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## **GIPSA RULE – PACKERS AND STOCKYARDS ACT**

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### Issue:

The Packers and Stockyards (P&S) Act was enacted in 1921 and prohibits unfair, deceptive and unjust discriminatory practices by market agencies, dealers, stockyards, packers, swine contractors and live poultry dealers in the livestock and poultry industries.

The 2008 farm bill instructed the U.S. Department of Agriculture’s Grain Inspection, Packers and Stockyards Administration (GIPSA) to create rules and definitions providing additional protections for livestock and poultry producers against unfair practices and addressing new market conditions not covered by existing rules. In 2010, GIPSA released a proposed rule with the goal of ensuring a level playing field for livestock and poultry producers. A final rule was issued in late 2011 with significant revisions. Additionally, several annual Agriculture Appropriations bills have included riders which subsequently prohibited GIPSA from continuing the rule’s promulgation on certain contentious protections for growers.

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### Background on Congressional and Agency Activity:

The 2008 farm bill included two sections which specifically addressed the P&S Act.

Section 11005 dealt with production contracts for swine and poultry growers:

- Requires a company to give three days (if not otherwise specified in the contract) to cancel a contract after signing it.
- If large capital investments will be required of the contract grower, requires the contractor to disclose that such investments may be required over the life of the contract.
- Provides livestock and poultry producers the ability to decline to be bound by an arbitration clause in a contract, before entering into the contract.
- Enables a producer to settle a dispute in the federal judicial district where the majority of the poultry or livestock are located rather than place of the company headquarters.

Section 11006 requires the USDA to establish criteria (rules promulgation) to determine the following:

- What actions constitute “undue or unreasonable preference or advantage.”
- Whether reasonable notice has been provided to a poultry grower when a firm decides to suspend the delivery of birds under a poultry growing arrangement.
- When additional large capital required of a poultry grower or swine production contract grower violates the Act.
- Whether a poultry or swine producer has been provided a reasonable amount of time to remedy a breach of contract that could ultimately lead to contract termination.

USDA was instructed to propose rules that would define and enforce these provisions and in 2010 proposed a rule to fulfill these requirements. The proposed rule sparked debates within the poultry and livestock industries. Proponents argued that it would make marketing agreements more transparent and fair, while opponents argued it would disturb markets that have developed over time and would lead to increased litigation.

Based on stakeholder feedback to the proposed rule (particularly the strong concerns from the pork and beef sectors), these provisions were not included in the final rule:

- Requirements for packers, swine contractors or live poultry dealers to maintain written records providing legitimate reasons for differential pricing or contract price deviations.
- Bans on packer-to-packer sales, as well as restrictions on packer-dealers.
- Requirements and prohibitions when capital investment is required.

On Nov. 3, 2011, USDA's GIPSA submitted to the Office of Management and Budget 1) a final rule addressing suspension of delivery of birds, additional capital investments, breach of contract, arbitration and additional swine and poultry contract provisions, and 2) an interim final rule on poultry tournament systems. However, before the agency's rules could be finalized, the FY2012 Agriculture Appropriations bill included an amendment that restricted the USDA's funding to enforce the rule. The Consolidated and Further Continuing Appropriations Act, 2012, was signed into law and therefore prohibited numerous provisions of the GIPSA rule from implementation.

Specifically, the GIPSA rider in the FY2012 Ag Appropriations bill called for the following prohibitions:

- GIPSA may not define *tournament system*, *competitive injury*, and *likelihood of competitive injury*.
- The rule may not apply to live poultry dealers and contracts.
- GIPSA may not find conduct in violation of the P&S Act without a finding of harm or likely harm to competition.
- GIPSA may not enforce an unjustified breach of contract, retaliatory action, attempts to limit a producer's rights, premiums or discounts without documented justification and several other examples of practices by meat packers and poultry dealers as "unfair, unjustly discriminatory and deceptive practices."
- GIPSA may not enforce set criteria for determining if an undue or unreasonable preference or prejudice has occurred in violation of the P&S Act.
- GIPSA may not require packers, swine contractors and live poultry dealers to make available all unique production contracts.
- GIPSA may not limit or modify the existing tournament system that processors use to determine payments for poultry growers.
- USDA may not publish any GIPSA rule exceeding \$100 million in costs to the economy.

Therefore, the agency published its final revised rule on Dec. 9, 2011, with an effective date of Feb. 7, 2012. The finalized rule contained only four provisions of the proposed rule:

1. Requiring poultry companies to give poultry growers at least a 90-day notice that birds will not be delivered under their contract agreement.
2. Eight criteria for determining if contracts that require additional capital investment violate the P&S Act, including taking compensation incentives into consideration.

3. Criteria for determining whether a poultry grower or livestock producer is given a reasonable timeframe to remedy a breach of contract that could ultimately lead to the termination of a contract.
4. Requiring contract statements providing poultry growers and livestock producers the right to decline arbitration provisions in their contracts.

