

The National Agricultural
Law Center



University of Arkansas

An Agricultural Law Research Project

Workshop Handout on GIPSA's Proposed Rule Changes:

**What are they?
How might they affect you?
How can you affect them?**

www.NationalAgLawCenter.org

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The National Agricultural Law Center

The National Agricultural Law Center is the only agricultural law research and information facility that is independent, national in scope, and directly connected to the national agricultural information network. The Center conducts legal research into some of the most critical issues facing agriculture today and provides nonpartisan, unbiased information to producers, consumers, attorneys, government entities, and others throughout the nation's agricultural community. This information is disseminated through live presentations, written publications, the Center website, and by inquires to Center staff either by email or via telephone.

Purpose of the Workshops

The goal of this workshop series is to inform producers and others about the proposed regulations concerning the livestock, meat, and poultry industries. The workshops will focus not only on the proposed regulations, but also on their background, what is GIPSA, what are regulations generally, how regulations work, "notice and comment" rulemaking, and how members of the public can participate in the rulemaking process. Questions may arise during or after the workshop sessions and attorneys will be available either in person after the workshop or they can be reached by e-mail or telephone at any time afterwards. Some questions may not be able to be answered, but Center attorneys will do their best to answer as many as possible.

What Is “GIPSA”?

United States Department of Agriculture

The U.S. Department of Agriculture is a federal department that operates under the executive branch of the government (the Secretary of Agriculture is a member of the President’s Cabinet) and is directly responsible for federal policy dealing with agriculture and food. After Congress passes a statute related to food or agriculture, the USDA is tasked with writing and enforcing regulations that carry out the intent of Congress. The USDA delegates the task to the administrative agency within the department that is best suited to the assignment. The statute, as passed by Congress, provides the basic framework for that administrative agency to begin writing the regulations that fill in the majority of the details.

The Packers and Stockyards Act

The Packers and Stockyards Act (“PSA”) is a statute passed by Congress in 1921 to prevent “unfair, deceptive, and unjust discriminatory practices by market agencies, dealers, stockyards, packers, swine contractors, and live poultry dealers in the livestock, meat-packing, and poultry industries.” It gave the Secretary of Agriculture the authority to regulate those entities to protect consumers, producers and growers. Almost every transaction within the animal agriculture industry is influenced by this Act in some form. Along with prohibiting unlawful practices, the PSA requires prompt payment for the sale of livestock (before the close of the next business day in most cases), bonds from purchasers that handle more than \$500,000 of livestock per year, and statutory trusts in case the buyer becomes insolvent. For purposes of the proposed regulations, the provision on unlawful practices from the Packers and Stockyards Act, along with the 2008 Farm Bill (The Food, Conservation and Energy Act of 2008), serve as the statutory framework for the regulations that are meant to carry out the broad objectives that Congress set forth.

The Grain Inspection, Packers and Stockyards Administration

The Grain Inspection, Packers and Stockyards Administration (“GIPSA”) is the administrative agency within USDA that has authority to address market issues in the livestock industry. GIPSA regulates the marketing of poultry, livestock, meat, grains, and various other agricultural products. One of GIPSA’s primary functions is to uphold “fair and competitive trading practices” to protect consumers as well as American agriculture. The precursors of the agency were the Federal Grain Inspection Service and the Packers and Stockyards Administration which were combined in 1994 to create GIPSA, however the field offices around the country and the division of duties within the agency remain divided into the Federal Grain Inspection Service and the Packers and Stockyards Program. To accomplish those objectives they use monitoring programs, reviews, and investigations to find potential violations. The Packers and Stockyards Program “fosters fair competition, provides payment protection, and guards against deceptive and fraudulent trade practices that affect the movement and price of meat animals

and their products.” In the case of violations to the PSA, GIPSA may issue cease and desist orders, suspend violator’s business operations, assess fines of up to \$11,000 per violation (\$27,000 per violation in poultry trust issues), or work with the Department of Justice to issue permanent injunctions, fines and jail sentences.

How Does GIPSA Make Rules?

What are regulations?

Regulations are implemented by agencies and usually have the force and effect of law. These are different from statutes, which are passed by Congress and signed by the President. Regulations are created by agencies to carry out the laws passed by Congress and contain the details of how the laws will be implemented.

How are regulations made?

