Appeal Pet. at 20-24.)

The Chief ALJ found among hog producers there was a mixed reaction to the formula change. Some hog producers favored the change to a more accurate formula, some hog producers were indifferent to the formula change, and some hog producers were upset with Respondent's failure to notify them of the formula change. (Initial Decision and Order at 10-11.) The Chief ALJ based his finding that hog producers had a mixed reaction to the formula change on testimony by William Alan Houchin, a marketing specialist employed by GIPSA, and Steve E. Ring, the general manager of Hog, Inc. (Tr. 633, 1084, 1091, 1099, 1159).

Mr. Houchin's testimony is based on interviews with six of Respondent's field buyers (Tr. 631). Mr. Houchin testified that one of Respondent's field buyers, Jim Shobe, stated that hog producer response to the change in the formula to estimate lean percent was "indifferent," which means that "some people liked the changes and some didn't." (Tr. 633.) Respondent contends that, later in his testimony, Mr. Houchin acknowledged that Mr. Shobe was referring to hog producer response to Respondent's June 1998 change to its lean value matrix and not to hog producer response to Respondent's use of the Purdue formula beginning in October 1997 (Respondent's Appeal Pet. at 23). While Mr. Houchin's testimony on this subject is not the mirror of clarity, the record supports Respondent's contention that Mr. Shobe characterized hog producer response to Respondent's June 1998 change in the lean value matrix as "indifferent" and that Mr. Shobe was not describing hog producer response to Respondent's change in the formula to estimate lean percent (Tr. 645-49; RX 60 at 2). Therefore, I do not rely on Mr. Houchin's testimony to support the finding that hog producers had a mixed reaction to Respondent's change in the formula to estimate lean percent.

Respondent also contends Mr. Ring's testimony on the subject of hog producer response to Respondent's change of the formula to estimate lean percent is not credible, and the Chief ALJ erred by giving any weight to

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Mr. Ring's testimony (Respondent's Appeal Pet. at 23-24).

The Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).<sup>29</sup> The Administrative

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<sup>29</sup>See also *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 210 (2002), *appeal docketed*, No. 02-9543 (10th Cir. July 19, 2002); *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 560 (2001), *appeal dismissed sub nom. Graves v. United States Dep't of Agric.*, No. 01-3956 (6th Cir. Nov. 28, 2001); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1053-54 (1998); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 90 (1997) (Order Denying Pet. for Recons.); *In re Garelick Farms, Inc.*, 56 Agric. Dec. 37, 78-79 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 245 (1997), *aff'd*, 172 F.3d 51 (Table), 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 860-61 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 852 (1996); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 159 (1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986); *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21). See generally *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (stating the substantial evidence standard is not modified in any way when the Board and the hearing examiner disagree); *JCC, Inc. v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (stating agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by an administrative law judge's credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (*per curiam*) (stating while considerable deference is owed to credibility findings by an administrative law judge, the Appeals Council has authority to reject such credibility findings); *Pennzoil v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (stating the Commission is not strictly bound by the credibility determinations of an administrative law judge); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (stating the Board has the authority to make credibility determinations in the first instance and may even disagree with a trial examiner's finding on credibility); 3 Kenneth C. Davis, *Administrative Law Treatise* § 17:16 (1980 & Supp. 1989) (stating the agency is entirely free to

(continued...)

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Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

**§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**

.....

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT describes the authority of the agency on review of an initial or recommended decision, as follows:

*Appeals and review. . . .*

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3,

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<sup>29</sup>(...continued)

substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

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1940), certiorari denied, 311 U.S. 705.

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(1947).

However, the consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify.<sup>30</sup>

Respondent contends Mr. Ring's testimony is tainted both by a dispute between Respondent and Hog, Inc., over the volume Hog, Inc., is contractually required to provide Respondent and by Mr. Ring's unhappiness that Respondent directly purchased hogs from producers who had earlier sold hogs to Respondent through Hog, Inc. (Respondent's Appeal Pet. at 23-24).

