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S. HRG. 106–1034

USDA'S ADMINISTRATIVE PROCEDURES REGARDING THE PACKERS AND STOCKYARDS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

SEPTEMBER 25, 2000

Serial No. J–106–108

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
73–877 WASHINGTON : 2001

For sale by the Superintendent of Documents, U.S. Government Printing Office
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USDA'S ADMINISTRATIVE PROCEDURES REGARDING THE PACKERS AND STOCKYARDS ACT

MONDAY, SEPTEMBER 25, 2000

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 1 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Charles E. Grassley (chairman of the subcommittee) presiding.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I am pleased to call today's hearing to order. We have a very important report from the General Accounting Office on the enforcement efforts of the Grain Inspection, Packers and Stockyards Administration of the U.S. Department of Agriculture with respect to anticompetitive activity in the livestock market. The report is entitled "Packers and Stockyards Program: Actions Needed to Improve Investigations of Competitive Practices." The report was issued last week.

One of the purposes of this subcommittee is to provide oversight of administrative procedures in various agencies of the Federal Government. This is useful in terms of making sure that agencies are doing their job in the best manner possible.

So in August 1999, I asked the General Accounting Office to conduct an investigation because I felt the U.S. Department of Agriculture was not doing everything under the current Packers and Stockyards Act authority to prevent unfair and anticompetitive practices in the cattle and hog industries.

I thought it would be helpful for Congress to have a fair assessment of the parameters of the Packers and Stockyards Act, what the U.S. Department of Agriculture should be doing under their current authority, and how well they have been doing it so far. This is particularly important as Congress considers how to best address concerns raised about concentration and anticompetitive practices in agriculture.

Even though we have 25-year-low prices for a lot of agricultural commodities, I probably hear more concern expressed about concentration and the lack of competition in agriculture than I do even with prices. So after this report was issued, I wasn't that surprised

when the General Accounting Office report found that GIPSA has substantial authority to prohibit anticompetitive activity in the livestock industry by taking investigative, enforcement, and regulatory action. I also wasn't that surprised when the report showed that GIPSA hasn't been very aggressive in terms of pursuing competition-related cases or issuing competition-related regulations.

However, I was shocked to learn that GIPSA has serious organizational, procedural, and expertise problems which the General Accounting Office report concludes substantially impede GIPSA's ability to effectively perform its competition duties.

I was even more shocked to learn that notwithstanding the fact that GIPSA has known since 1991 that there were serious problems—in fact, in 1997 the U.S. Department of Agriculture's own inspector general identified these same problems—very little has been done to address and resolve them in an appropriate manner or as a priority matter for the Department.

Undoubtedly, these shortcomings affect how GIPSA conducts its business in a very negative way and, ultimately, whether farmers are protected from unfair and anticompetitive practices in the livestock industry. These shortcomings also severely handicap GIPSA's ability to perform its statutory responsibilities.

Now, the way I see this is that even if Congress were to enact further laws—and the bills introduced in Congress so far generally involve giving the U.S. Department of Agriculture more authority—perhaps the USDA is not in a state to accomplish anything of real benefit for farmers to protect competition.

The General Accounting Office says that GIPSA hasn't got the right procedures and processes in place, nor do they have the requisite expertise to do the job that they have to do right now. And if you read between the lines of the General Accounting Office report, it is saying that the U.S. Department of Agriculture and GIPSA haven't made the competition issue a priority in the grand scheme of things, based on the small amount of resources and time they have actually dedicated to these matters. We will explore these issues in depth with today's witnesses.

A final point. I think it is clear that USDA currently has very expansive authority to take action to prevent unfair and anticompetitive activity in the livestock market, and that the U.S. Department of Agriculture hasn't been effective in this responsibility because of the problems identified in the General Accounting Office report.

While the Packers and Stockyards Act may not necessarily be a panacea in terms of addressing concentration and competition in the livestock industry, giving the U.S. Department of Agriculture more authority at this time makes little sense because it appears that the USDA can't even do the job it is supposed to do right now.

I believe that if the USDA doesn't get its act in order, then USDA won't be accomplishing its competition mission under the Packers and Stockyards Act. The U.S. Department of Agriculture must implement the case methods and investigative processes specifically tailored for competition matters, and dedicate experienced antitrust lawyers to conduct these investigations and pursue them as legal cases which can be won in court.

I am not saying that additional legislation would never be appropriate. In fact, I myself think that it would be a good idea to get the U.S. Department of Agriculture more involved in the merger review process, and I have actually introduced a bill that would do just that. But if the USDA can't do antitrust, throwing more legislation and authority at it will do little to help farmers and competition in agriculture.

Most importantly, though, the USDA needs to make competition matters a priority. While I keep hearing that they think that these concerns are important and they are focusing on them, why do we then have a report that concludes so very little USDA, OGC, and GIPSA time and staff is spent and dedicated to competition-related matters? Why hasn't the U.S. Department of Agriculture put this at the top of its to-do list?

Ultimately, I believe that the priorities of this administration's USDA are not in order, and we in Congress have to force USDA to do it. That is the reason why I introduced S. 3091 last week, with Senators Grams, Ashcroft, and Brownback. I refer to this as the Packers and Stockyards Enforcement Improvement Act of 2000. Our bill will require the U.S. Department of Agriculture to implement the GAO recommendations within a year.

It is truly a disgrace that Congress has to resort to legislative action to force the U.S. Department of Agriculture to make commonsense changes, considering the fact that competition and concentration are of such concern to our farmers. As I expressed, I hear more about that, quite frankly, than I do the low prices.

I believe that the General Accounting Office Report will significantly help improve USDA's monitoring, investigations, and enforcement under the Packers and Stockyards Act, and consequently help family farmers in the end.

Now, I am ready to call our witnesses. Even though we are only going to receive testimony from Mr. Dunn, who is Under Secretary of Agriculture for Marketing and Regulatory Affairs, and a fellow Iowan, and Mr. Lawrence Dyckman, Director of Food and Agriculture Issues at the General Accounting Office, Mr. Dunn and Dyckman are free to bring—I thought each of you wanted to bring two extra people to the table with you, so would you each come with your teams?

I want to take your testimony and remind you that your entire statements will be put in the record. We have asked you to summarize in 5 minutes, and I would like to have you stick to that. Now, normally, I would take as long as I could to listen to testimony because I think particularly agencies of our Government ought to have adequate time to do that.

But we have been told—and I hope this doesn't happen, but I have been told that the Democrat minority is going to enforce what is referred to as the 2-hour rule, which means that 2 hours after the Senate has taken effect, gone into session, we must then not have any hearings or committee meetings.

The reason I hope they don't do that is because I think it would be irresponsible not to allow us to get to the bottom of these issues that are pretty much bipartisan in this Congress, competition in agriculture, and the efforts of my subcommittee and other subcommittees of the Congress to put proper attention on this. If they

do, then we are just going to have to stop because under the practice of this committee, we do not keep the committee going in violation of the Senate rules to take testimony informally, as some committees do.

What we will do at that point, then, is we will have to submit all the questions that are unanswered in oral comments to each of you to respond to, and we will put all of the statements in the record.

So would you please start, Secretary Dunn.

PANEL CONSISTING OF MICHAEL V. DUNN, UNDER SECRETARY OF MARKETING AND REGULATORY AFFAIRS, U.S. DEPARTMENT OF AGRICULTURE, WASHINGTON, DC, ACCOMPANIED BY CHARLES RAWLS, JAMES BAKER, AND JOANNE WATERFIELD; AND LAWRENCE J. DYCKMAN, DIRECTOR, FOOD AND AGRICULTURE ISSUES, RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISION, U.S. GENERAL ACCOUNTING OFFICE, WASHINGTON, DC, ACCOMPANIED BY CHARLES ADAMS AND SUSAN POLING

STATEMENT OF MICHAEL V. DUNN

Mr. DUNN. Thank you, Mr. Chairman. On behalf of Secretary Glickman, I want to thank you for inviting us to present our views on the General Accounting Office's Report, entitled "Packers and Stockyards Programs: Action Needed to Improve Investigation of Competitive Practices."

I am pleased to present written testimony and provide any additional comments that you might need. I would ask that the committee accept that written testimony as it was written.

Senator GRASSLEY. Yes, we will.

Mr. DUNN. Thank you.

Senator GRASSLEY. The same for Mr. Dyckman.

Mr. DUNN. With me today is our General Counsel, Mr. Charlie Rawls, and the Administrator of the Grain Inspection, Packers and Stockyards agency, Mr. Jim Baker. In addition to that, I would like to introduce to you for the first time at this committee our recently appointed Deputy Administrator for Packers and Stockyards Programs, Joanne Waterfield. She comes to us from the Trade Practices Branch of the Office of General Counsel.

Senator GRASSLEY. Thank you for your presence, and congratulations on your new position.

Mr. DUNN. I want to respond to the GAO report recommendations provided in this report. Mr. Chairman, generally I strongly agree with the need to formalize a team approach between the economists and counsels at the start of an investigation. I think it is an excellent suggestion, as are many of the suggestions in the report.

Now, Secretary Glickman also shares the concerns. Back in 1996, he and I talked about what needed to be done in Packers and Stockyards, and he had the same concern that you had, Mr. Chairman, about the ability of Packers and Stockyards to not only fulfill its traditional role under trade and financial concerns, but to address this competition problem.

The Secretary asked the Office of Inspector General to do an audit of Packers and Stockyards, and they did that audit. It was released in 1997. That audit put about a watershed change in how Packers and Stockyards should operate, and instructed us to begin looking at getting more statisticians, more economists, and people with legal expertise on the Packers and Stockyards rolls.

Mr. Chairman, we did go about doing that and have implemented almost all of the procedures that the OIG had asked us to implement in that audit report. The result has been that we have restructured Packers and Stockyards; downsized the number of people at the headquarters, went from 11 regional offices to 3 offices, one office in Denver which primarily looks at livestock issues for beef and sheep, an office in Des Moines, Iowa, that primarily looks at issues of pork, and an office in Atlanta that primarily looks at issues involving poultry.

In addition to that, we have vastly increased the staff in Packers and Stockyards to address those other issues. We have 18 new economists and statisticians on the staff of Packers and Stockyards. We have hired six people with legal backgrounds, and have two in each of the three areas. Mr. Chairman, Joanne Waterfield, who is the new Deputy Administrator for Packers and Stockyards, is also an attorney. So we have begun following the general guidelines that were set out by the Office of Inspector General.

I think that the GAO report is a timely report to come through to see how we are doing it. It has some very good recommendations on what we need to do and, Mr. Chairman, we will be following those.

Thank you very much.

[The information supplied by Mr. Dunn follows:]

SUMMARY OF USDA TESTIMONY—GENERAL ACCOUNTING OFFICE REPORT "PACKERS AND STOCKYARDS PROGRAMS: ACTIONS NEEDED TO IMPROVE INVESTIGATIONS OF COMPETITIVE PRACTICES"

USDA is concerned about the competitive effects of rising concentration levels, vertical coordination, and other structural changes in the livestock, poultry and meat packing industries, and is committed to effectively responding to competitive, trade practice, and financial protection issues in these sectors. Overall, GIPSA and OGC concur with the recommendations provided in the report. The Department finds GAO's recommendations are within GIPSA's existing reorganization, reengineering, training, and long-term planning and implementation strategies.

This testimony outlines GAO's three sets of recommendations: GIPSA economists and OGC attorneys should develop a team approach for investigations; the number and role of OGC attorneys in GIPSA's investigations, as well as the role of GIPSA's own legal specialists, should be revisited; and informational activities are needed to educate and inform the industry and Congressional representatives of the competitive activities occurring in the industry, and changes in business practices affecting market operations, or for raising concerns under the P&S Act.

The testimony addresses GIPSA's past, current, and planned activities that are responsive to each of the GAO recommendations.

Overall, USDA has taken and plans more steps to strengthen its capacity to address concerns about competitiveness in the livestock, meat, and poultry industries under the Packers and Stockyards Act. The Department welcomes GAO's constructive suggestions. Many of the recommended changes have already been made and others will be undertaken as available resources allow.

PREPARED STATEMENT OF MICHAEL V. DUNN

Members of the Subcommittee, thank you for this opportunity to address the issues raised by the General Accounting Office Report "Packers and Stockyards Pro-

grams: Actions Needed to Improve Investigations of Competitive Practices" (GAO/RCED–00–242).

USDA is concerned about the competitive effects of rising concentration levels, vertical coordination, and other structural changes in the livestock, poultry and meat packing industries. The Department completed a major study of concentration (1996) in the red meat industry and formed the Advisory Commission on Agricultural Concentration in 1996. In 1997, USDA's Office of the Inspector General (OIG) reviewed GIPSA's program for investigating competitiveness issues under the Packers and Stockyards Act (P&S Act). OIG recommended the GIPSA place more of its resources in regional offices, obtain additional staff with economic, statistical, and legal backgrounds to investigate anticompetitive practices; and develop procedures to consult with the Office of the General Counsel (OGC) as investigations are initiated and throughout the course of the investigations. In 1998, GIPSA restructured its P&S Programs and reallocated staff to provide the economic, statistical, and legal resources needed to investigate complex competitiveness issues.

GIPSA's restructuring has strengthened its capability to investigate complex competitive, trade practice, and financial issues in the livestock, meat and poultry industries. For example, in March the U.S. Attorney's Office for the Eastern District of Maryland filed a complaint in United States District Court on behalf of USDA against a leading poultry processor, based on results of an investigation by GIPSA. The complaint alleged that the poultry firm engaged in unfair and deceptive practices in its dealings with poultry growers. On July 31, the Department of Agriculture and the company entered into a consent agreement to resolve this complaint. In April 1999, GIPSA filed a complaint charging a leading pork packer with engaging in unfair practices in violation of the Packers and Stockyards Act. An administrative hearing to adjudicate this issue is currently in progress. In July 1999, GIPSA filed a complaint charging a major beef packing company with engaging in an unfair practice by retaliating against a feedlot, in violation of the Packers and Stockyards Act. The administrative hearing in that case is scheduled for March of next year.

