

Overview of GIPSA's Proposed Rule for Enforcing the Packers and Stockyards Act

The U.S. Department of Agriculture's Grain Inspection Packers and Stockyards Administration (GIPSA) June 22 published a proposed rule to define terms of and enforce the Packers and Stockyards Act. The rule was proposed in accordance with requirements of the 2008 Farm Bill as well as under GIPSA's authority to enforce the P&S Act. The latter was not called for by Congress or any other agency.

The 2008 Farm Bill required GIPSA to promulgate rules to address five specific issues:

- Criteria for determining whether an undue or unreasonable preference or advantage has been given to any producer.
- Whether a poultry dealer or swine contractor has provided sufficient time for a grower to remedy a breach of contract that could result in contract termination.
- Whether a poultry dealer has given reasonable notice of any suspension of delivery of birds to a grower under a contract.
- When a requirement of additional capital investment during the life of a contract constitutes a violation of the Packers and Stockyards Act as an unfair practice.
- The factors that comprise a fair usage of arbitration, including notification and the option for producers to opt out of automatic arbitration to resolve disputes.

GIPSA also proposed rules that go far beyond what was required by the Farm Bill. Some of the rules are contrary to the decisions of several federal courts and to the votes of Congress. In addition, some of the features of the rules written to address the Farm Bill requirements are problematic for pork producers.

The key proposals and possible difficulties include:

- Any capital investment of more than \$25,000, whether initial or during the life of a contract, will trigger limitations on additional capital requirements. This is a very low threshold.
- Competitive injury is defined as any distortion of competition in the marketplace. There are differing levels of competition, and perfect competition is a very high standard.

- Requires packers and contractors to keep written records that document and provide “justification” for any price difference or contract term differences. But the rule provides no guidance for determining an acceptable “justification.”
- Provides a very broad and complex definition of unfair, unjustly discriminatory and deceptive practices. Congress required that specific criteria “unfair preference” criteria required by Congress in the Farm Bill. So that they won’t be considered “unfair” – and therefore violations of the P&S Act any price differences must be substantiated by revenue and cost analyses to not be considered “unfair” preferences. It does not appear that timing or market conditions are sufficient reasons for differences.
- Prohibits dealers who are listed with GIPSA as a buyer for one packer from buying livestock for other packers. This is quite likely a cattle issue.
- Requires hog marketing contracts, but not production contracts, to be submitted to GIPSA within 10 days of execution and packers to notify GIPSA within 10 days of when a specific type of contract is no longer used. The rule does provide that confidential business information be stricken from the submitted contracts before they are made public but appears to give GIPSA final say over what, in fact, will be stricken.
- Requires a contract to be long enough to allow a grower to recoup 80 percent of his/her capital investment, taking away flexibility from both growers and contractors.
- Establishes some criteria for “fair” arbitration processes instead of using the procedures of the American Arbitration Association. Reinforces a past requirement that producers be given the opportunity to opt out of required arbitration.

Perhaps the most egregious items, however, are somewhat buried in the rule.

One states that actions found to be unfair practices but that do not diminish competition will still be violations of the P&S Act. Seven appellate courts have held in 11 different cases that the P&S Act is about competition and that actions that do not harm competition, even if they harm individuals, are not violations of the law. Further, Congress failed to pass an amendment to the 2008 Farm Bill that would have eliminated the need to prove an action caused a competitive injury in violation of the act.

A second is a prohibition on packers buying animals from other packers or their “affiliated companies.” This feature is meant to prevent price “signaling” by packers trading with one another, but “affiliated companies” is not defined. It very well may mean that packer owners may not be able to sell livestock to any packer that is covered by the P&S Act. It appears that this item addresses conditions in beef feedlots, but it ignores the fact that prices and quantities of packer-sold pigs are already reported to USDA and published in each day’s reports. We think it would be difficult to send under-the-table price signals when the data are published each day.

In addition, the proposed rules will force packers who sell hogs, whether market hogs or cull breeding stock, to brokers who will then sell the pigs to another packer.

What will be the impact of these regulations? They will have a chilling effect on innovation and flexibility. Packers may forego the hassle of “justifying” and documenting different prices and simply pay one price (almost certainly the lowest!) to all producers. Regulation and uncertainty – and this rule creates a lot of legal uncertainty – will drive costs higher and may drive the costs of using contracts at the production and packing level high enough that contract growers decide to own their own buildings or to produce their own hogs. The result will be a higher level of vertical integration and, almost certainly, a new push to limit or prohibit that vertical integration – even though laws and regulations caused the vertical integration in the first place.

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