Agencies must have the authority to create regulations. For the proposed GIPSA regulations, the authority to create these new regulations arise from the 2008 Farm Bill, which requires USDA to promulgate rules to address specific concerns within the livestock and poultry industries, and the Packers and Stockyards Act, which GIPSA administers and enforces.

What is “Notice and Comment Rulemaking”?

Notice and Comment Rulemaking is the process that agencies use most often to create regulations. The first step in this process is the publication of Notice of Proposed Rulemaking in the Federal Register, which is the official daily publication for rules, proposed rules, notices from federal agencies and presidential documents. The Federal Register is available online <http://www.gpoaccess.gov/fr/>. The notice of proposed rulemaking includes the legal authority for issuing the proposed rule and the first draft of the rule. Additionally, the notice includes the deadline for submitting comments and the address where comments can be sent. The notice of proposed rulemaking for the proposed GIPSA regulations was published June 22, 2010.

The second step in notice and comment rulemaking is the comment process. Usually, agencies accept public comments for a period of 60 days after the initial notice is published in the Federal Register. The original deadline for submission of comments on the proposed GIPSA regulations was August 23, 2010. The comment period was extended on July 26, 2010, and **the comment period is set to close on November 22, 2010.**

Who can make comments?

Anyone may submit a comment on the proposed regulations, including but not limited to companies, individuals, special interest groups or member organizations. The comments may address part or all of the proposed regulations, and a commenter may agree, disagree or take no issue with any part of the proposed regulations. Comments may be submitted by email, mail, delivery service, fax or online through www.Regulations.gov.

What happens to comments once they're made?

Once a comment is submitted to the agency, it becomes part of the permanent record. Any information included with the comment, such as a name or address, is included with the comment and also becomes part of the permanent record. However, comments may be made anonymously by simply not including your personal information. All comments for the proposed GIPSA regulations are available online at www.Regulations.gov.

What Are The Proposed Changes?

There's really no single way to divide the new proposed regulations in an organized manner—some of them apply to some sectors of producers but not all groups, while others would apply to contract provisions, or specific actions, or recordkeeping requirements. As a result, the provisions are organized below into groups based solely on the section GIPSA claims has given them authority to draft the regulations. Because different regulations would apply to different groups, it is important to note the specific groups to whom each regulation applies.

Some examples of situations where GIPSA could get involved in raising or marketing livestock or poultry because of the PSA would be an LLC that is involved in swine production contracts, situations dealing with broiler integrators or a producer who is engaged in forward contracting his beef. The PSA would not apply, and GIPSA would not be directly involved, in situations where a producer is marketing his own livestock, or buying livestock for their own stocking or feeding purposes. Further, the new regulations do not apply to producers hens that only produce table eggs.¹

GIPSA's new proposed regulations are based primarily on three existing individual sections of the PSA, and the regulations would be modifying the enforcement of those three sections. The first section prohibits packers, swine contractors or live poultry dealers from engaging in or using "any unfair, unjustly discriminatory or deceptive practice or device."² The second section prohibits those groups from giving undue or unreasonable preference or advantage to any particular person or locality, or on the other side of the coin, subjecting any particular person or locality to any undue or unreasonable

¹ This is found in the proposed regulations, at section 201.3. If the regulations are finalized, the citation would be 9 C.F.R. 201.3. This tells you that the regulation is located in Title 9 (the first number) of the Code of Federal Regulations (the middle letters) at part 201 (the numbers before the period), and section 3 (the last numbers, after the period). To see finalized regulations, you can go to <http://www.gpoaccess.gov/cfr/retrieve.html> and enter the title, part and section numbers in the appropriate boxes. To see the proposed regulations, go to <http://archive.gipsa.usda.gov/rulemaking/fr10/06-22-10.pdf>.

² The "citation" of a law maps out the location of that specific law. For example, the citation for this section is 7 U.S.C. 192. This tells you that the law is located in Title 7 (the first number) of the United States Code (the middle letters), at section 192 (the last number). To see the law itself, you can go to www.law.cornell.edu/uscode and enter the title and section numbers in the appropriate boxes.

prejudice or disadvantage.³ The final section on which these regulations are based discusses the use of arbitration in livestock or poultry contracts.⁴

“Unfair, unjustly discriminatory or deceptive practice or devices”

The first group of regulations address what GIPSA will consider to be unfair, unjustly discriminatory or deceptive practices or devices. They include regulations on specifically prohibited practices, requirements for situations where it is necessary for a producer to make monetary investments, what specific notice must be given when a delivery of birds is suspended and a discussion of the requirements to establishing a reasonable time to remedy a breach of contract.