USDA is committed to effective responses in competitiveness issues, trade practice and financial protection issues in the livestock, meat, and poultry industries. We welcome GAO's thorough review of P&S' Programs and view GAO's recommendations as constructive. As stated in the Department's response to the report "Overall, GIPSA and OGC concur with the recommendations provided in the report . . ." The Department finds GAO's recommendations to be consistent with the existing reorganization, reengineering, training, and long-term planning and implementation strategies of the agency.

GAO makes three sets of recommendations:

The first set suggests that GIPSA economists and OGC attorneys develop a team approach for investigations. While this has occurred informally during the early stages of complex investigations, GIPSA and OGC will formalize this process to ensure that investigative, economic, and legal issues are considered prior to embarking on complex investigations.

GIPSA has been recruiting economists and legal specialists and now employs a total of 28 economists and 6 legal specialists, with an additional 8 economists and 1 legal specialist to be hired, to improve investigative capabilities. The Agency believes that it is important that we institute well-developed investigative procedures to ensure efficient and effective use of these capabilities. GIPSA is examining the investigative procedures of the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), as recommended by GAO. GIPSA will also examine procedures utilized by other federal regulatory agencies whose missions may more closely parallel our own, including the Commodity Futures Trading Commission, the Federal Aviation Administration, and the Federal Communications Commission. Based on our review, we will develop and refine written guidelines and procedures for both routine and complex investigations.

GIPSA plans to implement a tiered review process for investigations. GIPSA anticipates that investigators and legal specialists in its field offices will jointly develop investigation plans. A screening process will then be used to approve both routine and complex investigations. Complex investigations are those that require a substantial commitment of resources, include major firms or segments of the industry, involve novel economic or legal theories, or otherwise present substantial challenges. Supervisors at the field office level would approve plans for the Agency's routine investigations, and GIPSA headquarters staff, in conjunction with OGC, would approve plans for more complex investigations. GIPSA and OGC will review detailed written reports of plans for complex investigations for logistical implications, such as resource management, and for legal issues and economic analyses. Such a careful review of complex investigative plans by GIPSA and OGC senior management will

result in a more effective use of investigative resources and will facilitate successful litigations.

The second set of recommendations in the GAO report discusses the number and role of OGC attorneys in GIPSA's investigations, as well as the role of GIPSA's own legal specialists. Congressional approval of the President's FY 2001 requested budget increase of $3.7 million for GIPSA for P&S activities would enable GIPSA to fully integrate OCG into GIPSA's investigative process. To the extent resources are available, USDA will increase the integration of OGC attorneys into GIPSA's investigative teams early in the investigative process. Through the screening and approval process described above, it can be expected that one or more OGC attorneys will be assigned to a GIPSA investigative team at the time that an investigative plan is reviewed and approved by GIPSA and OGC senior management. GIPSA may also seek to have an OGC attorney assigned to a team during the initial development of an investigative plan. The OGC attorney(s) will work closely with GIPSA economists, legal specialists, and other technical specialists to ensure that investigative plans have a sound legal basis and to address critical legal issues throughout the conduct of an investigation. If evidence leads to the filing of a complaint, the integration of OGC attorneys in GIPSA's investigative teams will improve USDA's ability to litigate a case effectively.

GAO also noted a decline in the number of OGC attorneys who are available to assist in GIPSA investigations. In the past 3 years, as a result of Congressional appropriations, OGC has been unable to fill positions that were vacated through attrition. OGC recognizes the high priority and increasing workload in critical areas such as its Trade Practices Division. If sufficient funds are not made available by Congress, as requested in the fiscal year 2001 budget, consideration will be given to transferring resources within OGC to better support the work of GIPSA. However, such a transfer would be difficult due to the fact that many areas of OGC are already working with reduced staffing.

GIPSA will enhance the effectiveness of its legal specialists. While the role of GIPSA legal specialists is not to act as attorneys for GIPSA or the Department, they serve as a frontline resource for legal advice on investigations. They will participate in investigation planning and will consult with OGC attorneys. The legal specialists in the field offices are new to the agency and its regulatory processes. They will require continuing training and guidance on investigative procedures. GIPSA will be looking to OGC for their recommendations in this regard.

The final recommendation addresses informational activities to educate and inform the industry and Congressional representatives of the competitive activities occurring in the industry, and changes in business practices affecting market operations, or raising concerns under the P&S Act.

GIPSA has a long history of meeting with the regulated industry and producers to discuss policy issues under the P&S Act. For example, GIPSA has held meetings with hog producers to discuss issues and maintain a meaningful dialogue. GIPSA has sponsored three regional meetings with state departments of agriculture and state attorneys general to find ways to better serve the agricultural community, share and exchange meaningful information, and develop better channels of communication. Last May, GIPSA sponsored a Millennium Conference, attended by over 450 people, which brought together speakers with divergent views in order to enhance public dialogue and debate on structural changes and industry concentration. The Agency has held, and is holding, a series of town hall meetings to discuss issues of concern to poultry growers, producers and processors. The town hall meetings will conclude this fall. USDA sponsored a public forum on September 21 in Denver to discuss issues surrounding captive supplies. The forum provided an opportunity for the public to submit written comments on key issues related to captive supplies, for farm groups to offer evidence on the problems or benefits or captive supplies, and for invited panelists to debate and discuss questions related to the issue. GIPSA is also planning a series of town hall meetings next year to discuss beef and sheep issues. Each of these events offers information about the agency, its function and industry findings.

GIPSA's three Packers and Stockyards Programs regional offices held open houses in May and June 1999, to provide opportunities for industry and government representatives to become more knowledgeable about Packers and Stockyards Programs' activities and responsibilities. GIPSA established a toll-free hotline (800–988–3447) as another avenue for producers and the public to voice their concerns and record their complaints about competitive, trade practice, or financial issues that may warrant investigation. As an aid for livestock and poultry growers, GIPSA has added information and links on its web site that can be used by producers as a guide before they commit to the legal and financial obligations that a signed growing contract would require.

GIPSA has developed rapid response teams to conduct high priority, speedy investigations to prevent or minimize major competitive or financial harm caused by violations of the P&S Act. Since July 1999, teams have been deployed in North and South Dakota, Missouri, Kansas, Nebraska, Mississippi, Pennsylvania, Idaho, Iowa, Illinois, and Wisconsin to address a variety of situations in the cattle, hog, and poultry industries. A significant part of the rapid response teams' activities have involved direct communication with producers and other concerned parties.

GIPSA has actively supported analysis and the public release of findings that directly relate to the competitive conditions and marketplace behavior in the meatpacking industry. For example, a report of an analysis of competitive conditions and behavior of U.S. meatpackers by Catherine Morrison at the University of California, Davis was released in 1999. A report of research by John Schroeter (Iowa State University) and Azzeddine Azzam (University of Nebraska-Lincoln) conducted as part of the Texas Panhandle Fed Cattle Investigation was also released in 1999. GIPSA conducted a peer review of the Texas Panhandle Investigation and released the results to the public. These findings have contributed to the public understanding and debate about the competitiveness of markets and the behavior of market participants including their use of marketing agreements, forward contracts and packer feeding. GIPSA published a petition submitted by the Western Organization of Resource Councils asking that USDA engage in rulemaking to limit packers' use of forward contracts and packer feeding, and provided the public an opportunity to comment. GIPSA publicly provided its assessment of the comments, which has stimulated dialogue and discussion of the issues.

GIPSA publishes an annual statistical report on the meat packing industry. The report contains data on packer procurement practices, changes in plant size, concentration ratios, and other structural changes occurring in the industry.

USDA recognizes that there is room for improvement. GIPSA recognizes that it would be helpful if producers had a better understanding of the P&S Act and how the Act applies to various market activities. GIPSA also agrees that it could report on market activities and identify those activities that may raise concerns about fairness and competition, as the FTC does.

GIPSA also plans to provide more guidance to the industry through the regulatory process. On July 28, Secretary Glickman announced plans to propose several new regulations and stated that "Our goal is to ensure there is fair competition in the marketplace and to help small farmers and ranchers compete more effectively. These new rules will help level the playing field by increasing the transparency of market transactions."

GIPSA has published proposed rules to establish the Swine Contract Library as mandated by Public Law 106–78, "Livestock Mandatory Reporting" and has promulgated a final rule to help ensure that feed weight is properly documented whenever it affects payment or settlement to livestock and poultry growers.

By increasing our public visibility through outreach efforts, GIPSA can both inform and educate our affected public about their responsibilities under the Act and monitor issues affecting the industry. If Congress approves its 2001 budget request, GIPSA will appoint a full-time Outreach Coordinator for the Packers and Stockyards Programs.

In summary, we have been taking steps to strengthen our capacity to address concerns about competitiveness in the livestock, meat, and poultry industries. We welcome GAO's constructive suggestions. Many of the recommended changes have already been made and we are continuing to make changes that available resources will allow.

The CHAIRMAN. Thank you, Mr. Dunn.

Mr. Dyckman.

STATEMENT OF LAWRENCE J. DYCKMAN

Mr. DYCKMAN. It is a pleasure to be here, Chairman Grassley. With me is Chuck Adams, to my right, the Assistant Director of the work, and Susan Poling, our Associate General Counsel, which helped us with the legal issues in our report. Again, I want to thank you for the opportunity to testify on our review of the Department's efforts to investigate concerns about competition in the marketing of cattle and hogs.

As you know, dynamic changes have taken place in these industries over the recent decades, transforming them and creating new

opportunities. However, these changes have also led to concerns—and you have described them—about the effects of increasing industry concentration, including the possibility that there have been anticompetitive actions.

Our testimony today focuses on USDA's efforts to investigate concerns about such actions. USDA's legal authority in this area is the Packers and Stockyards Act. GIPSA is responsible, as we all know, for that implementation. My testimony is based on our report issued last week to you and the House and Senate Agriculture Committees that addresses GIPSA's authority the Act, the results of GIPSA's investigations, and the agency's capability to effectively investigate concerns about these types of practices.

I won't bore you with the background of the Act. I believe you are familiar with it, but let me just say that the Act gives GIPSA broad authority. GIPSA has to prove that a practice is unfair. It must show that a packer intended to injure another party, or that the packer's action caused injury or is likely to do so. The Act provides for GIPSA to start investigations and take administrative actions to halt packer practices that violate the Act. USDA has an administrative law process. It hears cases, and these cases are decided by an administrative law judge.

In terms of the status of the investigations, what we found was that recent GIPSA investigations have identified very few anticompetitive activities. From October 1997 to December 1999, GIPSA investigated 74 allegations or concerns about anticompetitive activity involving cattle or hogs. At the end of March 2000, 57 investigations were completed and 17 were ongoing. Our report has a full description of the status of these cases. GIPSA identified a total of five alleged violations of the Act which involved actions by one or more companies in such areas as deceptive pricing and improper bidding practices.

We also observed, and Secretary Dunn has just described, the major effort that the Department has started to improve its investigative capabilities. They have reorganized, they have tried to hire additional staff, and they are to be commended for that. However, our work identified significant problems in the way GIPSA conducts its investigations. And these are not new findings on our part; the IG reported many of them several years ago.

First, they are being performed without the direct involvement of attorneys. Consequently, the legal perspective of USDA's attorneys is generally absent until GIPSA has performed an investigation and forwarded a case file to them for review and action. In comparison, we know that the Department of Justice and the Federal Trade Commission do not perform investigations of potential anticompetitive practices without an experienced attorney leading the way, not just involved in the case.

Second, we found that GIPSA's investigative practices have not been designed for complex investigations involving competition. Rather, they were designed years ago for traditional practice investigations and financial type investigations. Moreover, GIPSA's investigative guidance manual was last revised 4 years ago, prior to the agency's reorganization, to develop anticompetitive practice investigation capabilities. The manual does not contain specific guidance for anticompetitive practice investigations, such as the con-

tents of an investigative plan, the information needed for approval of an investigation, or how frequently these investigations should occur.

We concluded that USDA needs to make substantial improvements in these areas. First, USDA needs to integrate OGC's attorneys into the investigative teams along with GIPSA's economists. Attorneys should be in a lead role on the complex competition-related investigations, just as they are at the other departments that we mentioned.

We recommend that they adopt a more systematic approach to performing investigations, including much more up-front planning. Like Justice and FTC, they should start with a preliminary phase to develop a theory of the alleged violation and an investigative plan. We do that actually on our reviews. We have audit program. We agree on what are the critical questions. We involved our attorneys on investigations like this one that involve legal issues up front, and they are equal partners on these investigations and our reviews.

At this stage of the investigative plan, senior officials with GIPSA and OGC could approve the initial theory of the case, the plan, and commit the necessary resources. Subsequently, periodic reviews should be held at major decision points. We recommend that GIPSA consult with the Attorney General and the Chairman of the Federal Trade Commission on these recommendations, to implement them.

We are heartened and encouraged that USDA's response is a positive one because it reflects an acknowledgement that actions are needed to make GIPSA's investigations even more effective than they are now.

Mr. Chairman, that concludes my statement and we would be happy to participate in questions and answers.

[The prepared statement of Mr. Dyckman follows:]

PREPARED STATEMENT OF LAWRENCE J. DYCKMAN

Mr. Chairman and Members of the Subcommittee: Thank you for the opportunity to testify on the work we have completed on the U.S. Department of Agriculture's (USDA) efforts to investigate concerns about competition in the marketing of cattle and hogs. Our testimony today is based on our September 21, 2000, report entitled Packers and Stockyards Programs: Actions Needed to Improve Investigations of Competitive Practices (GAO–RCED–00–242), which you requested. As you know, within USDA, the Grain Inspection, Packers and Stockyards Administration (GIPSA) is responsible for investigating concerns about unfair and anticompetitive practices in the $43 billion cattle and hog market.

