

## PolicyPennings by Daryll E. Ray & Harwood D. Schaffer

# GIPSA final rule: Issues relating to arbitration and the rule's overall impact

One of the concerns long expressed by poultry producers is the arbitration clause in poultry contracts. To obtain production contracts with integrators, producers must agree to use arbitration to resolve contractual disputes thereby giving up the right to file lawsuits. Producer concerns about arbitration clauses were addressed in the proposed GIPSA rule published in the Federal Register on June 22, 2010. Producers offered comments expressing the importance of the proposed rule on arbitration clauses both in testimony during the 2010 “Workshops on Competition in Agriculture,” sponsored by the United States Department of Agriculture (USDA) and the Department of Justice, and in written comments submitted directly to the USDA.

In addition to considering the arbitration issue, this column also focuses on overall regulatory impact of the rule, including concerns by meat packers and integrators about the cost of the proposed rule. We take a look at the way the USDA dealt with these two issues in the final rule that was published on December 9, 2011. To provide a sense of what the USDA did, we use extensive quotes from the final rule.

### Arbitration: Summary of Comments

“Almost all the comments on this section were supportive. Comments from growers and producers felt this was an important provision to protect their rights. Two comments expressed concern that live poultry dealers may terminate their relationship with growers that opted-out of arbitration when the live poultry dealers need to decrease production. Several comments expressed general opposition to the entire section and that anyone who did not like the arbitration terms in a contract should simply not enter into the contract instead of having a right to opt-out.... There were several comments on the provision that said failure to sign either the arbitration acceptance or declination statement voided the contract. Comments from two parties recommended that in the alternative, the rule should state failure to sign one of the elections meant the grower was opting-out of arbitration without voiding the contract. One other party suggested that if neither election is made the required arbitration clause portion of the contract was void.”

### Arbitration: Agency Response

“With regard to comments concerning growers or producers being subject to retaliation for exercising their right to opt-out, we agree with this concern. We also point out that terminating relationships with

growers because they exercised their right to opt-out of required arbitration under § 201.219 would be an unlawful practice. With regard to general comments against the right to opt-out of arbitration, we point out this provision was included in the 2008 Farm Bill. This provision implements section 210 of the P&S Act added by the 2008 Farm Bill.... With regard to the comments on failure to select the option to decline or to be bound by the arbitration terms, we tended to agree with the comments that voiding the entire contract was not necessary. We have modified the provision to say a failure to sign either of the “Right to Decline Arbitration” statements will be treated as if the contract producer or grower declined to accept the required arbitration clause in the contract.”

### Regulatory Impact Analysis: Summary of Comments

“Thirty-seven comments were received on GIPSA’s compliance with the analytical requirements of Executive Order 12866. [Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.] Many of the comments favoring the proposed changes pointed to what they viewed as the deleterious effects of increased concentration on competition. For example, a number of commenters referred to declining farm prices and the declining farm share of the retail value of meat and poultry as indications that increased concentration had adversely affected producers. However, few comments provided numerical estimates of the economic benefits of the proposal.

“Three comments, consisting of over 1,000 pages, expressed concern that the economic impacts of the proposed rule would be economically significant and submitted evidence that the proposed provisions might have costs of more than \$1 billion per year. Comments also suggested the rule would hurt innovation and food safety and increase costs and prices to consumers. Commenters noted that for the cattle and hog indus-

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tries adjustment costs would be related to the shifting away from the use of marketing arrangement forms of procurement and contracts in favor of the spot market and for poultry would entail overall losses of production efficiency in the conversion of factor inputs to product output. In the study prepared for the National Meat Association by Informa Economics [Informa Economics, Inc. "An Estimate of the Economic Impact of GIPSA's Proposed Rules"], 75 percent of the economic costs associated with the proposed rule were associated with, in their view, relieving plaintiffs from the burden of proving competitive injury [We examined this study in a previous column, <http://agpolicy.org/weekcol/582.html>].

"The Informa study estimated the aggregate impact of the June 22, 2010, proposed GIPSA rule for the U.S. meat and poultry industry at \$1.64 billion.... The Informa study further estimated the value of lost production based on their estimated on-going and adjustment costs. The value of lost production totaled almost \$1.1 billion or about 66 percent of the total estimated costs. The estimates differ because the total on-going and adjustment costs represent the cost to each industry before markets adjust to the changes in output. The value of lost industry production represents the cost to each industry after markets adjust to changes in output."

**Regulatory Impact Analysis: Agency Response**

"This final rule contains several significant changes based on the comments received during the comment period for the June 22, 2010 proposed rule. Many of the proposed provisions identified by commenters and in the Informa analysis as having the largest effect in the market are not included in this final rule. We have considered all the analyses and information provided in comments as we completed the analysis for this final rule, but in some cases it was of limited use and refinement of estimates was difficult. For example, though the Informa study provided some insight into understanding the costs and benefits associated with many of the major proposed rule changes, it also has limitations. As detailed in the Informa study, "\*\*\* it is important to recognize that it

was impossible to structure the interview process in a way that provided a pure random sample and thus the information gleaned from the surveys should not be used to make statistical inferences about industry populations in a strict sense.' It is also not clear whether those responding to the Informa survey based their input on the estimated cost associated with the proposed rule or a 'worst case' scenario. As discussed by Gresenz et al. [Gresenz, Carole Roan, Deborah H. Hensler, David M. Studdard, Bonnie Dombey-Moore, and Nicholas M. Pace (1998). "A Flood of Litigation? Predicting the Consequences of Changing Legal Remedies Available to ERISA Beneficiaries." RAND Issue Paper, IP-198], without a history of claims on which to base a prediction, it is difficult to accurately estimate the potential threat. Gresenz et al. further notes that individuals are likely to overestimate the likelihood that plaintiffs will win cases and decision makers may over-react to the small possibility of having to pay large penalties. To the extent this tendency to over-react to the small possibility of having to pay large penalties is reflected in the Informa study estimates, the Informa study costs over-estimate the costs associated with the proposed rule. Similarly, the estimates of the economic costs provided by Elam [Elam, Dr. Thomas E. "Proposed GIPSA Rules Relating to the Chicken Industry: Economic Impact." FarmEcon LLC (November 16, 2010)] are potentially an over-estimate of the true costs because of the significant changes to the proposed rule."

While Congress prohibited the USDA from issuing 14 sections in the proposed rule, to us it seems apparent from the USDA's analysis of the 4 retained sections that the USDA took the comments seriously in its search for the balance in the relationship between producers and packers/integrators. The issues in the 14 deleted sections, which are predominantly producer identified, may get airings in the future but not without Congressional action.

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