In subsequent years, this rider was also included in the FY2013, FY2014 and FY2015 Ag Appropriations bills. The House FY2013 Agriculture Appropriations bill included additional provisions to rescind the definition of *suspension of delivery of birds*, the application of the rule to live poultry dealers, and the enforcement of the 90-day notification for suspension of delivery of birds; however, these rescinded provisions were not included in the final FY2013 continuing resolution (CR; P.L. 112-175). The continuing resolution (P.L. 113-235, Division A) funding FY2015 Agriculture Appropriations did include language to repeal these three provisions.

<b>Status of GIPSA Rule</b>		
(Citations to Title 9 of the Code of Federal Regulations)		
<b>Provisions blocked in FY2012, FY2013, FY2014, FY2015 Appropriations Bills</b>	<b>Repealed Provisions of FY2015, Initially Proposed for House FY2013</b>	<b>Agency Finalized Provisions Still in Effect</b>
<ul style="list-style-type: none"> <li>• 201.2(l) – Definition of tournament system</li> <li>• 201.2(t) – Definition of competitive injury</li> <li>• 201.2(u) – Definition of likelihood of competitive injury</li> <li>• 201.3(c) – Elimination of need for proof of harm or likely harm to competition</li> <li>• 201.210 – Unfair, unjustly discriminatory and deceptive practices or devices</li> <li>• 201.211 – Undue or unreasonable advantages/disadvantages</li> <li>• 201.213 – Contract submission requirement</li> <li>• 201.214 – Tournament system rules</li> </ul>	<ul style="list-style-type: none"> <li>• 201.2(o) – Definition of suspension of delivery</li> <li>• 201.3(a) – Applicability to live poultry</li> <li>• 201.215(a) – 90-day notification requirement before suspension of delivery of birds</li> </ul>	<ul style="list-style-type: none"> <li>• 201.2(m) – Definition of principal part of performance</li> <li>• 201.2(n) – Definition of additional capital investment</li> <li>• 201.3(b) – Effective date of regulations (now 201.3)</li> <li>• 201.215 – Criteria for suspension of delivery of birds</li> <li>• 201.216 – Criteria for required additional capital investments</li> <li>• 201.217 – Reasonable period of time to remedy a breach of contract</li> <li>• 201.218 – Arbitration clauses</li> </ul>

The FY2016 Ag Appropriations bill did not include the original rider or other variations, and the USDA subsequently renewed its work on rule writing. While the House Appropriation Committee’s FY2017 Ag Appropriations bill once again included the GIPSA rider to prohibit funding, Congress approved a short-term continuing resolution (H.R. 2028) in December 2016 to fund the federal

government through April 28, 2017—which extended the FY2016 funding provisions. Consequently, the USDA did issue a package of rules in late December 2016, dubbed the Farmer Fair Practices Rules, which includes an Interim Final Rule on the “Scope of §202(a) and 202(b)” and two proposed rules addressing “Unfair Practices and Undue Preferences” and “Poultry Grower Ranking Systems,” respectively.

In October 17, 2017 USDA announced it was withdrawing the Interim Final Rule on the “Scope of §202(a) and 202(b)” and would not finalize one of the proposed rules: Unfair Practices and Undue Preferences. The third rule of Farmer Fair Practices package, known as the Poultry Grower Ranking Systems, was still under consideration by the administration. At the time of this writing, Farm Bureau is still hopeful there may be still a rule to help farmers in the poultry industry against predatory practices.

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#### Background on Farm Bureau Activity:

Farm Bureau offered broad support for actions called for in the 2008 farm bill. While Farm Bureau found many positives for poultry grower contracts in the proposed rules from 2010, there were other provisions that caused concern regarding hog and cattle marketing systems.

In comments to the proposed rule, Farm Bureau expressed support for each of the four provisions that were ultimately included in the finalized rule. Our comments noted that the increased transparency in poultry contracting and protection from retaliation was a great start in the right direction to protect growers. The organization opposed eliminating the need to prove likelihood of competitive injury as a blanket statement for livestock and poultry producers and instead suggested focusing on the poultry industry (where most issues had arisen). Farm Bureau also had concerns about the depth of justification for price differentials, privacy in contracting, and the negative impacts for part-owners and cooperatives if packer-to-packer sales were restricted. Farm Bureau’s comments encouraged the agency to clarify in the rule that incentive pay was still allowed, as the topic had caused a great deal of concern in the industry.

Farm Bureau has opposed the appropriations amendments each time they have been introduced. Also, Farm Bureau opposed the more expansive FY2013 Agriculture Appropriations amendment identified above.

Farm Bureau opposed the interim final rule, but supported both the Unfair Practices and Undue Preferences pieces of the Farmer Fair Practice Rules. Our comments focused on the need to address unfair and discriminatory practices that are currently taking place without jeopardizing marketing arrangements that were functioning properly in other species or markets.

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#### Changes in AFBF Policy:

In 1958, Farm Bureau noted the Packers and Stockyards Act of 1921 as one of its first legislative accomplishments. Farm Bureau policy stated, “This objective [to protect livestock producers and feeders in the marketing of their livestock] must be safeguarded at all times.”

Policy has continued to expand since then, and the following recent changes correlate with the development and implementation of the GIPSA rule.