Our testimony today focuses on the three areas covered in our report: (1) the number and status of investigations conducted by GIPSA in response to complaints and concerns about anticompetitive activity involving the marketing of cattle and hogs, (2) factors that affect GIPSA's ability to investigate concerns about anticompetitive practices, and (3) GIPSA's authority under the Packers and Stockyards Act to address concerns about anticompetitive and unfair practices. In summary, we found the following:

From October 1, 1997, through December 31, 1999, GIPSA investigated 74 allegations or concerns about anticompetitive activity involving cattle or hogs. At the end of March 2000, 57 of these investigations had been completed, and the remaining 17 were ongoing. GIPSA identified a total of five alleged violations of the Packers and Stockyards Act. These violations involved acts by one or a few companies in such areas as deceptive pricing.

GIPSA has strengthened its ability to address competition concerns since a highly critical report was issued by USDA's Inspector General in 1997. However, two principal factors continue to detract from GIPSA's ability to investigate concerns about

anticompetitive practices in these markets. First, the agency's investigations are planned and conducted primarily by economists without the formal involvement of attorneys from GIPSA's Office of General Counsel (OGC). As a result, a legal perspective that focuses on assessing potential violations is generally absent when investigations are initiated and conducted. Second. GIPSA's investigative processes and practices are designed for the traditional trade practice and financial issues that the agency has emphasized for years and are not suited for the more complex competition-related concerns that it is also now addressing.

USDA has authority under the Packers and Stockyards Act, which has been delegated to GIPSA, to initiate actions to halt unfair and anticompetitive practices by meatpacking companies and by other parties involved in livestock marketing. Specifically, the agency can take action to stop companies from engaging in or using any unfair, unjustly discriminatory, or deceptive practice or device, or making or giving any undue or unreasonable preference or advantage to another party. In addition, the agency can take action to halt unlawful anticompetitive practices that are antitrust-type actions, such as a packer's activities that manipulate or control prices or restrain trade.

In our report, we recommended several actions to improve GIPSA's investigations. Specifically, we recommended that USDA integrate the attorneys from OGC into GIPSA's investigative teams. The teamwork approach used at the Department of Justice (DOJ) and the Federal Trade Commission (FTC) to perform comparable investigations of anticompetitive practices would benefit GIPSA's investigations. We also recommended that GIPSA adopt more systematic approaches to its investigative work, including approaches on how cases are selected and investigations conducted.

Mr. Chairman, we are encouraged by USDA's positive response to our draft report. The Department concurred with our recommendations and spelled out specific steps that it is considering in responding to the problems that we identified.

BACKGROUND

The Packers and Stockyards Act was passed in 1921 in response to concerns that, among other things, the marketing of livestock presented special problems that could not be adequately addressed by the federal antitrust laws existing at that time. The act's provisions were based, in part, on prior antitrust statutes, including the Sherman Act and the Federal Trade Commission Act. GIPSA is responsible for implementing the Packers and Stockyards Act. USDA's OGC also has a role in enforcing the act and, among other activities, represents the Department in administrative and court proceedings addressing alleged violations of the act.

In general, DOJ and FTC are responsible for enforcing federal antitrust laws that protect the marketplace from practices that adversely affect competition. DOJ is responsible for enforcing the Sherman Act, and FTC has responsibility for the Federal Trade Commission Act.[1] If GIPSA identifies an activity that appears to be criminal or a violation of antitrust law, GIPSA officials may consult with DOJ on whether the case should be forwarded to DOJ for action. DOJ and FTC also share responsibility for reviewing proposed mergers under the Clayton Act.[2]

In 1996, GIPSA reported that dynamic changes had taken place in the cattle and hog industries in recent years, including increasing concentration and vertical integration—where packers own the animals. GIPSA stated that these changes had reduced the role of public markets, where terms of a trade are visible to all. GIPSA also reported that past studies wee inconclusive about whether the industry remained competitive. Also, in 1996, an advisory committee to the Secretary of Agriculture reviewed the concerns of producers and others about the changes in livestock markets and recommended, among other things, a review of GIPSA's efforts to enforce the Packers and Stockyards Act. The Secretary of Agriculture then asked USDA's Office of Inspector General (OIG) to review GIPSA's program.

In 1997, USDA's OIG reported that GIPSA had a credible record of investigating claims of fraud and unfair business dealings, such as false weighing and failing to pay for livestock. However, the report stated that GIPSA (1) did not have the capability to perform effective anticompetitive practice investigations and (2) faced formidable obstacles to become effective in performing such investigations because it had not been organized, operated, or staffed for this purpose. The Inspector General stated that GIPSA should employ an approach similar to that used by DOJ and

[1] FTC has a specific responsibility under the Packers and Stockyards Act to address anticompetitive and unfair practices in retail sales of meat and meat products.

[2] The Packers and Stockyards Act does not provide USDA with premerger review authority. However, GIPSA may initiate administrative actions to halt unfair and anticompetitive practices of a company formed by a merger.

FTC, and integrate attorneys and economists from the beginning of the investigative process.

In response, GIPSA completed a major restructuring of its headquarters and field offices in 1999 and hired staff to strengthen its investigations of alleged anticompetitive practices. GIPSA now has regional offices in Denver, Colorado, for its work on the cattle industry; in Des Moines, Iowa, for handling work on the hog industry; and in Atlanta, Georgia, for its work on the poultry industry. During the reorganization, GIPSA experienced substantial employee changes: Over 40 staff relocated, and 44 staff left the agency. Also, the agency hired 67 new employees from April 1998 through July 2000, including economists and legal specialists to assist with its investigations of competitive practices.

RECENT GIPSA INVESTIGATION HAS FOUND LITTLE ANTICOMPETITIVE ACTIVITY

Our review disclosed that GIPSA has found few instances of anticompetitive activity in recent years. Specifically, GIPSA conducted 74 investigations involving concerns about potential anticompetitive activity in the cattle and hog markets from October 1, 1997, through December 31, 1999, and identified alleged anticompetitive actions in only five cases.[3] (See table 1.) The alleged violations involved acts by specific meatpacking companies, such as deceptive pricing, rather than industrywide practices. Thirty-six of these investigations were in direct response to specific complaints about anticompetitive actions; the other 38 cases were initiated by GIPSA.

[3] We did not evaluate the effectiveness of GIPSA's efforts and findings in these cases.

Table 1: Results of GIPSA's Investigations of Allegations of Anticompetitive Actions From the Start of Fiscal Year 1998 Through the First Quarter of Fiscal 2000

Alleged violator and type of animal	Number of investigations	Status of investigation		Did GIPSA find anticompetitive action?	
		Open	Closed	Yes	No
Meatpacking company					
Cattle	39	11	28	3	27
Hogs	12	6	6	2	7
Subtotal[a]	51	17	34	5	34
Other[b]					
Cattle	21	0	21	0	21
Hogs	2	0	2	0	2
Subtotal	23	0	23	0	23
Total					
Cattle	60	11	49	3	48
Hogs	14	6	8	2	9
Total	**74**	**17**	**57**	**5**	**57**

Note: The information on the status of investigations and whether GIPSA found anticompetitive actions is as of the end of March 2000.

[a]The total number of cases where GIPSA did or did not find anticompetitive actions exceeds the total number of closed cases because three cases in which anticompetitive actions were reported remained open for resolution at the time of our review and two cases in which anticompetitive actions were not found remained open for an informational review at the agency's headquarters.

[b]Includes livestock markets, dealers, and others who buy or sell livestock on commission.

Source: GAO's analysis of information obtained from GIPSA's complaint/investigation automated system, the agency's files and records, and the agency's officials.

During this period, GIPSA also conducted various other examinations that were designed primarily to develop information about the cattle and hog markets, including how prices for animals are determined. Specifically, a major examination of cattle buying in Texas was completed in 1999; another involving the procurement of hogs in four states in the Western Cornbelt was completed in 1998.[4] Neither found violations of the Packers and Stockyards Act.

TWO PRINCIPAL FACTORS DETRACT FROM GIPSA'S CAPABILITY TO FULLY INVESTIGATE CONCERNS ABOUT COMPETITION

We identified two principal factors that detract from GIPSA's capability to investigate anticompetitive practices. The first factor concerns the composition of GIPSA's investigative teams. We found that attorneys from USDA's OGC are not directly involved in GIPSA's investigative work and the economists that GIPSA has hired since 1998 are inexperienced in investigative work. The second factor we identified is that GIPSA does not have investigative processes and practices appropriate for conducting complex anticompetitive practice investigations.

Attorneys' participation in investigations

GIPSA relies on USDA's OGC attorneys for legal advice, and OGC reviews the results of GIPSA's investigations to determine if violations of law might have occurred. However, OGC attorneys usually do not participate at the start or throughout the agency's investigations. OGC attorneys are not assigned until GIPSA has performed an investigation and forwarded a developed case file to them for review and action. The agency's investigations are planned and conducted primarily by economists, most of whom have limited investigative experience.

In contrast, DOJ and FTC have teams of attorneys and economists to perform investigations of anticompetitive practices. Attorneys are assigned to lead and conduct the investigations from the outset so that a legal perspective is focused on assessing potential violations of law, and economists are routinely assigned as an integral part of the investigation teams. These agencies use this approach so that a legal perspective is brought to bear on the interpretation of law, development of evidence, and preparation of cases for presentation in administrative and judicial proceedings.

We also found that OGC officials have provided GIPSA with informal assistance in the investigations, but this assistance has been limited and has declined along with the number of OGC attorneys assigned to assist GIPSA. Since 1998, the number of OGC attorneys assigned to GIPSA's cases has decreased from eight to five because of budget constraints, according to USDA's General Counsel. Also, these attorneys are not all assigned full-time to GIPSA's financial, trade practice, and competition cases; some are assigned to responsibilities in other USDA areas as well. OGC officials told us that at least six full-time attorneys are needed for GIPSA's casework and the agency's reorganization plan called for up to eight attorneys.

Furthermore, GIPSA has had difficulty recruiting economists with specialties that are particularly useful in anticompetitive practice investigations. The grade levels that GIPSA has offered for these positions (up to GS–11) are not competitive with the grade levels offered by other agencies such as DOJ and FTC (up to GS–15). Also, the legal specialist position that GIPSA developed appears to be more limited than anticipated. USDA's General Counsel informed GIPSA that (1) its legal specialists can assist on investigations but that they are not lawyers for GIPSA and cannot give legal opinions even if they have law degrees and (2) only OGC's lawyers are authorized to provide legal services in support of all USDA activities. In addition, the legal specialists in GIPSA's field offices are not supervised by attorneys.

In our report, we concluded that GIPSA's program has additional steps to take to become more effective and efficient in performing investigations. One step forward would be to integrate OGC's attorneys into GIPSA's investigative teams. A teamwork approach has been used at DOJ and FTC and would also be beneficial in GIPSA's investigations. In addition, the role of GIPSA's legal specialists could be strengthened if they have the leadership and supervision of OGC's attorneys, and GIPSA may also be able to improve its recruitment of economic specialists. Therefore, we recommended that the Secretary of Agriculture develop a teamwork approach for investigations with GIPSA's economists and OGC's attorneys working together to identify violations of the law. We also recommended that the Secretary (1) determine the number of attorneys that are needed for USDA's OGC to participate in GIPSA's investigations and, as needed, assign attorneys to lead or participate in the investigations, (2) ensure that legal specialists are used effectively by

[4] GIPSA published the results of these examinations in papers entitled Investigation of Fed Cattle Procurement in the Texas Panhandle (Dec. 28, 1999) and Western Cornbelt Hog Procurement Investigation (Oct. 8, 1998).

providing them with leadership and supervision by USDA's OGC attorneys, and (3) ensure that GIPSA has the economic talents its requires by considering whether to modify the GS grade structure for GIPSA's economists.

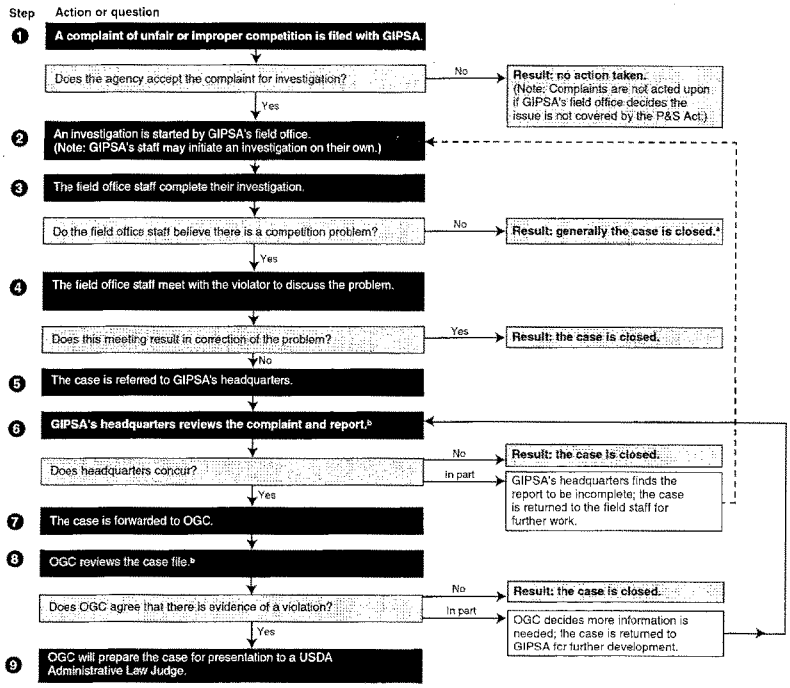
Processes and practices for anticompetitive practice investigations

The second factor affecting GIPSA's capabilities is that its investigative processes and practices were not designed for addressing complex anticompetitive practice concerns—they were designed for the trade practice and financial issues that the agency has emphasized for years. In comparison, DOJ and FTC have processes and practices specifically designed for guiding investigations of competition-related issues.

DOJ and FTC emphasize establishing the theory of each case and the elements that will prove a case. At each stage of an investigation, including selecting the case, planning, and conducting the investigation, there are reviews by senior officials—who are attorneys and economists—that focus on developing sound cases. For example, DOJ and FTC require their attorneys, assisted by economists, to establish a theory explaining how a company's (or companies') behavior may be a violation of the law. The case theory and evidence are reviewed by senior officials after a preliminary inquiry, prior to approving an investigation, and then periodically as the factual underpinnings of the case come into focus as the investigation proceeds. The plan is to consider all the evidence that may be needed to determine if there is a violation. The theory of the case and an outline of proof are revised through the course of an investigation.

