



What is *Really* in the Proposed GIPSA REGULATIONS Concerning Contracting by Packers With Producers?

July 2010

Distortions in the USDA's proposed rules to regulate the use of contracts between processors of livestock and poultry and producers, who raise animals for America's meat supply, are running wild. They appear to be fueled by packer and processor interests¹.

The truth about the rules should emerge. *Truthfully* they are not complicated, lengthy, or even surprising. The new proposals are 4 pages long, not 66 as one incredible story declared. They are explained with examples and a historical description of the problems the new articles address. These are written in language intended for lay people.

The rules, themselves, can be read, at pages 13-17 of //archive.gipsa.usda.gov/rulemaking/ FR10/06-22-10.pdf. Thirteen pages of explanation precede the rules. Technically, these are proposed Regulations, i.e., they will become part of the *Code of Federal Regulations* when adopted.

As written, the proposed Regs consist of about 4,000 words. These include specific contract language required to be included in contracts to assure producers are informed, and definitions of terms.

The Regulations, with their series of definitions and ten separate sections, contain these key features.

§ 201.2 Terms Defined

Among the interesting definitions are these:

¹ The packer-controlled American Meat Institute, and the packer-influenced if not controlled National Pork Producers Council were leaders at requests for more time to comment on the rules and issued statements critical of them.

1. *Tournament System* means any method used by a live poultry dealer to calculate some portion of the payment made to poultry growers based on comparison of one poultry grower's performance with that of one or more others....
2. *Capital Investment* means any initial capital investment of \$25,000 or more paid by a grower for growing and raising facilities....
3. *Additional Capital Investment* means a combined amount of \$25,000 or more paid by a poultry grower or swine production contractor beyond the initial investment....
4. *Forward Contract* means fixed price or basis contract, oral or written, for the purchase of a specified quantity, or a lot or lots of livestock, where delivery will occur more than 14 days after the agreement is entered. Price may be determined when an agreement is entered... or... at a later date....
5. *Marketing Agreement* means an agreement to purchase livestock at a future date with a price to be determined at or after the time of slaughter, where a delivery will occur more than 14 days after the agreement is entered.
6. *Production Contract* means a contract detailing specific poultry grower or swine production... responsibilities for production inputs and practices as well as a mechanism for determining payment.
7. *Competition Injury* occurs when conduct distorts competition in the market channel or marketplace.
8. *Likelihood of Competitive Injury* means there is a reasonable basis to believe a competitive injury is likely to occur in the market channel or marketplace....

Comments:

This list of definitions is not exhaustive. Some are shortened for presentation here. Suffice it to say the definitions contain no surprises. They do not require an Ivy League education to understand. Neither do the Regulations.

§ 201.3 Applicability

This section of the new Regulations applies the regs to live poultry dealers and contracts, and notes the appropriate application of the competition provisions of the *Packers & Stockyards Act* "depends on the nature and circumstances of the challenged conduct. A finding that the challenged act or practice adversely affects, or is likely to adversely affect, competition is not necessary in all cases.

Comments:

This section is much despised by packers because it allows a producer to sustain a complaint for mistreatment by a packer without spending \$50,000 + on economists to write reports on how the packer's behavior toward one little guy injures the whole market.

The law's current structure is a classic Catch 22: If you are beat to death by a packer but are too little to have death of your operation change the market as a whole, there is no remedy for you. To get a remedy you must get bigger, lose more money, and finally be so big that when you fail your operation's death does cause harm to the whole market. This current view of the law is the legal equivalent of inoculating the offending packer against recourse by the producer because the producer is too small to succeed and the packer is too big to fail.

This provision would also effectively restrict packers from picking off small operations one by one and thus aggregating a substantive effect on competition.

§ 201.94 Information as to Business

This Regulation requires packers and poultry dealers to maintain "written records that provide justification for differential pricing or any deviation from standard price or contract terms offered to [poultry and swine producers]."

Comment:

Wouldn't any reasonable business person expect an honorable business to keep such records?

§ 201.210 Unjust Discrimination

This section provides that an "unfair, unjustly discriminatory, and deceptive practice or devise" as used in 7 USC § 192 includes these kinds of behavior:

1. Unjustified material breach of contract.
2. Retaliatory action in response to lawful activity by producers.
3. Refusal to provide contract poultry growers with required information.

4. Attempts to limit legal rights by taking away, without knowing and voluntary consent, the right to trial by jury, to all damages available under the law, to available bankruptcy rights, or to deprive the judge or jury of the authority to award attorney's fees to the appropriate party. The regulation also prohibits requiring an arbitration or trial occur some place other than the location where the principal part of contract performance occurs. Paying premiums or taking discounts without documenting reasons is prohibited. So is terminating contracts with no basis other than an allegation of noncompliance without proof. Fraud is also prohibited.

Comments:

Nothing about these prohibitions is excessive. They simply require packers to stop limiting the remedies available against packer misconduct with non-negotiable adhesion contracts producers are compelled to sign because they are given no choice.

§ 201.211

This provision allows the Secretary of Agriculture to consider certain things including: contract terms, including volume or other conditions, whether price premiums are based on standards or are subjective, and whether information is relevant to the premiums of discounts as disclosed to everyone, as the USDA determines whether undue or unreasonable preference or advantage has been given to a favored producer

No Comment Required.

