

PolicyPennings by Daryll E. Ray & Harwood D. Schaffer

GIPSA responds to "misunderstandings" of proposed rule and extends comment period

On the day that we sent the last column to the publisher, July 26th, the USDA's Grain Inspection, Packers, and Stockyards Administration (GIPSA) made two announcements via a "To whom it may concern:" letter signed by Edward Avalos, Under Secretary for Marketing and Regulatory Programs, USDA (<http://archive.gipsa.usda.gov/psp/avalosstatements.pdf>). Avalos extended the comment period on GIPSA's proposed livestock competition rule by 90 days to November 22, 2010. Secondly, Avalos released a four-page document to "clarify" what is and what is not proposed in the rule (<http://archive.gipsa.usda.gov/psp/rulefacts.pdf>).

In his letter he says, "it has become apparent that there are misunderstandings" concerning the proposed rule. By way of introducing the accompanying document, Avalos goes on to say, "This rule does not limit or prohibit marketing agreements, the use of premiums, or other value-added activities. The rule does not require anyone to do business with any particular person or require packers to pay all producers the same price."

The document that accompanies Avalos' letter is entitled, "Farm Bill Regulations - Misconceptions and Explanations." The format of the document is to state each of several misconceptions as perceived by the USDA followed by an explanation of that misconception. To facilitate presentation, we convert each "misconception" into a question and then quote a key portion of the USDA's response.

Question: Would the provision on competitive injury allow producers to sue companies without having to show competitive injury?

USDA response: If a producer filed a claim on matters dealing with practices that could cause competitive harm, such as manipulation of prices, the producer would need to show harm or the likelihood of harm to competition. If a producer filed a claim on matters that do not involve competitive harm, such as retaliatory conduct, using inaccurate scales, or providing a grower sick birds, proof of competitive injury or the likelihood of competitive injury would not apply. Such a requirement would be like having a car stolen, but before the police act, one would need to prove how the theft of the car impacts all of the neighbors.

Question: Would the proposed rule cause increased litigation due to the provision on competitive injury or harm?

USDA response: The lack of clarity on the issue of competitive injury currently causes litigation. The proposed rule seeks to clarify the issue and is intended to reduce litigation. One of the reasons the courts in recent years have ruled that proof of competitive injury or harm is necessary is because the Department has not articulated its position in regulation.

Question: Would the provision on packer to packer sales eliminate marketing agreements or other value added activities and take away the incentive to produce meat products that consumers prefer?

USDA response: The proposed rule seeks to prevent collusion and price manipulation caused by the sharing of pricing information between packers. It does not ban packers from owning their own livestock. When a packer sells livestock to another packer, the information signals important market information about price and supply levels. With high levels of consolidation and vertical integration, firms may be able to affect the prices of sales on the open market. There is nothing in this provision that limits or eliminates marketing agreements. Instead, the proposed rule would provide integrity in the market to prevent manipulation of prices on the open market and in marketing agreements.

Question: Will the packer to packer provision now require packers to sell livestock across the country to other packers willing to buy livestock?

USDA response: The proposed rule prohibits only direct sales of livestock between packers. A packer could sell to individuals, market agencies, dealers or other buyers.

Question: Would Poultry Growers and Swine Production Contract Growers be guaranteed a return of 80 percent with their production contracts?

USDA response: Under the proposed rule, producers are to be offered production contracts with a sufficient period of time that provide the opportunity to recoup up to 80 percent of the cost of their capital investment. Producers would not be guaranteed an 80 percent return on investment. This rule would not affect provisions in production contracts to deal with poor performers such as termination for cause. [Columnists' note: The document quoted here says "recoup up to 80 percent," but the published proposed rule does not include the words "up to."]

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Question: Will companies no longer be allowed to provide premiums to producers?

USDA response: There is no provision in the proposed rule that would limit or eliminate the ability of companies to provide premiums to reward producers for providing certain quantity or quality of livestock. The proposed rule simply requires that if differential pricing is offered, the packer, swine contractor, or live poultry dealer must maintain records to document the business justification for that pricing arrangement. The documents that would be required by this provision are those documents containing information typically used by the regulated entity.

Question: Will the proposed rule take away producers' ability to maintain the privacy of business transactions because all transactions will be reviewed by GIPSA and then posted on a government website open to public access?

USDA response: There is nothing in the proposed

rule that suggests GIPSA would review all business transactions, nor require that all these transactions be made available on its website. To increase transparency, GIPSA is proposing that packers, swine contractors, and live poultry dealers provide *sample* (italics, bold, and underline in original) contracts and poultry growing arrangements to GIPSA. In return, GIPSA will make these sample contracts available on its website. The proposal requires the submission of sample contracts, not every transaction. Any trade secrets, confidential business information and personally identifiable information submitted would be removed and not made available on GIPSA's website.

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