In contrast to DOJ and FTC, GIPSA does not require investigations to be (1) planned and developed on the basis of how a company's actions may have violated the law and (2) periodically reviewed as they progress by senior officials with anticompetitive practice experience. GIPSA's investigation work is led by regional staff with minimal oversight; headquarters officials generally do not require reviews until investigation cases are developed. We identified nine steps in the process for handling concerns about anticompetitive practices; GIPSA's headquarters performs a review of the case in the sixth step, and OGC is not involved until the eighth step, as shown in figure 1.

Figure 1: GIPSA's Process for Handling Concerns About Anticompetitive Practices



Legend: P&S Act = Packers and Stockyards Act

Note: There are no time criteria for completing any step in this process, except for step six, in which the initial review by GIPSA's headquarters is generally to be completed within 30 days.

[a]In some instances, the field office sends a case file to GIPSA's headquarters for review for informational purposes. When this happens, the case remains open until the agency's headquarters completes its review.

[b]Step six is generally the first time that GIPSA's headquarters becomes involved in a case, and step eight is generally the first time that OGC becomes involved.

Source: GAO's analysis based on discussions with GIPSA officials.

According to GIPSA's headquarters and OGC officials, regional staff informally discuss some plans for investigations with them, but the agency does not have specific requirements for approving an investigation or an investigation plan. These conditions were reflected in the comments of GIPSA's regional office managers and economists, who said that they often have questions about how to interpret the law and how best to scope and perform investigations. Also, OGC officials told us that the anticompetitive practice cases that GIPSA had forwarded often had weaknesses that needed to be addressed before they could determine whether a violation had occurred. Both OGC and GIPSA officials said that OGC's reviews of GIPSA's cases have led to disagreements about interpretation of the act and the sufficiency of evidence.

We also found that GIPSA's investigative guidance manual was last revised in 1996, prior to the agency's reorganization to develop anticompetitive practice investigation capabilities. The manual does not contain specific guidance for anticompetitive practice investigations, such as the contents of an investigative plan, the information needed for approval of an investigation, or the frequency of reviews of the investigations.

In our report, we concluded that GIPSA needs to adopt a more systematic approach to planning and performing investigations. An approach similar to DOJ's and FTC's would start with a preliminary phase to develop a theory of the alleged violation and a plan of investigation. At this stage, senior officials within GIPSA and OGC would approve the initial theory of the case, the plan, and the commitment of resources. Thereafter, periodic reviews would be held at major decision points. If GIPSA and OGC officials consult with DOJ and FTC officials, they may obtain suggestions about how to promote teamwork on investigations and ideas about how to shape a program suited for GIPSA's and OGC's workload and organizational structures. Therefore, we recommended that the Secretary of Agriculture improve GIPSA's investigation processes and practices by adopting methods and guidance similar to DOJ's and FTC's for selecting, planning, conducting, and reviewing investigations. In doing so, we recommended that the Secretary (1) provide for senior GIPSA and OGC officials to review the progress of investigations at main decision points and provide feedback, guidance, and approval of investigations as they progress, and (2) consult with the Attorney General and the Chairman of the Federal Trade Commission on investigation management, operations, and case development processes.

GIPSA'S AUTHORITY UNDER THE PACKERS AND STOCKYARDS ACT

The Packers and Stockyards Act[5] prohibits packers[6] from engaging in or using any unfair, unjustly discriminatory, or deceptive practice or device, or making or giving any undue or unreasonable preference or advantage to another party.[7] The act does not define "unfair practices" and consequently what is unfair must be determined by regulation or on a case-by-case basis by applying "a rule of reason." To prove that a practice is unfair, GIPSA must show that the packer intended to injure another party (predatory intent) or that its action caused injury (e.g., injury to competitors) or is likely to do so.

In addition, the Packers and Stockyards Act specifically makes unlawful packer anticompetitive practices that are antitrust-type actions, including a packer's activities that manipulate or control prices or restrain trade. To prove that such an activity has occurred under the act, GIPSA, in most instances, must show that the purpose of the packer's action or its actual effect was to carry out the prohibited activity. GIPSA may also choose to treat such activity as an unfair practice, which may be easier to prove than a violation of the act's antitrust-type provisions. Also, while mergers are a concern because they can reduce competition, the act does not provide USDA with premerger review authority.

The act allows GIPSA to start investigations and administrative actions to halt packer practices that it deems to be unfair or anticompetitive. When an investiga-

[5] A more detailed discussion of GIPSA's authority under the act, including references to statutory and regulatory provisions and court decisions is contained in appendix I of our September 21, 2000, report.

[6] The act defines the term "packer" to include any person who in commerce (1) buys livestock for slaughter; (2) manufactures or prepares meat products for sale or shipment; or (3) markets meat, meat products, or livestock products in an unmanufactured form as a wholesale broker, dealer, or distributor.

[7] It is also unlawful under the act for any stockyard owner, market agency, or dealer to engage in any unfair, unjustly discriminatory, or deceptive practice in connection with, among other things, the marketing, buying, or selling of livestock on a commission basis. The Secretary of Agriculture may, pursuant to a complaint or on his own initiative, bring an administrative action to halt such practices.

tion finds and develops evidence to show that a packer may have engaged in an anticompetitive or unfair practice, GIPSA may file a complaint against the packer. The packer has a right to a hearing, which is held before a USDA administrative law judge. If, after reviewing the evidence presented by GIPSA and the packer, the administrative law judge decides that there has been a violation of the act, a cease and desist order may be issued, and a civil fine may be levied. An administrative law judge's decision can be appealed to USDA's Judicial Officer, who act on behalf of the Secretary of Agriculture. The packer, but not USDA, may file a further appeal to a Federal Circuit Court of Appeals.

In our report, we concluded that GIPSA has strengthened its program since 1997 by reorganizing to focus on specific livestock industries. Also, GIPSA's economists, with some experience and guidance, will enable the agency to be more effective in its investigations of complicated market issues. Presently, however, GIPSA is better positioned for performing economic analyses than fully developing the complete cases needed to prove that anticompetitive practices have occurred. We also noted that DOJ, FTC, and GIPSA have been involved in monitoring the industry and have taken producers' concerns into account. We believe, however, that GIPSA and USDA's OGC need to continue improving their investigative capabilities and processes.

GIPSA also has an important role in periodically keeping the industry and the Congress informed about its monitoring of livestock markets. Since GIPSA's last major report in 1996, there have been further dynamic changes in the cattle and hog markets. These changes involve integration within the industry and changes in market operations and production margins. GIPSA could further help shape the understanding and views of industry participants by reporting again on such changes and by providing its perspective on issues involving competition. Therefore, we also recommended in our report that the Administrator, GIPSA, provide industry participants and the Congress with clarifications of GIPSA's views on competitive activities by reporting publicly on changing business practices in the cattle and hog industries and identifying market operations or activities that appear to raise concerns under the Packers and Stockyards Act.

USDA reviewed a draft of our report before it was issued and concurred with our report and recommendations. USDA's written comments discussed actions that GIPSA and OGC are taking or planning to take to improve investigations of anticompetitive practices. Specifically, USDA said, among other things, that it (1) will seek to formalize consultations between GIPSA and OGC on complex investigations of anticompetitive practices, and integrate OGC's attorneys into GIPSA's investigative teams early in the investigative process; (2) will adopt relevant portions of the procedures used by DOJ and FTC for planning, developing, implementing, and reviewing investigations; and (3) anticipates developing a tiered review process for investigations in which routine investigations are subject to oversight by GIPSA's headquarters and complex investigations are subject to review and approval by GIPSA's headquarters and OGC. In addition, USDA also agreed that GIPSA could report on how the Packers and Stockyards Act applies to market activities and identify those activities that raise concerns about fairness and competition.

Mr. Chairman, we believe that the implementation of our recommendations will improve GIPSA's capabilities, processes, and practices for investigating alleged anticompetitive practices. These improvements will reflect a more vigilant and skillful federal presence and instill greater confidence that industry's concerns will be investigated fairly and diligently.

Mr. Chairman, this concludes our formal statement. If you or other Members of the Subcommittee have any questions, we will be pleased to respond to them.

CONTACT AND ACKNOWLEDGMENT

For future contacts regarding this testimony, please contact Lawrence J. Dyckman on (202) 512–5138. Individuals making key contributions to this testimony and/or to the report on which it was based include Charles M. Adams, Patrick J. Sweeney, Alan R. Kasdan, Gary T. Brown, Larry D. Van Sickle, Fredrick C. Light, and Mary C. Kenney.

Senator GRASSLEY. Now, this is what I would like to do in questioning, and I want to make sure that each side gets an opportunity to have their statements. I want to ask Mr. Dyckman a series of questions and then I am going to ask Mr. Dunn to respond. And if you would keep track of the things that you want to make comments on, I will see that you and your team get an opportunity

to respond to each. By the way, any or all of your team can respond.

I am going to start on the report of the General Accounting Office assessment of the parameters of the U.S. Department of Agriculture's authority in addressing livestock competition matters.

As you know, Mr. Dyckman, there is some controversy here in Congress as to what the USDA presently can or cannot do under the Packers and Stockyards Act. Your report states that, "USDA's responsibilities under the Packers and Stockyards Act are, in part, based on and go further than"—and I would emphasize that—"and go further than the Sherman Act in addressing unfair practices, and aim to protect buyers and sellers of livestock."

Your report then indicates that the Act gives the U.S. Department of Agriculture investigative, enforcement, and regulatory authority to halt practices by packers that it has reason to believe are in violation of the Act. The authority sounds pretty broad to me, so let me ask, Mr. Dyckman, if you would answer these questions.

Am I correct in saying that GIPSA has broad authority to take action against unfair and anticompetitive activity in the livestock industry under the Packers and Stockyards Act?

Mr. DYCKMAN. I would agree with that, Mr. Chairman. The courts have described USDA's authority as very broad. Our review showed that it is broad, and the IG in their earlier views agrees with the statement that you just made. So they do have broad authority to rein in on antitrust type activities and to prevent such things from occurring.

Senator GRASSLEY. How broad compared to the Sherman and Clayton Antitrust Acts? Is the USDA's authority more expansive than what DOJ and the FTC have under those laws?

Mr. DYCKMAN. The legislative history, I believe, makes it clear that the intent was to actually make the Packers and Stockyards Act even broader, and to give USDA even more authority than under those.

Would either of you like to add something?

Mr. ADAMS. Mr. Chairman, I would like to add that the Packers and Stockyards Act addresses a category of potential violations called unfair practices. That is a section that is not present in the Sherman Act. GIPSA also has authority issue regulations. The Justice Department does not issue regulations under the Sherman Act. There is a difference in the enforcement, however, in that the Sherman Act cases go to court and can be brought under criminal statutes. The work under the Packers and Stockyards Act is civil and it is handled through the judicial process within GIPSA. One final point. The Packers and Stockyards Act doesn't provide for restitution, and there are differences in damages if there are fines against a company.

Ms. POLING. I will just add one more thing. There is no premerger approval authority in the USDA. That is just delegated to the Department of Justice and the Federal Trade Commission.

Senator GRASSLEY. Now, there has been some inference that case law has curtailed the authority of the U.S. Department of Agriculture and GIPSA in recent years. So I want to ask you, what does case law indicate about the authority of GIPSA? Do you believe that case law has curtailed GIPSA's ability to investigate, reg-

ulate, or take enforcement action against unfair and anticompetitive activity in the livestock and meatpacking industry under the Act, because this is one of the main arguments being made?

The reason I am asking the question is because I have read some of these cases, and while in those instances the decisions found that there was no violation of the Act, they still strongly affirm USDA's broad authority. I would like to quote from the *IBP* decision, "The Act does not require the USDA to prove actual injury before a practice may be found unfair, in violation of the Act. A potential violation can suffice. The purpose of the Act is to halt unfair trade practices in their incipiency, before harm has been suffered."

Then it goes on to say that, "A practice which is likely to reduce competition and prices paid to farmers for cattle can be found an unfair practice under the Act. However, we," meaning the judges, "are also mindful that the purpose behind the Act was not to so upset the traditional principles of freedom of contract as to require an entirely level playing field for all."

What it seems the courts are saying is that USDA has broad power, but when the USDA prosecutes a case or issues a violation, it also needs to have evidence that there was the effect or potential effect of suppressing or reducing competition.

I asked you two questions before I quoted from the case. I also want to ask, finally, if my interpretation of that case is accurate.

Mr. Dyckman.

Mr. DYCKMAN. Yes, our attorneys tell us it is. The courts have said that the authority goes beyond the Sherman Act. USDA, I believe, will agree with that. Their OGC has said that they have broad authority under the Act. The IG has said that, and our attorneys have, too. Of course, USDA has the obligation of proving something, but in our opinion they clearly have authority to take action.

Senator GRASSLEY. Your report indicates that unfair and anticompetitive practices under the Packers and Stockyards Act are not specifically defined. Then consequently, Mr. Dyckman, I understand that the USDA would have to test what this standard is on a case-by-case basis in the courts, or USDA itself would have to clarify what an unfair or anticompetitive practice would be in the livestock industry. They would have to do that either through guidance or policy documents or rulemakings, is that correct? In addition, does USDA have the power to issue regulations dealing with market transparency and business practices in the livestock industry?

Mr. DYCKMAN. Yes; the Secretary can issue regulations, obviously, necessary to carry out the Act. Generally speaking, they would gather sufficient information to prove that there is a need for these regulations, but they clearly have the authority to do that, sir.

Senator GRASSLEY. I am trying to assess whether USDA really has been proactive in formulating competition rules and policies to address concerns about unfair and anticompetitive activity.

So, Mr. Dyckman, what Packers and Stockyards competition-related rulemaking or guidance did the General Accounting Office find that the USDA has generated in, let's say, the last decade? Do you think that the USDA has been aggressive with respect to initi-

ating rulemakings or issuing guidelines dealing with competition-related matters?