Hog, Inc.'s dispute with Respondent and Mr. Ring's unhappiness with Respondent are not related to Mr. Ring's testimony regarding the reaction of hog producers to Respondent's change of the formula to estimate lean percent. I do not find Hog, Inc.'s dispute with Respondent or Mr. Ring's unhappiness with Respondent about matters which are not related to this proceeding sufficient bases to reverse the Chief ALJ's credibility determination with respect to Mr. Ring. Therefore, I find no basis to reverse the Chief ALJ's finding that hog producers had a mixed reaction to Respondent's change of the

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<sup>30</sup>*In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 212 (2002), *appeal docketed*, No. 02-9543 (10th Cir. July 19, 2002); *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 561-62 (2001), *appeal dismissed sub nom. Graves v. United States Dep't of Agric.*, No. 01-3956 (6th Cir. Nov. 28, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 602 (1999); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1055-56 (1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *aff'd*, 99 F. Supp. 2d 1308 (D. Kan. 1998), *aff'd*, No. 00-3173, 2001 WL 401594 (10th Cir. Apr. 20, 2001) (unpublished); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 279 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426 (1979) (Remand Order); *In re Steve Beech*, 37 Agric. Dec. 869, 871-72 (1978); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American Commodity Brokers, Inc.*, 32 Agric. Dec. 1765, 1772 (1973); *In re Cardwell Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

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formula to estimate lean percent.

Sixth, Respondent contends the Chief ALJ erroneously rejects the importance of Respondent's evidence that Respondent had no contractual obligation to some hog producers to notify these hog producers before Respondent changed the formula to estimate lean percent and Respondent's evidence that some hog producers did not care which formula Respondent used to estimate lean percent. Respondent further states this evidence lends crucial support to its contention that it had no legal duty to inform hog producers before changing the formula to estimate lean percent and the Chief ALJ erroneously describes Respondent's contention as being that hog producers waived their right to notification of the change of the formula to estimate lean percent. (Respondent's Appeal Pet. at 25-26.)

The Chief ALJ describes Respondent's contention as being that some hog producers contractually waived their right to notice of Respondent's change of the formula to estimate lean percent and that some hog producers in effect waived their right to notice of Respondent's change of the formula to estimate lean percent because they did not care whether Respondent changed the formula (Initial Decision and Order at 17-18). Based on my reading of Respondent's filings, I do not find Respondent contends that hog producers waived or in effect waived a right to notice of Respondent's change of the formula to estimate lean percent. Instead, it appears Respondent contends that it had no duty to inform hog producers of the change in the formula and Respondent's contracts with hog producers and hog producer reaction to Respondent's formula change indicate that Respondent had no legal duty to notify hog producers of the change in the formula to estimate lean percent. Therefore, I do not adopt the Chief ALJ's discussion concerning the waiver of a right under the Packers and Stockyards Act and the Regulations.

However, I reject Respondent's contention that its contracts with some hog producers and the reaction of some hog producers to Respondent's change of the formula to estimate lean percent indicate that Respondent had no obligation under the Packers and Stockyards Act and the Regulations to notify hog producers before changing the formula to estimate lean percent. Section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) requires each packer purchasing livestock on a carcass merit basis, prior to the purchase, to make known to the seller the details of the purchase contract, including the grading to be used. The formula to estimate lean percent is a part of the "grading" within the meaning of section 201.99 of the Regulations (9 C.F.R. § 201.99) as it is an element of Respondent's carcass evaluation process. Respondent legal

obligation under section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) and section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) is neither affected by Respondent's contracts with hog producers nor affected by hog producer reaction to Respondent's change of the formula to estimate lean percent.

Seventh, Respondent contends the Chief ALJ erroneously ordered Respondent to engage in arbitration with producers that Complainant contends were not paid in full for the difference for hogs purchased using the Purdue formula as compared to the Danish formula. Specifically, Respondent contends the Chief ALJ does not have authority to order arbitration and arbitration provides a non-contractual remedy not bargained for by the parties. (Respondent's Appeal Pet. at 31-32.)

I agree with Respondent's contention that the Chief ALJ does not have authority to order Respondent to engage in arbitration with hog producers that Complainant contends were not paid in full for the difference for hogs purchased using the Purdue formula as compared to the Danish formula. My reasons for this conclusion are fully explicated in this Decision and Order, *supra*. Accordingly, I do not adopt the portion of the Chief ALJ's Order that requires Respondent to engage in arbitration with hog producers.

