

# Grain Inspection, Packers and Stockyards Administration (GIPSA)

## FARM BILL REGULATIONS – PROPOSED RULE OUTLINE

### Purpose and Summary of the Proposed Rule

This proposed rule carries out the requirements in Sections 11005 and 11006 of Title XI of the Food, Conservation and Energy Act of 2008 (Farm Bill). It is also intended to address the increased use of contracting in the marketing and production of livestock and poultry by entities subject to the Packers and Stockyards (P&S) Act. The goal of this regulation is to level the playing field between packers, live poultry dealers, and swine contractors, and the nation's poultry growers and livestock producers.

### GIPSA is proposing the following regulations:

**§ 201.2 Terms Defined.** Defines the terms for tournament system, principal part of performance, capital investment, additional capital investment, suspension of delivery of birds, forward contract, marketing agreement, production contract, competitive injury, and likelihood of competitive injury.

**§ 201.94(b) Records Retention.** Would require a packer, swine contractor, or live poultry dealer to maintain written records that provide justification for differential pricing or any deviation from standard price or contract terms offered to poultry growers, swine production contract growers or livestock producers. If a packer, swine contractor, or live poultry dealer believes it can justify disparate treatment of growers or producers, it must have a legitimate reason for that differential treatment. This justification need not be extensive but enough to identify the benefit/cost basis of any pricing differentials. GIPSA would consider the particular circumstances of any pricing disparity in determining if a violation of the Act has occurred. This provision is important in that if a violation is suspected, then records dated from the time the violation occurred must be accounted for and not altered.

**§ 201.210 Unfair, Deceptive, Unjustly discriminatory and Deceptive Practice or Device.** Provides examples of conduct that would be considered an unfair, unjustly discriminatory and deceptive practice or device to provide more clarity and allow improved enforcement under the Act.

In recent years, a number of U.S. circuit courts of appeals have not given deference to USDA's interpretation of sections 202(a) and (b) of the Act, consequently frustrating its enforcement capabilities. USDA has consistently held that under sections 202(a) or (b) of the Act, an unfair practice can be proven without proof of predatory intent, competitive injury, or likelihood of competitive injury. The court decisions that require proof of harm or likelihood of harm to competition in order to prove any violation of section 202(a) or (b) of the Act creates an unreasonable standard that may be difficult to meet. Many practices can be unfair and never have an anticompetitive implication. Examples of such practices include, but not limited to, not allowing a poultry grower to watch birds being weighed, using inaccurate scales, providing a grower poor quality feed, giving a grower sick birds to raise, failing to provide a grower the growing contract in a timely manner, or retaliation against a grower.

To the extent that the courts failed to defer to USDA's interpretation of the statute because that interpretation was not enshrined in regulation, the proposed regulations would constitute a material change in circumstances that would warrant judicial reexamination of this issue.

**§ 201.211 *Undue or unreasonable preferences or advantages; undue or unreasonable prejudice or disadvantages.*** Establishes criteria the Secretary may consider in determining if an undue or unreasonable preference or advantage, or an undue or unreasonable prejudice or disadvantage has occurred under the Act. For example, it could be a violation of the Act when a packer or swine contractor to offer better price terms to producers who can provide larger volumes of livestock than to a group of producers who collectively can provide the same volume of livestock of equal quality and it cannot provide a legitimate justification for the disparity. Please note that this provision would not require packers to purchase livestock if their needs are already satisfied or impose a public utility duty to deal with all sellers.

**§ 201.212 *Livestock Purchasing Practices.*** Requires that dealers who operate as packer buyers only purchase livestock for the packer that identifies that dealer as its packer buyer. Packers would be prohibited from entering into exclusive arrangements with a dealer except those dealers the packer has identified as its packer buyer. Packers would be prohibited from purchasing, acquiring, or receiving livestock from another packer or another packer's affiliated company, including but not limited to the other packer's parent company and wholly owned subsidiaries of the packer or its parent company. This regulation would allow a packer to apply to the Administrator for a waiver in the case of catastrophic or natural disaster or other emergency. These provisions would open the market to other buyers, increase participation in the cow/bull slaughter market and would prevent collusion between multiple packers using one dealer as an exclusive agent to manipulate prices. When one packer buys from or sells livestock to another packer, the information transfers signals about the price that packers will pay producers. This creates a situation where packers may then be able to manipulate prices. GIPSA has received complaints from market participants that packer to packer sales may have the intended or unintended effect of manipulating market prices.

**§ 201.213 *Sample Contracts.*** Would require packers, swine contractors and live poultry dealers to provide GIPSA with sample copies of contracts within 10 business days of entering into the agreement with a grower or producer to increase transparency in the use of contracts and allow producers to make more informed business decisions. Packers, swine contractors and live poultry dealers would need to notify GIPSA within 10 business days when a sample contract submitted to GIPSA is no longer in use. Trade secrets, confidential business information and personally identifiable information would not be made public. GIPSA has received complaints of preference or retaliation by packers and live poultry dealers in contracts and marketing agreements that, upon investigation, were found to be in compliance with the Act. The transparency provided by this section is intended to significantly reduce these misperceptions of unfair practice or preferential treatment.

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**§ 201.214 *Tournament Systems.*** Would require live poultry dealers to pay the same base pay to growers that are raising the same type and kind of poultry. Live poultry dealers would be prohibited from paying growers in growing arrangements below the base pay amount. Live poultry dealers would also be required to rank growers in settlement groups with other growers with like house types.

**§ 201.215 Suspension of delivery of birds.** This section spells out the criteria the Secretary may consider when determining whether or not reasonable notice has been given for suspension of delivery of birds. In particular, failure of a live poultry dealer to provide notice of any suspension of delivery of birds at least 90 days prior to the suspension taking place may be considered unreasonable. This 90-day period would be important to allow the poultry grower time to consider options for utilizing his or her poultry houses and for keeping up with any loan payments, some of which are government guaranteed loans.

**§ 201.216 Capital Investment Criteria.** The section includes the criteria the Secretary may consider when determining whether a requirement that a poultry grower or swine production contract grower make additional capital investments over the life of a production contract or growing arrangement constitutes an unfair practice in violation of the Act. For example, if a producer made a large capital investment in a poultry house, in most instances he or she should not soon thereafter be required to make another capital investment to improve his/her facilities. Another example could be when a producer or grower is required to make an additional capital investment but no other similarly situated grower was required to make additional capital investments.

**§ 201.217 Capital Investment Requirements/Prohibitions.** This section provides specific requirements and prohibitions regarding additional capital investments. In particular, it would require a production contract to be of sufficient length to allow poultry growers or swine production contract growers to recoup 80 percent of investment costs related to the capital investment. This would be important given that producers are often required to make capital investments as a condition to enter into or continue a production contract often causing producers or growers to go into severe debt, and in some instances, default on their loans.

**§ 201.218 Reasonable period of time to remedy a breach of contract.** This section includes the criteria the Secretary may consider when determining whether a packer, swine contractor or live poultry dealer has provided a poultry grower or swine production contract grower a reasonable period of time to remedy a breach of contract that could lead to contract termination.

**§ 201.219 Arbitration.** This section provides the criteria the Secretary may consider when determining whether the arbitration process provided in a contract provides a meaningful and fair opportunity for the poultry grower, livestock producer, or swine production contract grower to participate fully in the arbitration process if he/she so chooses. Additionally, contracts would be required to contain conspicuous print that outlines a producer's right to decline arbitration as required by the Act.