Mr. DYCKMAN. "Aggressive" is not a term I would use in describing USDA's actions. No, they have not been aggressive, sir. They have not issued, to my knowledge, any regulations or substantial guidelines in this area.

Senator GRASSLEY. I also want to clarify what USDA can currently do under the Act with respect to mergers and acquisitions in the livestock industry. What actions can the USDA take, or is the review of mergers and acquisitions specifically related to the Justice Department or the FTC? Second, what can the USDA do under the Act about increased concentration in the industry?

Mr. DYCKMAN. Well, as I indicated in my statement, my earlier remarks, GIPSA doesn't have premerger approval authority. They can, like anyone else, refer instances to the Justice Department where they suspect things, but they don't have authority for action in this area.

Ms. POLING. If, after there is a merger, they do find anticompetitive activity, they, of course, can take action. But they do not have premerger approval authority.

Senator GRASSLEY. From the U.S. Department of Agriculture's Office of Inspector General report of 1997, page 2, it is pretty clear the types of anticompetitive activities that Packers and Stockyards may investigate include—and I am not going to read the paragraphs associated with each, but captive supply, vertical coordination and vertical integration, apportionment of territory, price-fixing and turn-taking, and things of that nature.

Mr. Dyckman, do you believe that Congress needs to enact additional legislation to give GIPSA the authority to take action with respect to unfair and anticompetitive practices in the livestock and meatpacking industries under the Packers and Stockyards Act?

What I am distinguishing here is GIPSA's ability to act with respect to unfair and anticompetitive practices rather than mergers and acquisitions, which you have stated are under the bailiwick of the Department of Justice and FTC. I am asking you this question because Congress is currently considering several bills that would either modify or build upon the U.S. Department of Agriculture's Packers and Stockyards current authority.

I indicated in my opening statement that I have a bill that would give the packers and stockyards agency authority not just on livestock and poultry, but all agricultural commodities. But it is important for us to know whether legislation other than current law is truly necessary in terms of the USDA's authority to specifically address issues of unfair and anticompetitive practices in the livestock industry.

Mr. DYCKMAN. Our review in terms of the legal authority was primarily descriptive. We were asked to look at what legal authority does the agency have, and we concluded that they have substantial legal authority and we did not find a need for additional authority. That is not to say that the Congress, in its prerogative and its policy-setting agenda, might not feel that there are some things that GIPSA needs additional authority.

Of course, that is really a question that Mr. Dunn probably should answer, but our review did not disclose any obvious gaps in the legislative power that GIPSA has.

Ms. POLING. But our analysis also didn't look into specific instances. You mentioned the eighth circuit cases, for example, and they do reflect on what could just be a lack of evidence. If there are additional problems there, it would be something that the U.S. Department of Agriculture should address.

Senator GRASSLEY. Now, Mr. Dunn, what I would like to do is state three or four questions for you to respond to, and that will also give you an opportunity not only to respond to my questions, but I think these questions also give you the opportunity to state any exceptions that you might have to what the General Accounting Office has said.

Basically, how do you respond, but more specifically, if GIPSA has broad authority to halt unfair and anticompetitive practices in the livestock and meatpacking industries under the Act, why hasn't more been done to address all these concerns, particularly since we are hearing so much about this from small and midsize producers?

Is there some reason that you haven't proposed rulemaking and opened that up as one way of maybe making more clear what the law says and what you want to do? I would also ask why we haven't seen more enforcement actions, although you may have addressed that by your statement that you said that you agree with the General Accounting Office that legal people ought to be involved more up front in a team manner. Could all of this be because no unfair or anticompetitive activity is taking place in the livestock or meatpacking business, or is there something else?

So I will be glad to just listen to you, and then I suppose I ought to say to Mr. Dyckman, because we want to lay everything out here on the table, without my asking any specific questions of you following what Secretary Dunn says, you may want to clarify some points, too.

Mr. Dunn.

Mr. DUNN. Thank you, Mr. Chairman. In the first set of questions you asked the General Accounting Office, I did look at page 26 of their report on what GIPSA can or cannot do. In the bottom paragraph of that first page it says, "GIPSA is not authorized to prescribe by regulations the price that packers may charge or the items that packers and producers contract. Also, the Act does not confer upon the Secretary of Agriculture the authority to directly regulate prices, discounts, or sales methods."

On page 26, then, it goes on to say, "To be unlawful, the Act requires that a practice be unfair or unduly discriminatory. The Act does not define unfair practices, and consequently what is unfair must be determined by regulations or on a case-by-case basis. In interpreting these rules, GIPSA and the courts must apply the rule of reason." At the bottom of the page it says, "The courts noted that the Act was not designed to upset traditional principles of freedom of contract."

And I think, Mr. Chairman, if we go back talking about the evolution of Packers and Stockyards and what resources, both human and fiscal, are there, they simply have not been designed over the past decade, since 1991, to really address these issues. And it

wasn't until Secretary Glickman asked for the audit in 1996 that the agency seriously began saying what type of resources are we going to need to be able to address those issues.

I would hasten to add that those are fiscal resources and human resources, as well. In 1996, the agency had asked for additional resources to look at the electronic filing and packer market competition, $480,000, $225,000, and industry structure and performance surveillance of $550,000. We received no monies to do that.

In fiscal 1998, the agency asked again for $225,000 for electronic filing to get a better overview of what is going on. It asked for poultry compliance, $750,000, and asked for $1,595,000 to look at packer competition in the industry. Of that, all they received was $800,000 to look at competition, of the almost $1.6 million that they had asked for.

Again, in 1999 they agency had asked for $225,000, again, for electronic filing. We did not get that. Another $750,000 for poultry compliance. We did not get that. We asked for packer competition in the industry, $795,000, and another $3 million to do restructuring. And $397,000 was given for looking at the competition issue, when $795,000 was asked for in that arena.

It fared much better in fiscal 2000. Again, electronic filing—it asked for $225,000 on that. It did receive it. For packers competition and industry structure, asked for $636,000, did receive all of that, and asked for $750,000 to look at poultry compliance and received all of that. So it was really fiscal 2000 before the agency did receive all the dollars that had been requested to address these very issues on competition.

I believe that I will ask that Mr. Baker address the issue on rulemaking and what rulemaking we currently have in process and have received comments on.

Senator GRASSLEY. Please proceed.

Mr. BAKER. Thanks, Mr. Chairman. Presently, we have six rulemaking procedures that we are going out with. I will give you the titles: Prohibit String Sales. String sales means average selling; prohibit this. We want the cattle to sell on the merits, or the livestock to sell on the merits.

Require production contracts be written in plain language. Prohibit nondisclosure of terms in production contracts. Specify types of records that packers are required to maintain in procurement transactions. Specify conditions under which packers may pay different prices for the same quality of cattle purchased on a carcass-merit basis.

The one that has been completed that is on the books now is implementing the feed weighing regulation, which it never had a regulation on feed weighing where contracts were involved. After this rule is implemented this year, we have reviewed all the major companies and they are in compliance with our feed weighing.

So we expect between now and the end of the year to have these out, comments moving, and moving forward on these majors in our rulemaking. This is six. We have some more on the drawing board I am not at liberty to talk about, but this is six.

Mr. DUNN. Mr. Chairman, in the report GAO reports that in the competition arena Packers and Stockyards did initiate—or there were some 74 different investigations that had gone on. Thirty-six

of those were as a result of complaints that we heard from outside. Thirty-eight of those, over half of them, were self-initiated by the agency.

Now, the determination of what has been filed, of course, were five, as had been put out in the report. But it does demonstrate in my mind that the agency is being much more aggressive than it had in the past in initiating its own investigations to go about this.

There are legal concerns that you had brought up, and I would ask the General Counsel for USDA to address some of those issues.

Senator GRASSLEY. Please do, sir.

Mr. RAWLS. Thank you, Mr. Chairman. I wanted to respond to two of the issues. First of all, I wouldn't want anything that we say in this hearing to reflect that anybody has a view of the Act that is not very broad, because I think the Packers and Stockyards Act is very broad in the authority that it confers on the Department to investigate and regulate activities that are ongoing in the livestock market.

However, I think Under Secretary Dunn appropriately cited you to the GAO report which discusses those authorities. I believe that the report is accurate. They cite the appropriate cases and I think their analysis is sound.

Briefly, what causes us some difficulty are the "uns" in the Act, that we must show that activities are unreasonable, undue preference, and that language requires us to prove up a case and does prove to be a challenge for us. I think I have probably said all I need to say about that.

The other issue that I wanted to mention is you talked about mergers and acquisitions, and the Department's authorities in that area are fairly limited. But as noted in the GAO report, I believe, is the recent memorandum of understanding that we signed with the FTC and the Department of Justice related to monitoring competitive conditions in the agricultural marketplace.

We are working with those other agencies, providing them information, citing studies that we have at USDA which are extensive. I recently read, and I believe this to be the case, that the red meat industry is the most studied industry within the U.S. economy. So we do have a lot of information to bring to the table.

We are working cooperatively with those other agencies with which we share responsibilities and in areas where they have primary jurisdiction, which would be more in mergers, acquisitions, and antitrust.

Senator GRASSLEY. Before I ask GAO if they want to respond to anything that was just said, is the inference in your—well, it is not an inference. We didn't appropriate the money you asked for 2 or 3 years. Now, you are getting the money now that was requested, right?

Mr. DUNN. That is correct.

Senator GRASSLEY. Is it fair to assume that you are going down the road you want to go down, only 3 years late because Congress didn't give you the money, and that you are able with these resources to do some of the things that maybe you could legitimately say to the GAO you haven't been doing because Congress didn't specifically give you the money?

Mr. DUNN. I think it is fair to say that we are beginning moving in that direction that GAO has indicated. But there have been difficulties, Mr. Chairman, in recruiting the type of personnel that we need to really become an effective enforcement of Packers and Stockyards in this anticompetitive arena.

Am I happy with where we are? No, I am not. Do I think we are going in the right direction? I think we are going in the right direction. The report does say that we have done that, but it also points out that we need recruitment of specific types of individuals and that we need to do training of those individuals. That is an area that we have to work much harder on jointly with Congress to ensure that we get the appropriations.

Currently, we have asked for an increase of about $3.9 million for Packers and Stockyards. We got about $200,000 of that in a supplemental a few weeks ago, but we are still waiting to find out what happens with that $3.7 million that we have asked for for the upcoming fiscal year which would help us tremendously.

Senator GRASSLEY. Before I go on to my next line of questioning, do you have anything to say in response to what the team from the USDA has stated?

Mr. DYCKMAN. It is an impressive team. It is hard for me to take exception to what they have said, but I guess I have a question, maybe, for the general counsel. When we looked at the fiscal year 2001 budget, we couldn't find anything that was specifically—while they asked for a $3.7 million increase, we couldn't find that any of that was labeled specifically for packers and stockyards work. Now, it could be that is what it was intended for, but we couldn't figure that out, unless it is in GIPSA's budget.

Senator GRASSLEY. Assume that that is a question I ask, so maybe you will feel more comfortable responding to it.

Mr. DYCKMAN. I am sorry.

Senator GRASSLEY. That is OK.

Please, would you respond to that?

Mr. RAWLS. I am happy to do so. It allows me to explain a little bit about some of the difficulties that we have had within my small office.

In recent years, Mr. Chairman, as discretionary budgets have been frozen and the caps that the appropriators have used have had their intended effect of holding down discretionary appropriations, small offices like the Office of General Counsel which are 90-percent or more personnel-based have suffered. We have suffered because we are not getting appropriations for certain fixed things like pay costs which are going to increase every year.

We therefore have been in a situation of not being able to backfill positions that are vacated through attrition, through retirements, and so on. I believe the report notes that we have gone from eight lawyers to five lawyers, not counting the two managers in this trade practices area.

So the question as asked—I think the answer is, yes, there is not a specific amount requested for this work within the Office of General Counsel. But, frankly, our effort has been to hold on to the base that we have. We are doing everything that we can do try to maintain the resources that we have.

Now, in responding to the GAO report, as the GIPSA reorganization has evolved we have identified since that budget was submitted to OMB, which I think was almost 2 years ago, that there are needs here and we are committed to doing everything that we can to address those needs. We want to implement this team approach. That will take resources, and so we are going to have to find those resources, and hopefully the appropriators will see fit to help us do that.

Senator GRASSLEY. Isn't a follow-through of the statement you just made that if this concentration issue and competition issue is a real priority in the Department that you will get resources for that from within the Department? I mean, there is some discretion on allocation of resources within the Department.

Mr. RAWLS. Mr. Chairman, because of the appropriations law, I can't go outside my office. I can reposition within the office, but I will tell you, which is why I gave a too lengthy answer to the question, because of the decline in discretionary spending and the attrition that we have had, it is very difficult within our office to move lawyers around.

I am going to do that if that is what it comes down to and we can't get these resources. It will not be at the level that I think we need to fully implement the GAO report and implement this team approach, but I am going to do everything that I can. And as I say, if we don't get the resources, I am going to find some to put to this.

Senator GRASSLEY. Thank you.

Mr. Dyckman, in the 1991 GAO report your agency found that the meatpacking industry was significantly more concentrated, which, "could increase the opportunities for buyers to use anticompetitive practices that could lower the prices paid to producers to below the level that would be set in a competitive market."

Yet, the General Accounting Office report also found that GIPSA's approach to developing concentration statistics was "no longer sufficient for monitoring competitiveness" and that GIPSA needed to enhance its competition activities and implementing regulations to effectively address changes in livestock marketing.

Then in 1997 a review of USDA's own Office of Inspector General found that implementation of the packers and stockyards program was woefully inadequate. I believe the Inspector General's own words were "insurmountable obstacles" in terms of USDA's organization, structure, and expertise, to the point where it even recommended that USDA may want to consider transferring its competition-related responsibilities under the Act to another agency.

Your report picks up on several of the recommendations identified in these two reports. So, Mr. Dyckman, in response to both of these reports, the USDA indicated that it would review and update its Packers and Stockyards Act regulations dealing with competition matters. Did they do that? If they did, in your opinion how effective do you think they were?