§ 201.212

This section requires dealers to be identified with packers and prohibits exclusive arrangements except as reported to the Secretary of Agriculture. It will eliminate packer-to-packer trades, but permits waivers for emergency or catastrophic circumstances.

Comment:

This section is intentionally pro-packer so long as the intention is to do business honestly.

§ 201.213

These provisions governing contracts require forms be filed with the USDA for approval. GIPSA must be notified of changes and have an advance right to approve or disapprove, and require all contracts be made public.

Comments:

These provisions assure fairness to producers and market transparency.

The provisions are carried further into effect with §§ 201.214 and 201.215, related to the poultry industry. If a Tournament System (see definition is above) is used, “all growers raising the same type and kind of poultry must receive the same base pay.” Furthermore, the Secretary is given latitude to determine when suspension of delivery of birds, i.e., a new flock, has occurred unfairly and is unlawful.

§ 201.216 – Capital Investments

This section permits the Secretary to consider criteria governing when a packer or integrator’s contract requirement compelling a producer spend money to make capital investments constitutes an unfair practice in violation of the Act. Considerations will include whether the investment is mandatory or discretionary, the result of coercion, retaliation, or threats; the packer intends to substantially reduce or end operations at a plant within 12 months; or whether, when, and under what circumstances additional capital contributions might be required. The age and recency of upgrades, cost, and reasonableness of the advance notice for the capital expenditures are all considerations.

Comments:

Because of the very long economic life of highly specialized poultry houses and essentially no alternative use, contract growers are vulnerable to what attorneys call “post-contract opportunism” and economists call “holdup.” This provision is intended to remedy post contract opportunism by integrators.

§ 201.217

This section requires any condition imposed by a packer that a capital investment be made in order to continue a growing arrangement “must be accompanied by a contract duration of a sufficient period of time for the poultry grower or swine production contractor to recoup 80% of the cost of the required capital investment. No packer can give notice of a required capital investment of a contract grower who has given the packer written notice of intent to sell the grower’s or producer’s farm and facilities unless the capital improvement requirement was given at least 90 days prior to the producer’s or grower’s notice of intent to sell.

Packers cannot require producers to buy or change equipment in good working order. They cannot reduce the number of birds or swine placed with a grower or terminate a growing arrangement based solely on failure to make equipment changes so long as existing equipment is in good working order, and they cannot force a grower to

voluntarily choose to enter into a growing arrangement or make capital investments by coercion.

Comments:

This Rule is well intended to bring parity to contract performance relationships. The 80% provision must be tempered by a requirement that the integrator cannot opt out early except for cause, and in good faith, and for reasons that relate demonstrably to the quality of the bird's produced, not the manner in which they are grown.

§ 201.18

The Secretary is empowered to consider when contract revisions concerning curing breaches of contract are unreasonable. The nature of the act, timing of the alleged breach, impact of the breach, and the reasonable time required to cure the breach and related topics are all to be considered.

No Comments Required.

§ 201.19 – Arbitration

This provision permits the Secretary to decide whether arbitration clauses in producer contracts are valid. It permits the Secretary to consider whether the contract discloses sufficient information in bold conspicuous print describing all costs of arbitration to be paid by the producer, whether impartial or unbiased qualified neutrals are to be used as arbitrators, how the costs of arbitration are apportioned or awarded, whether there are reasonable time limits for the arbitration, and whether there are fair procedures for compliance with the *Federal Arbitration Act*.

The scope of an arbitration clause is also considered. The Secretary is authorized to look askance at arbitration clauses going beyond disputes relevant to contractual obligations of the parties.

Proposed regulation provides a poultry grower or livestock producer “has the right to decline to be bound by the arbitration provision.” The contract must expressively provide for a right to decline with a simple form stating:

I decline to be bound by the arbitration provision set forth in this agreement.

Signature

or

I accept the arbitration provisions as set forth in this agreement.

Signature

The proposed language would also conclude, “failure to choose an option by signing one of the above renders the contract void.” This provision is designed to assure packers do not force producers to sign arbitration clauses.

Overall Comments

As this outline of the regulations makes clear, the proposed additions to 7 CFR § 201 et seq., are not shocking or overreaching. They are modest, reasonable, and responsible.

Critics want to a delay in implementation of the Rules to study their economic impact. History discloses this is coded communication for a political rally for support against the Rules. The economics are well known and apparent where livestock is produced. The current market does not work for cattle, hogs or poultry. These new Regulations are a major first step toward establishment of a functioning market place.

It is hard to imagine how anyone can oppose a regulation requiring compliance with the law, or permits the Secretary to invalidate a contract, and guides the agency through the enforcement process with checklists of things which are, and should be, considered overreaching and inappropriate.

The Regulations will guide decisions by administrative law judges, arbitrators, and courts when they are called upon to evaluate packer conduct against producers.

While the Regulations do not make dramatic changes, they do make important ones. These additions to the regulatory law of the United States will assure the elements of proof, and evidence gathering process for public officials and private citizens engaged in pursuit of remedies under the Packers & Stockyards Act, or packers defending such claims know what kind of evidence to look for and why to look for it.

The Regulations will direct the court and the civil prosecutor in their work. They will allow the packer and the producer to have an equal, identical, and co-extensive view of what goes too far and what does not.

David A Domina, Omaha NE

Dr Robert Taylor, Auburn University, Auburn AL