

PolicyPennings by Daryll E. Ray & Harwood D. Schaffer

Livestock packers' choice: Instill fear of litigation or deal with "unfair practices?"

The deadline for submitting comments on the proposed Grain Inspection, Packers and Stockyards Administration regulations ends November 22, 2010. The proposed regulations allow livestock growers to sue livestock dealers and packers for unfair practices without having to show harm to competition. The proposed regulations also establish rules that:

- Require a packer, swine contractor, or live poultry dealer to maintain written records that provide justification for differential pricing or any deviation from standard price or contract terms offered to poultry growers, swine production contract growers or livestock producers;
- Prohibits a packer or swine contractor from offering better price terms to producers who can provide larger volumes of livestock than to a group of producers who collectively can provide the same volume of livestock of equal quality and it cannot provide a legitimate justification for the disparity;
- Bans packer to packer sales;
- Prohibits livestock purchasers from buying for more than one packer;
- Requires packers, swine contractors, and live poultry dealers to provide GIPSA with sample copies of contracts within 10 business days of entering into the agreement with a grower or producer to increase transparency in the use of contracts and allow producers to make more informed business decisions;
- Requires live poultry dealers to pay the same base pay to growers who are raising the same type and kind of poultry; and
- Set rules on suspension of delivery of birds, capital investment criteria, capital investment requirements, reasonable period of time to remedy a breach of contract, and arbitration.

The USDA estimated that the cost of paperwork required with regard to these new regulations would be about \$500,000. In addition, their analysis showed that the benefits of the regulations are expected to exceed the costs by providing for more transparent, competitive markets.

The American Meat Institute's (AMI) recently released a study of the economic impact of the rule came to the conclusion that the implementation of the GIPSA rule would cost about 104,000 jobs and reduce the US Gross Domestic Product (GDP) by \$14 billion and "cause a total of \$1.36 billion in lost rev-

enues to the Federal, state and local governments."

On November 10, 2010, Informa Economics released a study conducted for the National Meat Association (NMA) in cooperation with the National Cattleman's Beef Association, the National Pork Producers Council, and the National Turkey Federation that estimated the costs of complying with the new regulations to include a loss of 22,800 jobs, a reduction in annual GDP of \$1.56 billion and a decline in tax revenues of \$359 million, <http://nppc.org/uploadedfiles/GipsaReport-Final2,2010-11-09.pdf>.

In their conclusion to their report, "An Estimate of the Economic Impact of GIPSA's Proposed Rules," Informa writes, "during the course of this study, it became clear to us that the provision in the rule that relieves plaintiffs from the burden of proving competitive injury is by far the most damaging. Simply removing that one provision could reduce the economic damage expected from the rule by nearly 75%. All of the expected efficiency losses and demand decline that forms the basis for the largest portion of the costs are tied back directly to the packer/processors' fear of increased litigation and an increased likelihood that a very large financial judgment will be rendered against them. That is the factor that will drive the packers to sharply reduce their use of AMAs, [alternative marketing agreements] which in turn creates large costs in terms of efficiency and product quality."

Indeed, the pro and con focal point of the GIPSA debate is the portion of the proposed rule that explicitly states that courts need not require plaintiffs to prove competitive injury at the industry level. It is fear of litigation that drives most of the additional costs that Informa projects with regard to the implementation of the proposed GIPSA rule.

Here is what the USDA says in their summary of the proposed rule, "many practices can be unfair and never have an anticompetitive implication. Examples of such practices include, but not limited to, not allowing a poultry grower to watch birds being weighed, using inaccurate scales, providing a grower poor quality feed, giving a grower sick birds to raise, failing to provide a grower the growing contract in a timely manner, or retaliation against a grower."

To us as analysts, without law degrees or years of

Cont. on p. 2

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Cont. from p. 1

experience in researching livestock marketing issues, this intra-industry fight seems to boil down to disagreements on what are "unfair practices."

With anticompetitive impact no longer a consideration, should the proposed rule be implemented, the packers/integrators are faced with the prospect of dealing with the merits of the "practices" themselves.

If the practices can be defended in court, they have nothing to worry about. If they cannot, the rational thing to do is change the "practices" that juries are likely to declare unfair. Claiming that practices that juries would find "unfair" should be allowed to continue simply because the alleged economic disruption that would be caused by their elimination, seems contrary to our judicial heritage.

The critical question on the alternative marketing agreements would seem to be: were there market reasons for initiating AMA's? If there were demand and/or cost efficiencies for creating AMA's, those eco-

nomie reasons for continuing them are likely to persist. The cost of reducing to paper and making public the criteria and non-discriminating conditions for starting, joining, or adding to an existing AMA is likely trivial compared to the market opportunities that AMAs afford. The issue centers on "practices" again, including transparency and availability.

And, again, the decision is whether to change practices or fight in court claiming that moving away from practices that have been found to be "unfair" would be economically disruptive.

Are we missing something here??

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