Specifically prohibited practices (Proposed Rule §201.210(a))

The first proposed regulation outlines several specifically prohibited practices. These practices are prohibited for the livestock (typically cattle), swine and poultry sectors except where specifically noted. Prohibited practices include an unjustified breach of contract or an action or omission that a reasonable person would consider “unscrupulous, deceitful or in bad faith,” as well as a “representation, omission or practice that is fraudulent or likely to mislead” a reasonable producer regarding a “material condition or a term in a contract or business transaction.” Retaliation is also prohibited when it is in response to the “lawful expression, spoken or written, association, or action of a poultry grower, livestock producer or swine production contract grower.” Prohibited “retaliation” may include but is not limited to “coercion, intimidation, or disadvantage” to any producer or grower in beginning, ending, extending or renewing a contract.

Further, packers, swine contractors and live poultry dealers may not include clauses in the producer’s contract that would attempt to limit a producer’s legal rights and remedies. Protected rights include the right to a trial by jury (except when arbitration has been voluntarily agreed to), the right to all damages available under law, protected rights under bankruptcy, a recognition of the judge and/or jury’s right to award attorney fees, and the requirement that any trial or arbitration be held in a location other than where the principal part of the performance of the arrangement or contract occurs. Finally, there is also a catch-all prohibition in that members of those three groups may not engage in “any other act that causes competitive injury or creates a likelihood of competitive injury.”

Swine contractors and live poultry dealers may not refuse to answer a contract grower’s written request for the statistical information and data used to determine the amount of compensation paid to the grower under a production contract. The data that may be requested includes such information as feed conversion rates, feed analysis, origination and breeder history. Further, swine contractors and live poultry dealers are also prohibited from terminating a grower’s contract with no basis other than an allegation that the producer “failed to comply with an applicable law, rule or regulation.” In order to use the alleged violation as grounds to terminate the contract, it must be immediately reported to the relevant law enforcement authorities.

³ 7 U.S.C. 192.

⁴ 7 U.S.C. 197c.

Swine contractors and livestock buyers may not pay a premium or apply a discount to the price received by the producer without documenting the reasons and substantiating the revenue and cost justification associated with the premium or discount.

Capital investments (Proposed Rule §201.217, §201.216)

The next requirements of the proposed regulations apply to the poultry and swine industries, and they discuss requirements for “capital investments,” both at the beginning (“initial capital investments”) and during (“additional capital investments”) the contract. The term “capital investments” means any “initial capital investment of \$25,000 or more paid by a grower for growing and raising facilities.” It includes the “total cost of equipment, goods, professional services and labor utilized, plus any interest incurred and any increased labor and operating costs that are directly attributable to the capital investment.”⁵

The proposed regulations would require that when a producer is required to make initial or additional capital investments in order to raise poultry or swine, the contract for raising the animals must be for a sufficient length of time for the producer to recover 80% of the investment cost. The repayment rate will be based on a percentage of the grower’s yearly compensation. Further, the regulations would prohibit swine contractors and live poultry dealers from requiring additional capital investments from a producer who has given written notice of his intent to sell the farm and facilities, unless the swine contractor’s or live poultry dealer’s notice of such additional capital investment was given at least 90 days prior to the producer’s notice of intent to sell. Other requirements involve “equipment previously approved and accepted” that is still in good working order. Under the proposed regulations, equipment changes cannot be required unless “adequate compensation incentives” are provided to the poultry grower or swine production contract grower, and the integrator may not reduce the number of animals placed with a producer or terminate a growing or production contract based on producer’s failure to make equipment changes. Further, packers, swine contractors and live poultry dealers cannot engage in conduct that is meant to limit the producer from making a voluntary or informed decision about production contracts or arrangements. Specifically prohibited actions include the use of intimidation, threats, false or misleading information, statements or data, or the concealment of any material information, statements or data.

