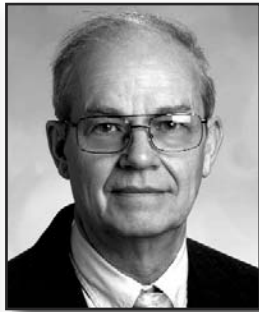


## “Suspension Of Delivery Of Birds” Provision In The Final GIPSA Rule



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In this series of columns, we have engaged in a somewhat detailed examination of the GIPSA (Grain Inspection, Packers, and Stockyards Administration) final rule that was published December 9, 2011 in the Federal Register. We first reviewed the 11 provisions that were in the proposed rule, but were not included in the final rule as a result of the inclusion of language in the recent Agricultural Appropriations bill that prohibited the United States Department of Agriculture from moving forward on these provisions. While many producers were in favor of these provisions, these 11 provisions were strongly opposed by the packers/integrators and some growers with value-added contracts.

After reviewing the 11 provisions not included in the final rule, we took time and two columns to look at GIPSA's review of the comments that they received on the 4 provisions and the cost analysis that were included in the final rule. The comments review section contains a summary of the comments that GIPSA received during the comment period, both for and against, followed by GIPSA's analysis of the comments and the reasoning behind its decision to either modify the rule or leave as proposed.

The final two sections of the 17 page rule deal the costs and benefits associated with the rule and the wording of the final rule on the four sections being finalized. Costs for the 11 provisions not included in the final rule were not included in the analysis.

GIPSA did not provide any financial amounts for the benefits for the final rule on the four provisions but rather gave a qualitative analysis. In explaining the benefits, the rule says, “In the June 22, 2010 proposed rule, we asserted that the proposed rule would have benefits but they are not quantified; however, we discuss below the qualitative benefits that we believe are associated with the final rule. In addition to the benefits expected from the various provisions as outlined below, this action fulfills the mandates specified in Title XI of the 2008 Farm Bill.”

With regard to the provision on the Suspension of Delivery of Birds, GIPSA wrote: “These new criteria may benefit poultry growers by allowing them to make informed decisions on the future use of resources. Adequate notice of suspension would give growers sufficient time to consider other options for their poultry houses and for keeping up with loan payments, and would help to address perceived equity concerns between dealers and growers.”

In addressing the benefits of the other three provisions (Additional Capital Investments Criteria, Breach of Contract, and Arbitration), the final rule states: “To the extent that market power exists and affects contracting, these criteria will provide greater parity in contractual relations between producers and the packer, swine contractor or live poultry dealer. A fundamental decision facing both growers and integrators or processors is given an uncertain future, how much capital should be invested and what percentage of the risk should be borne by the grower and the integrator or processor. To the extent integrators or processors have market power, they can shift more risk on the grower.

“The relatively large investment in poultry growing facilities makes it difficult financially for growers to exit the industry once they enter into the contract and contract compensation rates may be below the grower's initial expectations. Additionally, poultry growers are also restricted to a limited number of markets,

frequently a single live poultry dealer, due to the limitations on transporting live poultry.

“Similarly, the breach of contract criteria may result in the packer, swine contractor, or live poultry dealer opting to provide adequate notice to a grower or provide sufficient time to remedy the breach. Finally, the arbitration provisions are expected to facilitate poultry growers, live-stock producers, and swine production contract growers' access to an effective arbitration process.”

While GIPSA couched its discussion of the benefits of the rule using conditional language – “To the extent that market power exists and affects contracting” – logically there is a credible argument that a significant power imbalance exists between an individual grower who may even have multiple facilities but provides an extremely small share of the animals that are processed through a given plant and an integrator who has multiple plants and controls a significant share of the total US market for meats. The conclusion being that growers are in a weaker bargaining position vis-à-vis the packer/integrator. The rule is intended to help provide some balance.

In documenting the potential costs of the rule, GIPSA assigns no cost to the requirement that growers be notified in the case of the suspension of the delivery of birds. For the other three sections the costs, including administrative costs range from \$32.6 million to \$144.1 million. The rule notes that the regulated entities have some control over these costs depending upon their perception of their vulnerability to complaints from growers. That would suggest that the less the regulated entities use their market power in their dealings with growers, the lower the costs of complying with the rule.

GIPSA provides the following summary of the four provisions of the final rule.

### “Suspension of Delivery of Birds

“Section 201.215 of this final rule establishes the criteria the Secretary may consider when determining whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement. These criteria include, but are not limited to, a written notice at least 90 days prior to suspension, written notice of the reason for the suspension of delivery, the length of the suspension of delivery, and the anticipated date the delivery of birds will resume.”

### “Additional Capital Investments Criteria

“Section 201.216 of this final rule provides the criteria the Secretary may consider when determining whether a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of the P&S Act.

### “Reasonable Period To Remedy Breach of Contract

“Section 201.217 of this final rule provides the criteria the Secretary may consider when determining if a packer, swine contractor, or live poultry dealer has provided a reasonable period of time for a poultry/swine grower to remedy a breach of contract that could lead to termination of a production contract. These criteria include, but are not limited to, the form and substance of the notice following the discovery of a breach of contract.

### “Arbitration

“Section 201.218 of this final rule requires production contracts that require the use of arbitration to include language on the signature page that allows the producer or grower to decline arbitration. Section 201.218 also includes the criteria the Secretary may consider when determining if the arbitration process provided in a contract provides a meaningful opportunity for the poultry growers, swine production contract growers, or livestock producers to participate fully in the arbitration process.”

A copy of the Final Rule can be obtained at <http://www.gipsa.usda.gov/Federal%20Register/fr11/12-9-11.pdf>. △

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