Mr. DYCKMAN. In our 1991 report, much of it was pointing out deficiencies in their evaluations and examinations of regional markets. And they have taken steps in that direction and they have developed some work and some additional information on regional markets, and pointed out the importance of the national markets.

The 1997 Inspector General report was quite critical, and as I mentioned earlier, unfortunately our current review found the same deficiencies, basically. And if you look at, I guess, the chart to my left, which is somewhat difficult to read but it is also in our report, it points out that the major findings of the Inspector General, particularly as they pertain to developing a case, putting the expertise where it has to be, having a team approach—you know, we were really surprised that those things had not been accomplished. Part of it is resources, but part of it, I believe, is trying to address some underlying causes for problems. It is surely not entirely just resources.

So a long answer to say, yes, they were somewhat responsive to our 1991 report, but they were not responsive to the major recommendations in the IG's report.

Senator GRASSLEY. So, Mr. Dunn, I am going to ask you for your response to that. Considering the fact that one of these was implemented—you already spoke about that, and you also spoke about your intention of accepting the recommendation of involving general counsel people in the early stages of the complaint.

I guess it is this simple: what about the implementation of all the recommendations, then, of the OIG?

Mr. DUNN. Again, Mr. Chairman, I would go through here and look at what GAO has had to say about where we are on implementation. On No. 1, it says GIPSA's reorganization concentrates its resources on major industries and issues, which is, I think, a direction that we are certainly trying to go.

On No. 2, assess staff qualifications and hire staff with legal, economic and statistical background, the GAO says GIPSA's additional staff improves its organization.

Thank you, GAO. We appreciate that.

"A detailed assessment of staffing levels was not performed. USDA has requested a budget increase for additional GIPSA staff because of its workload." Again, let me go back to our request since 1996 for full-time employees.

In 1996, the agency had requested 185 and Congress gave us 185 after review by the OIG, at a time when the rest of the Department of Agriculture was cutting back on employees. Remember, we had gone from about 120,000 to——

Senator GRASSLEY. Yes, but don't forget most of those were out in the field.

Mr. DUNN. That is correct.

Senator GRASSLEY. And with the service agencies.

Mr. DUNN. That is correct. But at that time when the Department was cutting back on operations, we were increasing the number in our field operations in Packers and Stockyards.

In 1997, the agency had requested 197 FTE's. We again got only the 185 that we had from the previous year. In fiscal year 1998, we requested 208 additional FTE's. We still were at the 185 level. In fiscal year 2000, then, we requested 203 FTE's. We received 178, a decrease from the 185 we had prior to that. So in 2000, we thought maybe we had better cut back to just the 178 that we had previously. In 2000, we were only given 168, so we had a decrease of 10 employees.

So in fiscal year 1997 we didn't get 12 that we asked for. In fiscal year 1998, we didn't get 23 that we had asked for. In fiscal year 1999, we didn't get 25 that we had asked for. In fiscal year 2000, we didn't get 10 that we had asked for.

Senator GRASSLEY. Are you saying, though, that these requests are all related to efforts to enforce the Packers and Stockyards Act more vigorously, and anticompetition things?

Mr. DUNN. Those were at a point in time when we were following through with the recommendations from the OIG to get more economists, more statisticians, and more legal expertise in Packers and Stockyards to be able to do what had been identified, and I think everyone will understand is very, very complex analysis to bring these cases to court. And during that time, we have put on 18 new field economists. We have put on six new attorneys out in the field and one at the headquarters level to address just what we had been asked to do in the restructuring of Packers and Stockyards.

Senator GRASSLEY. Why would you decrease the number of lawyers during that period of time, then?

Mr. DUNN. In Packers and Stockyards, we did not. We went from zero lawyers up to where we presently are with seven attorneys.

Senator GRASSLEY. The point that I think the General Accounting Office is trying to make is that these should be people who are giving legal advice in the direction that the investigation ought to take with the potential enforcement of the law, as opposed to just people who may be lawyers, but staff people not giving the advice that the Office of General Counsel would give.

Mr. DUNN. I think, Mr. Chairman, it goes back to the recommendation that is in the report here that attorneys should, in fact, lead the investigation, as they do in the Department of Justice and FTC. Now, you also have to keep in mind that they are a law enforcement entity, whereas Packers and Stockyards is a regulatory and law enforcement entity. And we rely on the delegated authorities to the Office of General Counsel on many of the law enforcement activities.

Senator GRASSLEY. I want to pose some questions to the panel about the process by which GIPSA investigates a case and determines whether to proceed on a claim of unfair and anticompetitive activity.

The process that spells out what goes on in a GIPSA field office is this chart here. GIPSA headquarters and the USDA Office of General Counsel actually review competition-related allegations. The reason I am disturbed is because I read the General Accounting Office report spelling out in great detail how important it is that attorneys be at the helm at the outset, formulating the theory of a case and collecting the proper evidence so that a competition case can proceed in the best manner possible, as is done at the Department of Justice.

Mr. Dyckman, am I correct when I say that attorneys do not review possible Packers and Stockyards Act competition-related cases until only very late in the stages of the GIPSA investigation?

Mr. DYCKMAN. Yes; the Office of General Counsel, as our chart shows and you have up there on the board, really don't get involved as a general rule until about step number eight. Now, you could

argue whether or not we have characterized the steps correctly or whether there should be seven steps or nine steps. But the main issue is that OGC basically approves and reviews after the work is done, and what we are suggesting is that they get involved much early in the process.

Senator GRASSLEY. For the record, tell us how important it is that we have somebody in counsel-related work to be part of the investigative team and to develop a proper investigative and case plan in terms of prosecuting a successful case.

Mr. DYCKMAN. Mr. Adams will take that.

Mr. ADAMS. Mr. Chairman, we think that is essential. I want to point out that the OGC's office has attempted to provide some additional consultation to the field staff, but based on our work we feel that that level of consultation that the field staff wanted was certainly less than the amount that was desirable. They felt that the consultation they got was excellent, but just not enough. And then also we have got this problem of the OGC's office not leading the cases. So they are not involved on a day-to-day basis with making the decisions. And we would like to see all those things taken care of.

Senator GRASSLEY. Well, is it possible then that allegations which could have constituted a violation of the Packers and Stockyards Act were not pursued by GIPSA because they were closed out before they were ever looked at or evaluated by an attorney with sufficient knowledge in antitrust matters and the capacity to act with official legal advice?

Mr. DYCKMAN. You know, it is difficult for us to answer that question, although we did notice that several investigations were deferred and not continued because of a lack of staff. And I am assuming it was general counsel staff, as well, so it is quite possible that the events that you describe could have taken place.

Mr. ADAMS. In addition, Mr. Chairman, cases are closed in the field without referring the body of the case to the general counsel's office for their review. And we have suggested through our recommendations that that practice not occur.

Senator GRASSLEY. And obviously Mr. Dunn says that he accepts that part of the recommendation. We have already talked about it a lot.

Is it fair to say, then, in kind of summary of what you already said, Mr. Dunn, that you see this as a weakness in the process up until now, and consequently we would see USDA then—by involving official legal advice early on the process, there might be higher usage of the Packers and Stockyards Act finding anticompetitive activity?

Mr. DUNN. Mr. Chairman, I think this very accurately portrays one of the major weaknesses of where we have been in the past of not having involvement with the Office of General Counsel from the inception.

Now, I just say that there were a lot of informal activities that have taken place. For instance, Mr. Chairman, you are familiar with the rapid response teams that we have sent out to nine different States, including your State of Iowa, to look at the Dubuque plant when it was being bought out.

Before rapid response teams went out, we did sit down with the Office of General Counsel to determine what should be looked for, how do we look for violations in these particular cases. There has been an ongoing exchange of information, but again it has not been any formal process. And I think it is important that you recognize in our response that we are talking about setting up this tiered approach so that we do have the Office of General Counsel in top management of the Packers and Stockyards involved at a much earlier time to reflect the concerns that were brought up in this report.

Senator GRASSLEY. Mr. Dyckman, would you care to respond how you would look at that tiered approach as to whether or not that satisfies your recommendations?

Mr. DYCKMAN. Well, I think it is an improvement, and obviously they are going to have to—USDA has to deal with the shortages of skilled personnel that they have. However, notwithstanding that, we have recommended a much more heavy involvement by OGC throughout the cases.

What I would envision—and I believe this is what the FTC and the Department of Justice do, is that they assign a lead attorney to the case, and that attorney can decide how much of his or her time is necessary on the case, as opposed to GIPSA officials. So I would caution against the committee accepting USDA's response to eliminate the problems that we have identified by addressing it through a tiered approach. It is a step forward, but I don't think it gets at the heart of the issue, which is having the attorneys involved in all cases, but let them decide which cases they have to spend less time on.

Senator GRASSLEY. The fact now that from your very first words, Mr. Dunn, you are stating that that is a very good recommendation of having attorneys involved in a team approach—let me follow through, then, with a question to you as to whether or not the Office of General Counsel has an estimate at this time of the number of attorneys that would need to be assigned to lead anticompetitive practice investigations.

Second, does the Office of General Counsel envision hiring attorneys with competition-related experience to lead investigations? And if that were not the case, how could the USDA then expect to perform in this area of legal expertise?

Mr. RAWLS. Mr. Chairman, thank you. I think as I indicated earlier, and perhaps I was not clear enough, the Department thinks this team approach is a great idea, and would be the most effective, efficient way to do these investigations and would result in the most efficient allocation of resources and successful cases.

The bottom line, though, is to implement this fully, I need more lawyers. And we looked at the issue.

Senator GRASSLEY. Well, here is your opportunity to tell me how many you need. That is what my question is.

Mr. RAWLS. Specifically, we think with five additional attorneys, we could do this investigatory support and provide the leadership envisioned by the GAO report. That would allow just this model where attorneys are brought in on the very front end and are assigned to investigations and are involved in the whole process.

Senator GRASSLEY. How many attorneys did the Office of General Counsel hire over the last 3 years and where were they assigned?

Mr. RAWLS. I have to admit I couldn't give you a precise number over the last 3 years. I could provide that for you. We have, as I have noted, struggled mightily with simply maintaining our base. We have not backfilled generally positions every time someone leaves. However, we were provided additional resources in the civil rights area and we staffed up a very small civil rights division with about seven lawyers. But, overall, as I have told my staff, we have managed by attrition, and to balance our budget we have not backfilled positions.

Senator GRASSLEY. You haven't specifically hired antitrust attorneys?

Mr. RAWLS. No, sir.

Senator GRASSLEY. How many attorneys are there in the USDA's Office of General Counsel?

Mr. RAWLS. I believe at the present time there are 234.

Senator GRASSLEY. I think what I need is a breakdown of your attorneys in terms of their expertise and responsibilities, and how many attorneys work on packers and stockyards issues and how much of their time is dedicated to working on competition and unfair practices issues of the Packers and Stockyards Act.

Mr. RAWLS. Yes, sir.

Senator GRASSLEY. Mr. Dyckman, the GAO report identifies as one of the primary factors hampering USDA's ability to address competition concerns the fact that GIPSA does not have in place the proper investigative methods, processes, and procedures. You have indicated that the Department of Justice and FTC are good models in terms of the appropriate way by which the agency should pursue competition-related claims. At this point, how deficient is USDA's current investigation manual, case methods, and processes relative to competition-related allegations?

Mr. DYCKMAN. Well, as our report indicates in full detail on page 19, the manual is basically obsolete. It was not written, as I understand it, for trade practice investigations that deal with anticompetitive issues. It doesn't lay out the types of planning that we would like to see in cases. It doesn't talk about case selection in the detail that we would like to see. It really is woefully deficient. I believe they recognize that. It is out of date. It needs to be updated to address the realities of the marketplace now.

Senator GRASSLEY. And they can't effectively do their work without doing that?

Mr. DYCKMAN. I think it is unfair to ask their employees to conduct these types of investigations, these complex investigations, without a good framework, a good set of guidance, and a good manual.

Senator GRASSLEY. How do you feel about that, Secretary Dunn and your team?

Mr. DUNN. Mr. Chairman, I concur with that, but it would be difficult to write a manual until we knew what the new structure would look like at Packers and Stockyards. And now that we are, in essence, 90 percent complete with our reorganization, we do feel that it is time to go forward and we have recently hired an econo-

mist to take the point on writing this manual. This is someone who has a background in criminal investigation.

Senator GRASSLEY. Does anybody on your team have any idea how much time this would involve, updating this?

Mr. BAKER. It is being updated right now, sir, and it has been a work in process for the last 4 months. It is not a quick process.

Mr. DUNN. We should have it in early spring, Mr. Chairman.

Senator GRASSLEY. OK; here is something that is a little more specific along the lines of our agreement among all of us of having attorneys lead investigative work. Does the Office of General Counsel need to have a delegation of authority from the Secretary to implement these recommendations of the General Accounting Office?

Mr. RAWLS. Mr. Chairman, we do not believe so. I don't think we do at all.

Senator GRASSLEY. OK; could you discuss for us how you would envision decisionmaking in these cases?

Mr. RAWLS. Well, I wouldn't want to prejudge discussions that I think we need to have between GIPSA and OGC on how to formalize this. But I guess, in general, I would see certainly a consultative process. I think it is important for the lawyers to discuss with the economists and the other experts what the allegations are and what evidence may be available, what information needs to be collected, sort of the threshold that is needed to prove a case. And as I say, I think that should be a very collaborative process.

Senator GRASSLEY. In this process, would you follow the recommendations of the General Accounting Office by seeking advice from the Department of Justice and the FTC in regard to this?

Mr. RAWLS. Absolutely, and I think that that is an important part of the work that we are doing now, talking to the FTC and DOJ about how they handle similar types of investigations. And I think we need to continue to work with them to share process ideas as well as information.

Senator GRASSLEY. Mr. Dunn, evidently the General Accounting Office said it was very necessary to periodically be reviewed by managers with antitrust experience when they get feedback from investigators in developing sound cases. The Inspector General's 1997 recommendation was to hire a manager qualified in anticompetitive practice investigations. That was not implemented.

Does the U.S. Department of Agriculture need to consider whether GIPSA and the USDA Office of General Counsel have sufficient expertise in anticompetitive practice investigations to be able to provide leadership in this area, both for the program that needs to develop and for the investigations which need review as they progress?

