

PolicyPennings by Dr. Daryll E. Ray

Additional contracting rules for poultry growers spelled out

Last week's column dealt with the United States Department of Agriculture Grain Inspection, Packers, and Stockyard Administration's (USDA-GIPSA) rationale for issuing the final rule that establishes four new rules covering contracts in the poultry industry. In its analysis, USDA-GIPSA noted the highly concentrated nature of the poultry industry and the asymmetry of information between the live poultry dealers and the growers who are under contract to them.

Also noted was the large amount of money that growers have invested in their "poultry houses, which have a limited value for purposes other than raising and caring for poultry."

The rationale given by USDA-GIPSA also indicated the large number of individuals who were available to advise the poultry dealers with regards to the contents of the poultry contracts they offered.

Lastly, USDA-GIPSA recognized that despite the large investments made by growers, there were times in which growers were not provided the terms of the agreement in a timely fashion.

The rules that were issued were derived from the rules that were proposed on August 1, 2007. The comment period for those rules ended October 30, 2007 and it took more than two years before the final rules were issued on December 3, 2009. Some of the comments provided during the comment period dealt with issues not covered by the proposed rules and thus were not acted upon at this time.

All of the new rules fall under Section 201.100 of the regulations under the Packers and Stockyards Act.

The first rule states, "(a) Poultry growing arrangement; timing of disclosure. As a live poultry dealer who offers a poultry growing arrangement to a poultry grower, you must provide the poultry grower with a true written copy of the offered poultry growing arrangement on the date you provide the poultry grower with poultry house specifications."

GIPSA explains the thinking behind this rule writing, "Growers who have invested heavily in poultry houses may face the choice of signing a poultry growing arrangements in which disclosure of terms is incomplete and/ or not provided in a timely fashion or facing financial difficulties, including possibly exiting the poultry growing business or going bankrupt. In some cases, live poultry dealers already provide complete information in a timely fashion. This final rule, however, will level the playing field by requiring that all live poultry dealers adopt fair and transparent prac-

tices when dealing with poultry growers.

"The failure of a live poultry dealer to deliver a written poultry growing arrangement in a timely manner is considered by GIPSA to be an unfair and deceptive practice because growers could not otherwise know what the poultry growing arrangement terms will be or whether the terms accurately reflect the agreement reached between the parties. This practice could also be considered discriminatory if some growers receive written poultry growing arrangements in a timely fashion and others do not. A live poultry dealer's failure to include written notice of termination procedures in the poultry growing arrangement and failure to provide a written notice of termination

is also considered unfair, discriminatory and deceptive for the same reasons."

The second rule reads, "(b) Right to discuss the terms of poultry growing arrangement offer. As a live poultry dealer, notwithstanding any confidentiality provision in the poultry growing arrangement, you must allow poultry growers to discuss the terms of a poultry growing arrangement offer with:

- (1) A Federal or State agency;
- (2) The grower's financial advisor or lender;
- (3) The grower's legal advisor;
- (4) An accounting services representative hired by the grower;
- (5) Other growers for the same live poultry dealer; or
- (6) A member of the grower's immediate family or a business associate. A business associate is a person not employed by the grower, but with whom the grower has a valid business reason for consulting with when entering into or operating under a poultry growing arrangement."

Commenters suggested the inclusion of appraisers, realtors and farm organizations. These were not added to the list by GIPSA, however they did add "poultry growers who have entered into poultry growing arrangements with the same live poultry dealer."

Thirdly, under subsection "(c) [which reads] Contracts; contents. Each live poultry dealer that enters into a poultry growing arrangement with a poultry grower shall furnish the grower with a true written copy of the poultry growing arrangement, which shall clearly specify:" GIPSA added a new subsection after the current 1 and 2. The new subsection reads:

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Cont. from p. 1

- (3) "Whether a performance improvement plan exists for that grower, and if so specify any performance improvement plan guidelines, including the following:
- (i) The factors considered when placing a poultry grower on a performance improvement plan;
 - (ii) The guidance and support provided to a poultry grower while on a performance improvement plan; and
 - (iii) The factors considered to determine if and when a poultry grower is removed from the performance improvement plan and placed back in good standing, or when the poultry growing arrangement will be terminated."

GIPSA states that they received "a comment from a poultry grower organization [that] requested that we require a live poultry dealer to disclose fully the existence (or the lack thereof) of the company's PIP program [performance improvement plan] in its poultry growing arrangements. A comment filed by another suggested that all original poultry growing arrangements disclose fully a live poultry dealer's PIP information. The commenter stated that a live poultry dealer should not be able to add riders containing PIP clauses to existing poultry growing arrangements. We have reviewed our proposal and agree with the comments. We will therefore modify § 201.100(c) in the final rule to require that a live poultry dealer specifically disclose in all future poultry growing arrangements whether it has a PIP program in existence and the guidelines for the program."

The fourth addition states, "(h) Written termination notice; furnishing, contents.

- (1) A live poultry dealer that ends a poultry growing arrangement with a poultry grower due to a termination, non-renewal, or expiration and subsequent non-replacement of a poultry growing arrangement shall provide the poultry grower with a written termination notice at least 90 days prior to the termination of the poultry growing arrangement. Written notice issued to a poultry grower by a live poultry dealer regarding termination shall contain the following:
 - (i) The reason(s) for termination;
 - (ii) When the termination is effective; and
 - (iii) Appeal rights, if any, that a poultry grower may have with the live poultry dealer.
- (2) A live poultry dealer's poultry growing arrangement with a poultry grower shall also provide the poultry grower with the opportunity to terminate its poultry growing arrangement in writ-

ing at least 90 days prior to the termination of the poultry growing arrangement."

GIPSA considered comments that ranged from 30 days to 2 years to the outright prohibition of "the termination of growing arrangements for growers with federally guaranteed loans." In the end GIPSA settled on 90 days stating, "we believe that 90 days advance written notice of termination should be adequate in order to give the affected parties time to make adjustments in their business operations. This is especially important given the long-term financial risks that an affected party may face. This change will provide the grower with more time to work with the live poultry dealer to improve his/her performance, obtain legal and/or financial advice or guidance, obtain a new contract with a new live poultry dealer, and/or sell his/her poultry growing business."

These new rules add a level of protection to poultry growers that was not codified into law in the past. The new rules will no doubt be well-received by poultry growers, but some believe that GIPSA should go further if GIPSA is to fully recover the role envisioned for it when the Packers and Stockyards Act was passed.

For example, the rule does not cover the situation where the poultry dealer upon termination of a contract retaliates against the grower by stating that they will not enter into a contract with anyone who buys the terminated grower's facilities, thus making the facilities worthless and leaving the grower in substantial debt.

Growers also expressed concern that the live poultry dealer has the ability to manipulate inputs to make a grower seem inefficient. GIPSA responds "If a poultry grower believes a live poultry dealer systematically has manipulated inputs to the grower's disadvantage, GIPSA can investigate the grower's complaint." In this case GIPSA does not make it clear how it will protect growers from retaliation if they report a problem to GIPSA.

The new rules are designed to rebalance the relationship between dealers and growers. Time will tell whether that intended balance occurs and if the formulation of additional rules is in the cards.

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