### **Respondent's Response to Complainant's Appeal**

On March 13, 2002, Complainant filed Complainant's Appeal of Procedural Rulings, Complainant's Appeal Petition, and Complainant's Appeal Brief, and Respondent filed Respondent's Appeal Petition. On June 6, 2002, Complainant filed Complainant's Response in which Complainant responds to Respondent's Appeal Petition. On June 6, 2002, Respondent filed Respondent's Response to Complainant's Appeal in which Respondent raises a number of issues that were not raised by Complainant in Complainant's Appeal of Procedural Rulings, Complainant's Appeal Petition, or Complainant's Appeal Brief. Section 1.145(b) of the Rules of Practice provides for a response to an appeal petition, as follows:

#### **§ 1.145 Appeal to Judicial Officer.**

. . . .

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk

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a response in support of or in opposition to the appeal *and in such response any relevant issue, not presented in the appeal petition, may be raised.*

7 C.F.R. § 1.145(b) (emphasis added).

The emphasized language was included in section 1.145(b) of the Rules of Practice (7 C.F.R. § 1.145(b)) so that neither party would have to file a protective notice of appeal (to be dropped if no appeal were filed by the other party), but could, instead, file the equivalent of a cross-appeal in response to the appeal petition filed by the other party.<sup>31</sup> Where a party has previously filed an appeal petition, that party's response to the other party's appeal petition is limited to a response in support of, or in opposition to, the other party's appeal. A party may not, in the guise of a response to another party's appeal petition, file a second appeal petition. Therefore, I do not consider the issues Respondent raises in Respondent's Response to Complainant's Appeal which are not in response to issues raised by Complainant in Complainant's Appeal of Procedural Rulings, Complainant's Appeal Petition, or Complainant's Appeal Brief.

**Findings of Fact**

1. Respondent, Excel Corporation, is a corporation whose mailing address is P.O. Box 2519, Wichita, Kansas 67201.
2. Respondent is a packer as defined by the Packers and Stockyards Act and engaged in the business of buying livestock, including hogs, in commerce for purposes of slaughter and manufacture into meat products.
3. Respondent buys hogs from producers.
4. After hogs are slaughtered, Respondent uses an instrument called the Fat-O-Meat'er and a formula embedded in the Fat-O-Meat'er to estimate the lean percent in hog carcasses.
5. The estimated lean percent is used to calculate the price Respondent will pay hog producers for their hogs.
6. On or about October 1997, Respondent changed the formula for

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<sup>31</sup>*In re Floyd Stanley White*, 47 Agric. Dec. 229, 262-63 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re Richard L. Thornton*, 41 Agric. Dec. 870, 900 (1982), *aff'd*, 715 F.2d 1508 (11th Cir. 1983), *reprinted in* 51 Agric. Dec. 295 (1992).

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calculating the lean percent in hogs.

7. The Fat-O-Meat'er and the formula and the change in the formula are all "grading to be used" within the meaning of section 201.99 of the Regulations (9 C.F.R. § 201.99).

8. Beginning on or about October 1997, Respondent did not notify hog producers that it was changing the formula to estimate lean percent prior to purchasing hogs on a carcass merit basis from those producers.

**Conclusion of Law**

Respondent, Excel Corporation, violated section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)) and section 201.99(a) of the Regulations (9 C.F.R. § 201.99(a)) when it failed to make known to hog producers that it was changing the formula to estimate lean percent, prior to purchasing hogs on a carcass merit basis from those producers.

For the foregoing reasons, the following Order should be issued.

**ORDER**

Respondent, its agents and employees, directly or indirectly through any corporate or other device, in connection with its purchases of livestock on a carcass merit basis, shall cease and desist from:

(a) Failing to make known to sellers, or their duly authorized agents, prior to purchasing livestock, the factors that affect Respondent's estimation of lean percent, including, but not limited to, any change in the formula used to estimate lean percent; and

(b) Failing to make known to sellers, or their duly authorized agents, prior to purchasing livestock, the details of the purchase contract, including, when applicable, the expected date and place of slaughter, carcass price, condemnation terms, description of the carcass trim, grading to be used, accounting, and any special conditions.

This Order shall become effective on the day after service of this Order on Respondent.

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