

Domina: Price Fairness Sought

USDA Pushes for Changes to Packers and Stockyards Act to Get More Price Transparency



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Mon Jul 19, 2010 11:19 AM CDT

OMAHA (DTN) -- An attorney who argued for producers in one of the most high-profile and controversial Packers and Stockyards Act court battles during the past decade says some livestock and packer groups are overdramatizing the effects of USDA's proposed new livestock competition rules.

Omaha attorney [David Domina](#) in front of the mural of Nebraska history in his office. Domina has been involved with packer and stockyards law for years. (DTN photo by Chris Clayton)

The Obama administration proposed new livestock competition rules last month that stem from provisions added to the 2008 farm bill. Some major livestock and packer organizations have criticized the rules and asked for a 120-day extension in the federal comment period to submit their comments.

But Omaha agricultural attorney David Domina said in an interview he thinks the rules are not unusual or complicated. Domina said some provisions of the new rules have been USDA's position going back two decades to former President George H.W. Bush's administration. For instance, administrative-law judges dealing with Packers and Stockyards Act cases have not demanded producers show "harm to competition" to prove a claim against a packer, Domina said.

"There is no change in that on the agency's side," he said. "Given the mandate, I would personally say they addressed the areas Congress asked them to address."

Domina said the new livestock rules should not be controversial, "unless your point of view is there should be no cash market. If transparency in price and no preferences among producers for buddy-buddy deals seem like fair concepts to you, then there is no controversy in these rules."

In a case that became Exhibit A for groups demanding reform in the Packers and Stockyards Act, Domina served as legal counsel for a group of cattle producers who initially won a \$1.2 billion class-action jury verdict in 2004 against IBP-Tyson Fresh Meats. They argued that the packer's marketing agreements and captive supply of cattle hurt the cash market, manipulated prices and violated the Packers and Stockyards Act. But the district judge in the case threw out the jury verdict and ruled for Tyson. (The suit was originally brought against IBP Inc., which was bought by Tyson before the case went to court). The 11th Circuit Court of Appeals sided

with the judge, stating that Tyson had several business justifications for its business practices and thus did not violate the Act.

Federal judges have effectively ignored USDA's interpretation of its own statute and adopted a different standard, Domina said. It will likely again take federal-court challenges to test what has become standard case law among federal judges that a producer must show harm to overall industry competition to bring a successful federal case against a packer.

"This rule repeats the agency's interpretation that a producer need not show harm to competition," he said

Under the provisions, packers and poultry dealers also would be required to maintain written records to explain differential pricing or deviation in pricing offered to producers. Poultry producers at a meeting in May complained about companies that offered price favoritism to some producers on their standard per-pound contracts.

Packers also would not be allowed to pay premiums or discounts without some documented explanation. Also, packers could no longer just terminate a contract without cause.

Other provisions in the rules would prevent packers and poultry integrators from retaliatory practices, such as terminating contracts for joining a particular organization or filing a GIPSA claim. Another key provision provides better protection for producers regarding requirements from packers to upgrade poultry or swine houses and defines when certain upgrade requirements are unfair. Though focusing on poultry and hogs, Domina said the upgrade provisions could eventually protect cattle producers as well.

"It's obviously coming to feedyards too," he said, citing dust control, drainage, cleaning and mechanization to meter feed as just some of the areas where upgrades could be demanded. "It's very obvious, if it happened to smaller animals, it will move to the larger animals."

The proposed rules have reflected the somewhat traditional divisions in livestock, with criticism coming from the American Meat Institute, National Cattlemen's Beef Association, National Chicken Council and National Pork Producers Council. Meanwhile the Organization for Competitive Markets, R-CALF USA and U.S. Cattlemen's Association each back the changes. The American Farm Bureau Federation and National Farmers Union also back the new rules.

Some early suggestions are that the rules would hurt "value-based marketing." The new rules require that terms and conditions of a packer's marketing grid be truly known. So, if a producer is being paid a premium to sell what is truly a better meat product, then others can mimic that. Such competition drives producers to be better, Domina said.

"If value is to be encouraged in the marketplace, then the parameters that define value must be transparent," Domina said. "There is no encouragement of the value if it pays for things that are secret. You are not encouraged to practice better genetics, or better animal husbandry or better lot management or to experiment with better feeding rations if all of the things that reward you

are secret."

Given that large feedlots are on an aggressive feed schedule and produce beef to meet demand, Domina said more transparency would likely help smaller feeders learn to do a better job to produce more prime meat.

"I really think the effect of the rules will be to promote and not to debilitate higher-quality live-animal products going to the packing plant," he said. "I think there will be an economic incentive for the smaller packers to do that."

Domina also didn't think a restriction of packer-to-packer sales would have a major impact. Investigating such instances during the Pickett case, Domina said attorneys found few transactions were going on between packer-owned feedlots and a competing packer.

"I think it is an industry concern that is more imagined than real," he said.

Unless an extension is granted, the comment period for the new Packers and Stockyards Act rules will end Aug. 23. The Federal Register posting for the rules can be found at <http://archive.gipsa.usda.gov/...>

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