In 2010, possibly preemptive of the rule's publishing, the following change was made:

**312 / Packers and Stockyards Act**

6.5. Farm Bureau supports ~~effective~~ *more vigorous* enforcement of U.S. antitrust laws *in keeping with original intent; to include the Sherman Act of 1890, Clayton Act of 1914 and the Packers and Stockyard Act of 1921.*

In 2011, in what may have been a response to the 2010 GIPSA rule, the following new policy statements were first amended as Farm Bureau Policies:

**312 / Packers and Stockyards Act**

7.2. *Farm Bureau opposes prohibiting a packer or livestock buyer from purchasing, acquiring or receiving livestock from another packer, livestock buyer, or another packer's or livestock buyer's "affiliate" companies or farms.*

7.3. *Farm Bureau opposes the government making livestock buyers, packers, contractors or livestock owners justify in writing why and how they are buying or selling livestock on the spot market.*

7.4. *Farm Bureau opposes any ban on contract livestock buyers purchasing livestock for more than one packer.*

9. *Farm Bureau believes any proposed GIPSA rules or legislation should address the following:*

- 1) *Separate and different rules should be allowed for different species of livestock;*
- 2) *An economic impact study must be conducted by USDA;*
- 3) *Opportunities for marketing arrangements between packers and producers must be allowed and preserved;*
- 4) *Confidentiality of contract information must be maintained; and*
- 5) *Establish legal thresholds for proof of injury."*

**313 / Poultry**

7.6. *Farm Bureau supports contract producers continuing to be furnished weight tickets for all poultry sold from their farms and for feed delivered to the farm. The weight tickets and feed charges should be in the farmer's hands by the time the producer receives the check;*

7.8. *Farm Bureau recommends maintaining tournament production contracts allowing growers the opportunity to earn better than average pay as a result of proper management and capital investment.*

8. *We oppose poultry integrators being allowed to void contracts or cut bird placements of growers because of failure to update equipment when their performance is equal to the company average in the area.*

These policies remain in the Farm Bureau Policies for 2018.

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Additional AFBF Policy:

The following are additional current policies stating Farm Bureau's stance on the GIPSA rule.

### **224 / Marketing Philosophy**

5.2. Farm Bureau will determine the need for any necessary legislation to ensure that farmers engaging in contract production and marketing are adequately protected.

5.3. Farm Bureau will assist individual member producers in their efforts to negotiate fair and equitable production contracts by:

5.3.1. Developing an information clearinghouse on and glossary of terms for production contracts;

5.3.2. Working with commodity groups in developing a list of negotiators available for individual member producers to contact in assisting them in negotiating production contracts;

5.3.3. Seeking legislation to limit production contract nondisclosure provisions;

5.3.4. Educating producers about the risks involved with buyers call provisions and ensuring that these provisions include:

5.3.4.1. Specific delivery periods with negotiated final delivery date;

5.3.4.2. Payments to seller if delivery period exceeds original contracted delivery period or if buyer "calls" for delivery prior to the contracted delivery period; and

5.3.4.3. Pricing ability to and beyond delivery;

5.3.5. Supporting farmers' ability to choose arbitration, mediation or a civil trial in any and all disputes between farmers and agribusinesses. We therefore support legislation that prohibits clauses in agricultural marketing or production contracts that require farmers to submit to arbitration and give up rights to mediation or a civil trial.

5.4. Farm Bureau will study the establishment of a mechanism to provide education and information for farmers engaged in contract production and marketing.

5.8. Farm Bureau will encourage companies that contract with producers to offer them stock purchases or profit sharing.

### **312 / Packers and Stockyards Act**

6.4. Farm Bureau supports legislation on a state and national basis, establishing GIPSA as the overall authority and provider of oversight to ensure livestock contracts are clearly-written, confidentiality concerns are addressed, investments are protected, enhanced price transparency and price discovery are enhanced and terms of contracts are honored.

7.1. Farm Bureau opposes any attempt to lessen the ability of GIPSA to adequately enforce anti-trust laws and regulations.

8. The Packers and Stockyards Act should be amended to:

8.3. Provide jurisdiction and enforcement over the marketing of poultry meat and eggs as already exists for livestock;

- 8.4. Strengthen the ability of GIPSA to stop predatory practices in the meat packing industry;
- 8.5. Provide producer restitution when a case is successfully prosecuted;
- 8.6. Provide GIPSA enforcement authority to ensure that all instruments used in quantifying quality factors for value determination for livestock are performing to a set standard; and
- 8.7. Include breeder hen and pullet operations so they are treated the same as broiler operations.

### **313 / Poultry**

4. Farm Bureau urges companies to justify mandatory modification of buildings and equipment through research documentation. Any modification should be a long-term agreement, negotiated in writing, between the grower and company before installation. The length of contracts should adequately protect a grower's investment in buildings and equipment.
  
7. Farm Bureau supports:
  - 7.2. Open dialogue between the individual poultry farmer and the company representative as the most effective method of issue resolution;
  - 7.7. The pay averaging criteria be revised to compensate for company production decisions that influence a farmer/producer's settlement.
  - 7.8 Maintaining tournament production contracts allowing growers the opportunity to earn better than average pay as a result of proper management and capital investment;

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