Mr. DUNN. Mr. Chairman, the new Deputy Administrator that I introduced to you has exactly that background.

Senator GRASSLEY. OK; also, Mr. Dunn, the report from the General Accounting Office reported that GIPSA seldom finds instances in which meatpacking companies or other parties involved in the marketing of cattle and hogs engage in anticompetitive practices. The General Accounting Office report then talks about factors that detract from GIPSA's ability to investigate concerns about anticompetitive practices.

A somewhat related area that is not addressed in the General Accounting Office report is the USDA's system of internal controls which are intended to ensure that your staff are doing the proper job. Specifically, what internal checks and controls are in place to provide an assurance that a proper job is being done in conducting investigations of alleged anticompetitive practices?

Mr. DUNN. I will turn to the Administrator to tell you about his internal checks and controls within GIPSA.

Mr. BAKER. Mr. Chairman, we log in every case that we take and we track it through a logging system with oversight in all three general offices and in Washington. The cases are logged in. That is our number one control. We have just recently established a hotline, and we know exactly how many calls we have had on that hotline. And they are logged in and we track those. Being logged in is our best tracking source right now.

Mr. ADAMS. Mr. Chairman.

Senator GRASSLEY. Yes.

Mr. ADAMS. I think the question you ask actually goes to a question about how investigations are conducted and if they are covering all of the right kinds of issues and asking the right kinds of questions. And based on the work we do, they haven't been in a position to have that kind of quality control. The control that Administrator Baker talks about is at a different level than we are talking about here, which goes to the quality of the investigative work itself.

Senator GRASSLEY. He describes, as I hear him, about internal controls on making sure that every complaint is monitored and looked into. And you are stating beyond that point that there are not controls in place.

Mr. DYCKMAN. Yes; that would get to the issue of the manual and the planning that we spoke about earlier to make sure that there is a consistent, high-level, quality approach to every investigation. I think that is what it sounds like you are really interested in. Obviously, it is important also to make sure that all complaints are handled, but you want to make sure that they are handled consistently at a high level.

Mr. DUNN. Mr. Chairman, if I could, I would like to ask the Deputy Administrator to come in and address this particular issue because I think it is extremely important that everyone understands that we are working toward having that level of review of actions that were taken and why those actions were taken.

Senator GRASSLEY. Yes, that is OK. Please come forward. Just give your name, please.

Ms. WATERFIELD. Thank you. My name is Joanne Waterfield. What happens now is when we receive a complaint, we will make an initial determination out in the field if the complaint warrants further investigation. That is a very preliminary review. If it is a straightforward case, that decision is made at the field level. If it is more complicated, that decision will be made at headquarters, with input from the field staff.

Once an investigation is completed, and investigative file is compiled with the help of legal specialists. The legal specialists out in the field review the file, then consult with a supervisor. The file is then referred to D.C. D.C. will work in conjunction with the super-

visors in the field to make sure that there isn't any further work. If it is a particularly complicated case, we will consult informally with OGC until we have the tiered process fully formalized. Once the case is actually referred to the Office of General Counsel, we will continue to work with them through the litigation.

Senator GRASSLEY. Thank you.

Now, Mr. Dyckman or your team, after you have heard that, does that satisfy some of what you—to what extent do you modify what you have already said as a result of that explanation?

Mr. DYCKMAN. Let me just say at the outset that we are talking about a process that is in evolution, so it is difficult for me to give GAO's opinion in terms of whether or not the tiered approach will address our recommendations. As I indicated earlier, my initial reaction is I have some reservations, and I think I stated those. I would like to see a uniform process where attorneys at least have a chance to weigh in on every case, whether it is, yes, I agree with the investigators that there are not really legal issues here.

And maybe that is what they intend. I don't want to sell what USDA is planning short, so I would feel more comfortable if, after they finalized their approach, we had a chance to look at it. You know, we would be happy to get back to you or your staff in terms of what we think about it. But I do have some initial questions, if you will, about it.

Senator GRASSLEY. Mr. Dyckman, in your opinion, what are the challenges that GIPSA and the Office of General Counsel face to improve their performance with respect to competition issues? Would they be leadership issues, priority issues, expertise, organization, funding?

And I suppose it could be all of the above and more, but it appears to me that so far the USDA has taken, and possibly still wants to take a very different approach to organizational and procedural issues to best accomplish their Packers and Stockyards Act responsibilities than what you have recommended in your report.

Mr. DYCKMAN. Mr. Chairman, Comptroller General Walker has spoken much on human capital issue challenges facing the Government, and I think this is an example of that. What we are talking about is very complex work where you need highly skilled people with legal backgrounds and economic backgrounds working together as a team.

This has not really occurred at USDA in the past, and what it will take is management's attention to bringing to bear the types of skills necessary, both from a legal standpoint, an investigative standpoint, an economic standpoint, and also changing the culture of the organization. The culture of USDA, as we have seen it, is not a teamwork approach. It is "I will do this, let me send it to headquarters, they will review it and they will get back to us." That is not the intent of our recommendations. We are talking about a teamwork approach.

Obviously, you mentioned funding issues. We have had some discussion on whether or not they have the resources to bring to bear to resolve some of these management issues. Clearly, that is an obstacle that will have to be overcome. But, quite frankly, the ability to hire the types of skills that are needed at Federal pay levels is

another human capital issue that has to be addressed not only at GIPSA but throughout the Government.

Senator GRASSLEY. Mr. Dunn, do you agree, or how do you see the challenges that I have presented in the sense of asking Mr. Dyckman the question I did?

Mr. DUNN. I think, Mr. Chairman, that there has been inertia that has taken place. Someone once described running the Department of Agriculture like being on the Queen Mary at full steam, and you turn the helm and it takes a long time for that ship to change in the right direction. I think that is what is going on here now.

But I think the reports that OIG has given us and the GAO audits are things that I take very, very seriously. I look at those at the compass to see that we are moving in the right direction to do things. And I would agree that the cultural changes are there and that it takes a long time to get those changes and to begin that teamwork and leadership that takes place. The interaction between the General Counsel and I—we have to be held accountable, and it has to be perceived by the folks in the field that we are working together to address this issue, to get there.

And, finally, the human resources that are available. Mr. Chairman, this is a tremendous problem for us to be able to hire the quality of people with the expertise that everyone agrees needs to be here at the pay levels that we have. Very, very frankly, to go out and ask a Ph.D. economist or an attorney to come to work at a GS–9 or 11 level in the field is simply not realistic in today's labor market.

Senator GRASSLEY. My last series of questions won't be very long, and I thank you very much for being attentive to my concerns here. This deals with the legislation that I put in specifically as a result of the GAO report, and that is to implement the recommendations within one year.

I believe it is imperative that we fix the staff, the organization, investigation and case procedure and methodological problems identified in the General Accounting Office report as soon as possible so that the USDA can do its job and best address the many concerns that we have been hearing about alleged unfair and anticompetitive practices. I think that if the USDA doesn't make these changes, there will never be an effective enforcement of the Act. GIPSA will not be performing its mission, and family farmers then would not be protected.

So now, Mr. Dyckman, you and your staff wrote the report, so I am sure that you would support implementation of its recommendations. But do you believe that it is a good idea for us to mandate that the U.S. Department of Agriculture implement these recommendations within a set timeframe rather than wait for the USDA to address them as they might see fit? Do you see any pitfalls in making these changes required by law?

Mr. DYCKMAN. Mr. Chairman, I don't. That is an interesting approach. We frequently in our reports—we just didn't do it in this case—we frequently ask the agency to come up with milestones and time lines for implementing things that they agree with. Or when they feel that they have done something, they have made some progress and have taken action but have not concluded it, we

frequently recommend that they come up with milestones, and your legislation does that. So I think that is a very novel and useful idea. Obviously, there are other options, but surely the Congress can—that is one option that would be quite effective.

Mr. ADAMS. Mr. Chairman, we would also suggest that oversight be continued on this program to observe the changes as they take place.

Senator GRASSLEY. Do you have any improvements in the legislation that you would suggest? Then I am going to ask Mr. Dunn for his opinion of the legislation.

First of all, Mr. Dyckman or Mr. Adams, do you have any changes?

Mr. DYCKMAN. No; it is simple, it is to the point.

Ms. POLING. I would just take another look at it before we make any recommendations. My quick look said it looked fine.

Senator GRASSLEY. Mr. Dunn.

Mr. DUNN. Mr. Chairman, we have not had an opportunity to fully look at the legislation and vet it through the administration, but I would hope that we don't have imposed upon the Department any further unfunded mandates that require us to do something without the resources to be able to do that.

And I would sincerely hope that the Department, the Under Secretary, whoever is sitting here a year from now, is in tune with what you are trying to do, Mr. Chairman. I know I have been out in the field with you, in Iowa, and we have listened to farmers and ranchers talk very, very emotionally about this. And they feel that their Government has not been doing everything they need to do to assist them, and I know that is what drives you. That is what drives me.

I would hope that we wouldn't have to have this type of very, very rigorous oversight, that we would be doing the right thing simply because it is the right thing and it is what we ought to be doing. That really is the prerogative of Congress to say we want to put you in this very, very tight parameter. I would also like to look at this and make sure that we feel that we have enough discretion in there to be able to move in the direction that we have to move based upon the very, very rapid changes that are taking place in the livestock industry. It is changing so fast and so furiously that what you and I might agree to today may change just in six short months from now.

Senator GRASSLEY. I would keep the record open because there might be members who could not come on a Monday afternoon to the subcommittee meeting. They might have some questions to submit to you for answers in writing, and I would leave the record open for 2 weeks for that purpose.

Also, Senator Brownback and Senator Ashcroft have submitted statements for the record. They will be included.

[The prepared statement of Senator Brownback follows:]

PREPARED STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS

Thank you for allowing me to submit this statement today on such an important issue—the enforcement of anti-trust laws in the agriculture industry. I also want to thank my friend, Sen. Grassley for his recent bill—the Packers and Stockyards

Enforcement Improvement Act of 2000, of which I am a co-sponsor. this is a common sense approach to a very controversial issue and I applaud his leadership.

Concerns about concentration and market monopolization have risen in the past few years as prices remain low and farmers struggle to adapt to the new global commerce. It is tempting to blame all large agri-business for the bad economic conditions many farmers find themselves in today. But blame does nothing to change the situation.

Sen. Grassley's bill spells our specific reforms that will make a direct difference in the way anti-trust issues and anti-competitive practices are dealt with. The bill comes after a thorough examining of USDA's enforcement of the Packers and Stockyards Act by the General Accounting Office. That report,discussed here today, found numerous problems in the way the agency approaches these investigations. Specifically, GAO found that USDA has not been attacking the concerns of anti-trust in the most effective and efficient way. As you have discussed at this hearing, there are relatively simple steps that can and should be taken to make sure that anti-trust concerns are being adequately addressed.

Today's agricultural markets are in very bad shape. We can not, however, make assumptions about concentration as the cause without having accurate information and thorough investigations. With Sen. Grassley's bill, this process will be greatly improved because it requires USDA to re-tool and devote more resources to the area of anti-trust enforcement. This bill avoids the pitfall of lumping the innocent in with the guilty and instead, sorts our anti-competitive practices where they occur. These reforms are necessary to restore producer confidence in the Packers and Stockyards Act—and USDA's a ability to police this increasingly concentrated industry.

Again, I thank Sen. Grassley for his wise approach on this tough issue and his continued sincere concern for the farmers of this nation.

[The prepared statement of Senator Ashcroft follows:]

PREPARED STATEMENT OF HON. JOHN ASHCROFT, A U.S. SENATOR FROM THE STATE OF MISSOURI

Thank you, Senator Grassley, for holding this hearing today on an issue that is one of the top priorities to farmers in my home state of Missouri—the freedom to market their products at fair prices without anti-competitive practices by corporate buyers.

As my constituents know, this is a priority for me. By definition, anti-competitive behavior harms Missouri farmers that produce hogs and cattle. Rural Missouri is built on family farming. We have 99,000 farms in Missouri, more than any state except Texas. Nearly 90 percent of Missouri's farms are owned by individuals or families. As I've traveled around the state, Missourians say they're concerned about a trend that leads to only a handful of corporate purchasers for their food and allows collusion or anti-competitive behavior among those purchasers or processors. Missouri farmers and ranchers need a market that is competitive and transparent, now more than ever, when they are experiencing lower prices and limited buyers.

Congress must do what it can to address these concerns, and I have introduced three bills that will tighten federal regulation of corporate agriculture mergers and that will encourage farmers to increase their income by starting "value added" agricultural projects. My three bills are designed to level the playing field for individual farmers and farmer-owned entities.

Mr. Chairman, it was deeply troubling to me to review a copy of the report you commissioned by the General Accounting Office (GAO) on the U.S. Department of Agriculture's failure to fulfill its current responsibility to enforce the law against anti-competitive behavior among the packers and processors. I thank you for requesting this report. It sheds light on another area on which we must focus—oversight of USDA's authority to enforce the Packers and Stockyard Act (P&S). As I've traveled around Missouri, I have been told repeatedly that the USDA, and more specifically, the Grain Inspection, Packers and Stockyard Administration (GIPSA), is failing to address anti-competitive behavior that is prohibited by P&S.

As we see from the GAO report released to Congress last week, my constituents are exactly right—that there is some evidence that the administration has failed to protect independent producers by ensuring competition in the livestock industry. Furthermore, USDA has failed to enforce the law despite two other reports in the 1990s that outlined similar failures.

Mr. Chairman, that is why I have joined you in introducing S. 3091, the Packers and Stockyards Enforcement Improvement Act of 2000, which will force the USDA to use its authority to stop anti-competitive practices in the livestock and meat

packing industries that rob Missouri family farmers and ranchers of competitive prices for their products.

S. 3091, will require USDA to take the following specific actions:

Implement the recommendations of the new GAO report within one year and in consultation with the Justice Department and the Federal Trade Commission.

Work with the Justice Department and the Federal Trade Commission to identify and investigate complaints of anti-competitive activity and to enforce P&S during this interim one-year period.

