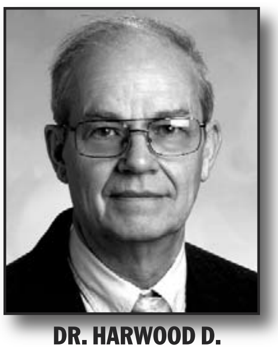
policy pennings

∆ Contact Dr. Daryll E. Ray or Dr. Harwood D. Schaffer
at the UT's Agricultural Policy Analysis Center by calling
(865) 974-7407,faxing (865) 974-7298,
or emailing dray@utk.edu or hdschaffer@utk.edu
For more info, visit: www.agpolicy.org

GIPSA Issues Final Rule On Suspension Of Bird Deliveries

DR. DARYLL E. RAY
Agricultural Economist
University of Tennessee



DR. HARWOOD D. SCHAFFER
Research Assistant Professor at
APAC, University of Tennessee

One of the most interesting parts of the GIPSA (Grain Inspection Packers and Stockyards Administration) final rule that was published in the Federal Register on December 9, 2011 is the discussion of comments that were received by GIPSA in response to the proposed rule, published on June 22, 2010. In making that statement, we admit that our tastes in reading material would not make the New York Times Best Sellers list, but that makes the comments no less interesting for those of us who have an interest in agricultural policy. A full copy of the full rule is available at http://www.gipsa.usda.gov/Federal%20Register/fr11/12-9-11.pdf.

The section discussing the comments that were received by GIPSA follows a brief introduction, a background section that explains the rationale for the making of this rule, and a summary of the provisions not being finalized – we discussed those provisions in the previous column. It also follows a listing of the rules being finalized by GIPSA.

Originally the proposed rule allowed for a 60-day comment period, ending on August 23, 2010. In response to requests to extend the comment period, the final date for comments was extended to November 22, 2010. During that 150-day period over 61,000 comments were received. In addition because two United States Department of Agriculture/Department of Justice "Workshops on Competition in Agriculture" were held during the comment period, "the Secretary [of Agriculture] announced that any comments made in those forums would be considered comments on the rule."

The comments included in the December 9, 2011 final rule only deal with the 4 sections being finalized at this time and the analysis of the costs and benefits of the final rule. Because the discussion of comments and GIPSA's response to the comments run over 5 pages, we will highlight only the comments and responses on the section on the suspension of delivery of birds in this column.

This section "indicates the various 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."

Comments Received on Bird Delivery Suspension Rules

"GIPSA received several comments in favor of this provision. The comments generally said that growers were struggling financially because there was too much time between flocks and too few flocks. One comment stated that growers need 90 days to make financial arrangements to mitigate the effects of a reduction in cash flow caused by a suspension of deliveries.... In addition, many growers agreed this would cause a reduction in the use of extended layouts as a form of retaliation, usually with no notice, for arbitrary reasons or to force upgrades.

"There were a few opposing comments from live poultry dealers, stating that forcing them to work with a terminated grower for 90 days would put their birds at risk. They argued that suspended growers have no incentive to do a good job with their last flock and may even abandon their operation putting the birds at risk. Also, growers who are suspended because of poor flock management would put the birds at risk and cause the live poultry dealer to receive inferior product. An additional concern was for the safety of the live poultry dealer's employees from physical threats following the suspension of deliveries.

"Other comments opposed the rule saying it did not give live poultry dealers the flexibility they needed to adjust to market conditions. For example, live poultry dealers may need to suspend the delivery of birds when the demand for product suddenly falls. There are times when a business forecaster cannot know 90 days ahead of time that the company will need to curtail production. Certain grower specific reasons would make it practically impossible to give 90 days' suspension notice, they said.

"One comment suggested the exact date of redelivery following suspension may be impossible to determine. They said GIPSA should change the requirements for suspension of delivery notices to say the notices did not have to state the date deliveries would resume.

"A commenter suggested bankruptcy be added to the list of emergency situations for which live poultry dealers might see a waiver of the notice requirement in subsection (c) of the proposed rule."

GIPSA Response

In its response, GIPSA clarified that this section dealt only with the suspension of delivery and not terminations. The agency also wrote that "this section is a list of criteria the Secretary may consider in determining whether reasonable notice of suspension of birds has been given; not a list of prohibitions."

They also wrote "with respect to concerns that providing a notice of suspension while the grower was in the midst of raising a flock would risk grower neglect or nonperformance, we feel poultry growing arrangements generally have other terms related to animal welfare or neglect that could be exercised to address this concern. Therefore, we decided not to adjust the section based on this comment. Similarly, threats against live poultry dealer employees can be addressed through other contract terms or reporting such actions to local law enforcement.

"Some commenters suggested live poultry dealers could not plan 90 days in advance because of changes in the market. Considering the fact live poultry dealers coordinate the production process from the hatchery to slaughter, we believe planning is generally possible under the 90-day timeframe. Within this timeframe, live poultry dealers would usually know with some certainty what their production needs were for the current flock under production. A 90-day notice period would obligate a live poultry dealer to place at most one additional flock after the current flock. Finally, the rule provides a criterion to consider in determining whether a live poultry dealer's ability to provide notice has been impacted by a variety of unforeseen emergency situations.

"While we agree the exact date that flock deliveries will resume may not be known, this final rule only establishes some criteria to be considered, and does not impose a specific requirement. Additionally, the rule discusses the "anticipated date," which implies some level of uncertainty and adjustment if conditions change. We generally feel providing an idea about the length of the suspension is an important part of these criteria and included this in this final rule. With respect to bankruptcies as emergencies, there have been bankruptcies of live poultry dealers in recent years and we agree these events do create emergency situations. We included bankruptcy among the list of unforeseen emergency situations that the Secretary may consider when determining whether or not reasonable notice has been given for suspension of delivery of birds."

Impressions

What becomes clear in reading this material is the importance of the time that producers took in responding to the proposed rule. In some circles it is felt that industry has had an outsized impact on the rulemaking process compared to producers, but we find no evidence of this in the administrative portion of the rulemaking process. Rather than looking at the work of GIPSA personnel in the rulemaking process, dissatisfied producers should look at Congress to see the impact that the industry has had on the rulemaking process – 14 of 18 sections were not finalized in the current rule as the result of a last-minute addition to a must-pass piece of legislation.

The sections on additional capital investments criteria, reasonable period of time to remedy breach of contract, and arbitration follows a similar pattern that summarizes the various types of comments that were received by the agency and the GIPSA's response to the comments. In the next column, we will deal with the comments and response with regard to arbitration and the section on regulatory impact analysis. ∆

DR. DARYLL E. RAY: Blasingame Chair of Excellence in Agricultural Policy, Institute of Agriculture, University of Tennessee

DR. HARWOOD D. SCHAFFER: Research Assistant Professor at APAC, University of Tennessee