Develop and implement a training program for competition investigations within one year for USDA staff.

Provide an annual report to Congress on the state of the cattle and hog industries, identifying business activities that represent possible violations of P&S.

Report to Congress within one year on actions taken to comply with S. 3091, the Packers and Stockyards Enforcement Improvement Act.

Mr. Chairman, I thank you for holding this important hearing today. I look forward to reviewing the testimony given. It is my hope that we can address these issues of concentration and anti-competitive behavior in the agricultural sector soon.

Senator GRASSLEY. I believe that Senator Grams, of Minnesota, will submit a statement that hasn't been submitted yet, and if he does that, that will be included.

I want to thank everybody for their participation. I am going to put my closing remarks in the record.

[The closing remarks of Senator Grassley follow:]

CLOSING REMARKS OF SENATOR CHARLES E. GRASSLEY

This was a good hearing, I think we all learned a lot today, and hopefully we'll be moving toward a more effective and capable GIPSA. While we've heard from USDA that they'll be addressing these issues, I want to make sure that it is done in a timely manner. Because I feel that USDA has had warning and time enough to make the appropriate changes to the way it does business, I think that we can best help family farmers and protect against anti-competitive activity by guaranteeing that USDA will make these changes by a time specific. That's why I think my legislation is so important—give USDA deadline to enact these recommendations. No more spinning wheels with pathetic results. USDA and the Clinton/Gore Administration have known since 1991 that more had to be done to monitor and investigate anti-competitive practices in the livestock industry. But left on their own, little has been accomplished, notwithstanding their own 1997 OIG Report and the overwhelming number of concerns voiced by family farmers across America. It is high time for this Administration and this USDA to get their priorities straight and make these changes. I hope we can move quickly on our bill, so that the shortcomings of USDA's OGC and GIPSA are addressed and their efforts are enhanced to protect family farmers and to preserve competition in the livestock industry.

Finally, I'd like to complement the GAO staff who conducted this investigation. This report reflects substantial work on the GAO's part. I'd like to thank you, Mr. Dyckman, and your staff. In particular, I'd like to compliment the hard work of Mr. Chuck Adams in leading this investigation and producing a report that will help improve the way USDA and the Packers and Stockyards program works. A log of family farmers and producers, as well as consumers, depend on the effective administration of this program, and I think that significant improvements will be made because of your efforts.

Senator GRASSLEY. Thank you all very much.

[Whereupon, at 2:33 p.m., the subcommittee was adjourned.]

APPENDIX

QUESTIONS AND ANSWERS

RESPONSES OF THE GENERAL ACCOUNTING OFFICE TO QUESTIONS FROM THE SENATE COMMITTEE ON THE JUDICIARY

Question 1A. Could you give me the specifics of what was requested and granted to USDA GIPSA and OGC in terms of competition-related appropriations for FY99, FY00, and FY01?

Answer 1A. USDA's budget submission to the Congress for fiscal years 1999 through 2001 included the following requests for increased funding for competition work involving cattle and hogs.

For GIPSA's competition work:

For FY99, USDA asked for a $795,000 (15 staff years) increase in GIPSA's budget for packers and stockyards work related to livestock competition and industry structure. The appropriation for FY99 was approved with an increase of $397,000 for this work. For FY99, USDA also asked for $3 million for cost associated with GIPSA's restructuring; and, the Congress appropriated $2.5 million.

For FY00, USDA asked for a $636,000 increase (7 staff years) in GIPSA's budget for work related to livestock competition and industry structure. The appropriation act for FY00 included this $636,000 request.

For FY01, USDA asked for a $1.2 million (5 staff years) increase in GIPSA's budget for work to develop models to help identify anticompetitive behavior and to examine the implication of contract livestock production. The budget request also included $1.3 million (12 staff years) for rapid response teams in GIPSA's regional offices to address complex, high priority investigations that are time sensitive. As of October 11, 2000, the Congress was still working on the Department's appropriation for FY01.

For OGC's competition work:

For FY99, USDA asked for a $1.9 million increase in OGC's budget. None of this requested increase related to packers and stockyards work.

For FY00, USDA asked for a $3.5 million increase in OGC's budget. Of this, $1,250,000 was for legal services to support USDA activities in natural resources, trade practices, and general law, and in the central and pacific parts of the country. The trade practices area includes:

(1) perishable commodities work of the Agricultural Marketing Service and (2) the Packers and Stockyards Programs work of GIPSA. The budget request did not provide specific details on the portion of the request that applied to trade practices or to the Packers and Stockyards Programs work of GIPSA. The appropriation act for FY00 was not approved with this request.

For FY01, USDA asked for a $3.7 million increase in OGC's budget. Of this, almost $1 million (16 staff years) was for increased legal services but none was identified as being related specifically to the Packers and Stockyards Programs work of GIPSA.

Question 1B. Were any attorneys requested for Packers and Stockyards Act competition-related responsibilities in USDA's OGC FY01 appropriations request?

Answer 1B. No attorneys or legal services were requested or referred to in USDA's FY01 budget request for OGC for work involving livestock competition or the Packers and Stockyards Programs work of GIPSA.

Question 1C. Do the USDA GIPSA and OGC appropriations requests reflect an indication that USDA sees competition-related issues as a priority for the agency as compared to other areas of responsibility?

Answer 1C. USDA's appropriation requests for GIPSA have emphasized the need for additional work on competition issues, but the OGC requests have not reflected a priority in this area.

Question 2A. At the Subcommittee hearing, the Agriculture Department witnesses indicated that USDA has issued six Packers and Stockyards Act competition-related rulemakings proceedings. Is that testimony accurate?

Answer 2A. GIPSA has announced plans for regulations related to competitive activity, but has not issued final regulations on competitive issues. On September 5, 2000, GIPSA proposed that packers should file swine marketing or purchase contracts with GIPSA. GIPSA plans to publish information about these contracts as required by the Livestock Mandatory Reporting Act of 1999. Also, according to GIPSA, on September 14, 2000, it submitted a draft proposed regulation to the Office of Management and Budget for review that would prohibit a packer from requiring that livestock sellers not report sale prices as a condition of purchase. In addition, in September 2000, GIPSA announced that it is drafting other regulations that would be designed to increase the transparency of market transactions. Since 1995, GIPSA has amended several existing trade practice related regulations. For example, in May 2000, GIPSA amended its existing regulations regarding the weighing of feed.

Question 2B. Do you believe that USDA has been aggressive with respect to initiating rulemaking or issuing guidelines dealing with competition-related matters?

Answer 2B. In our opinion, GIPSA has not been aggressive with competition related rulemakings or guidance.

Question 3. At this Subcommittee hearing, I asked the USDA what internal checks and controls were in place at USDA GIPSA to provide an assurance that a proper job was being done in conducting investigations of alleged anti-competitive practices. Would you like to respond to USDA's answer regarding their internal operations?

Answer 3. During the hearing, USDA referred to GIPSA's process of assigning a control number to each investigation for tracking purposes. This tracking system is not by itself an internal control system. An internal control system or periodic quality assessments could be used to test and ensure that the agency has conducted full and complete investigations.

Question 4. In your opinion, what are the challenges for USDA GIPSA and OGC to improve their performance with respect to competition issues?

Answer 4. The challenges are several. First, USDA needs to adopt a fundamentally different approach to investigations than the agency currently practices. Second, USDA will need to overcome the limited experience of GIPSA and OGC staff with competition related investigation work aimed at the practices of major companies. Also, OGC has not traditionally led GIPSA investigation cases, and doing so in a teamwork environment is likely to call for cultural changes in organizational behavior. Third, GIPSA and OGC will need to work with the Department of Justice and Federal Trade Commission to obtain their advice and counsel on changes before implementation. This will call for a consultative relationship between the agencies.

Question 5. At the hearing and in their response to the GAO report, USDA spelled out in some detail what it needs to do to address the problems raised in your report. Do you believe that USDA's proposals will effectively address the current shortcomings in GIPSA's performance in regard to their competition duties? Do any of USDA's proposed changes raise any concerns?

Answer 5. Overall, we believe that the steps that GIPSA has proposed are a positive response to our recommendations. Nevertheless, USDA's initial proposals as described in USDA's testimony vary from our recommendations in several respects.

We recommend that USDA's OGC attorneys lead GIPSA's investigations involving competition issues using a team approach with GIPSA's economists, and also supervise GIPSA's legal specialists. USDA's testimony indicates that OGC attorneys may lead some of these investigations, but not others. If so, USDA may not achieve a full teamwork approach. Also, USDA did not directly address the limitations on the responsibilities of GIPSA's legal specialists, and how these legal specialists would be led and supervised. We believe that USDA needs to assure that competition-related investigations are led by attorneys with experience in this field of practice (or at least that they are in an active part of the team), and that there is a teamwork approach between GIPSA and OGC throughout the investigative work and litigation phase when that is necessary.

In addition, USDA's testimony does not address our recommendation that it consult with DOJ and FTC on the changes it is planning, including the organizational relationships needed to achieve a teamwork approach. Hopefully, this process will be undertaken early on before USDA adopts its plans. Also, USDA officials stated

that 5 additional USDA OGC attorneys are needed for competition investigation work. While we have not reviewed the basis for this initial estimate, adding 5 OGC attorneys would clearly be an improvement, particularly if they have experience in this field of practice. Also, we believe USDA/GIPSA should consult with DOJ and FTC on the appropriate ratio of attorneys to economists involved in competition-related investigations.

ADDITIONAL SUBMISSIONS FOR THE RECORD

PREPARED STATEMENT OF HON. ROD GRAMS, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Mr. Chairman, I appreciate the opportunity to offer a statement to your subcommittee concerning the enforcement of provisions of the Packers and Stockyards Act. I also want to commend you for your diligence in fulfilling your legislative oversight responsibilities and your concern for the plight of family farmers across America's heartland. I am a proud original cosponsor of the "Packers and Stockyards Enforcement Improvement Act of 2000," which is a common-sense piece of legislation that sets aside the contentious issue of expanding the statutory authority of federal agencies, and instead focuses on guaranteeing that existing law is being thoroughly and competently enforced.

As I have said before, the extent of market competition protection provided in federal law is certainly of concern to all stakeholders in American agriculture, but we must be careful to avoid taking measures that may reduce America's global competitiveness and have negative, unintended consequences on producers. Nevertheless, we should be able to reach a consensus that the current responsibilities of federal agencies should be discharged with energy and focus, and with the technical competency necessary to get the job done. Unfortunately, the GAO report you are examining today indicates that may not be true for GIPSA in recent years.

I believe that your bill will take important steps towards improving GIPSA's investigation methods and performance, and will bring legal expertise and improved review methods to bear from the beginning of the investigations. I am hopeful that with the additional required training mandated by the bill, and by tapping the experience and resources of the Department of Justice and Federal Trade Commission, that GIPSA will soon be better equipped to fulfill its statutory duties of protecting livestock producers against unfair trade practices.

The nation's producers are uneasy about the number of mergers and the degree of concentration that has occurred in the livestock industry in recent years. Family farmers need to have confidence that the laws that protect them are being diligently enforced, and that is why I again salute you for your efforts and am glad to be an original cosponsor of your bill.

DEPARTMENT OF AGRICULTURE, GRAIN INSPECTION,
PACKERS AND STOCKYARDS ADMINISTRATION,
Washington, DC, September 28, 2000.

Hon. CHARLES E. GRASSLEY,
Chairman, Administrative Oversight and the Courts Subcommittee, Hart Senate Office Building, Washington, DC.

DEAR CHAIRMAN GRASSLEY: Thank you for the opportunity to interact with your Subcommittee on Monday, September 25, 2000. I enjoyed speaking with you after the hearing.

Enclosed is a document addressing the Grain Inspection, Packers and Stockyards Administration's FY 2000 Regulatory Initiative that outline regulatory actions the Agency is pursuing in order to better serve American agriculture.

It is my desire that the attached be added to the record of the Subcommittee's hearing on Monday, September 25, 2000.

Sincerely,

JAMES R. BAKER,
Administrator.

Enclosure.

FY 2000 REGULATORY INITIATIVES, SEPTEMBER 27, 2000

GRAIN INSPECTION, PACKERS AND STOCKYARDS ADMINISTRATION (GIPSA), PACKERS AND STOCKYARDS PROGRAMS

During fiscal year 2000, the Packers and Stockyards Programs, GIPSA, has worked on seven regulatory initiatives. The title, status, and a brief description of each regulatory initiative are provided below.

Feed weigh final rule

Status: Published April 5, 2000, effective as of May 5, 2000.

Description: The feed weigh final rule amended existing scales and weighing regulations to include requirements regarding the weighing of feed. The feed weigh regulations are intended to assure livestock and poultry growers that feed weights are accurately or reasonably determined.

Swine packer marketing contracts library proposed rule

Status: Published on September 5, 2000, comments are due by October 5, 2000.

Description: The proposed rule adds a new regulation to implement the Swine Packer Marketing Contracts subtitle of the Livestock Mandatory Reporting Act of 1999. The new regulation would require certain packers to file swine marketing or purchase contracts with GIPSA and would require GIPSA to publish monthly reports about available swine marketing contracts.

Non-reporting of price proposed rule

Status: Submitted to OMB for review on September 14, 2000, the 90-day OMB review period ends on December 12, 2000.

Description: The proposed rule would prohibit a packer from requiring that the seller not report the price as a condition of the purchase or sale of livestock.

Proposed rules for livestock and poultry marketing

Status: GIPSA is drafting and reviewing four proposed rules.

Description: The series of four proposed rules are intended to help ensure fair competition in the livestock, poultry, and meat packing industries. These new regulations will help level the playing field by increasing the transparency of market transactions. Specifically, the new regulations are intended to:

Clarify recordkeeping requirements for packers;

Mandate disclosure of specific production contract terms in plain language and prohibit restrictions on the disclosure of contract terms;

Require that livestock owned by different people be purchased, sold, or offered for purchase or sale on its own merits; and

Specify conditions under which packers may offer premiums and discounts in carcass merit transactions.

○