The proposed regulations also give some examples of criteria that, while not specifically unfair practices, will be considered in determining whether an unfair practice has occurred in regards to capital investments. These criteria include an analysis of whether the producer has discretion to decide for or against the capital investment, and whether the investment was the result of coercion, retaliation or threats. It also considers whether the integrator intends to (or actually does) substantially reduce or end operations at the facility where the animals are processed within one year of requiring the additional investment, although a live poultry dealer may apply for an emergency waiver of this provision. Other criteria include whether all similarly situated producers are required to make the same

⁵ Proposed Rule § 201.2(n)

investments, the age of the producer's facilities- taking into account recent upgrades to or capital investments in the facilities- and whether the cost of the required capital investments is reasonably expected to be recouped by the producer. Finally, the Secretary would consider if the producer was given a reasonable time period to implement the required capital investments.

Notice of suspension of delivery of birds (Proposed Rule § 201.215)

The next set of proposed regulations involves the poultry industry specifically, and the notice that must be given when a delivery of birds is suspended. In this case, GIPSA has proposed a list of factors to consider when determining if "reasonable notice" has been given. These include a consideration of whether the grower was given written notice of the dealer's intent to suspend delivery of birds, if that notice is given at least 90 days prior to date of suspension, and if the notice includes the reason for and length of the suspension, and the date delivery of birds will resume. Dealers may apply for emergency waivers of the 90-day notice provision.

Reasonable period of time to remedy contract breach (Proposed Rule § 201.218)

The final proposed regulations where GIPSA claims authority under the "unfair, unjustly discriminatory or deceptive practices or devices" section is a listing of the criteria that the Secretary of Agriculture will consider when determining if a packer, swine contractor or live poultry dealer has provided a "reasonable period of time to remedy a breach of contract that could lead to contract termination." It includes whether written notice was supplied upon initial discovery (if written notice was not supplied within 90 days of discovery, it is generally considered to be a waiver of the breach). If the notice was given, consideration is given to whether it includes a description of the act/omission, the date of the breach, an explanation of how the producer can remedy breach (if possible), and the date of a reasonable time to remedy the breach. Other factors include whether the notice gives the producer a chance to rebut allegations of breach, and allows sufficient time to do so (generally 14 days), if, when choosing a "reasonable time" to remedy the breach, the producer's ongoing responsibility to the animals under their care is taken into account, and if a contract is terminated after the alleged breach has been submitted to arbitration in which the grower prevailed.

Undue or unreasonable preference/prejudice or advantage/disadvantage

The next group of regulations addresses what GIPSA will consider to be instances of giving undue or unreasonable preference or advantage to any particular person or locality, or on the other side of the coin, subjecting any particular person or locality to any undue or unreasonable prejudice or disadvantage. They include regulations on purchasing practices, sample contracts, tournament systems and differential pricing, as well as a listing of factors that will be used to determine if an undue or unreasonable preference/prejudice or advantage/disadvantage has taken place.

Purchasing practices (Proposed Rule § 201.212)

Proposed Rule § 201.212 covers the purchasing practices of the cattle industry. It prohibits packers from buying and selling livestock between themselves, although packers may apply for emergency waivers of this prohibition. Further, it requires that dealers who buy solely for one packer

must be identified as that dealer's "packer buyer," and that once a dealer is identified as a packer buyer, they are limited to purchasing livestock only for the packer they are associated with.

Sample contracts (Proposed Rule § 201.213)

Under the proposed regulations, all three animal agriculture sectors would be required to submit sample copies of each unique type of contract or arrangement to GIPSA. This would include forward, formula, and production contracts, marketing agreements and poultry growing arrangements. The contracts or agreements must be submitted within ten days of entering into the agreement, and the packer, swine contractor or live poultry dealer must notify GIPSA within 10 days of discontinuing use of the contract or arrangement. Once the samples are submitted, GIPSA may then post them on their website, with confidential business information, trade secrets or personally identifiable information redacted.

Tournament systems (Proposed Rule § 201.214)

The next section that outlines what would constitute an undue or unreasonable preference or advantage deals with the tournament system and is exclusive to live poultry dealers. It would require that if growers are paid on a tournament system, all growers raising the same type and kind of poultry must receive the same base pay. Further, growers must be ranked in settlement groups with other growers who use the same house type, and finally, no poultry growing arrangements would be able to decrease or reduce compensation below the base pay rate.

Differential pricing (Proposed Rule § 201.94)

Proposed Regulation §201.94 covers all three animal agriculture sectors, and would require that packers, swine contractors and live poultry dealers maintain written records to justify differential pricing or any deviation from standard price or contract terms. The records should be enough to identify the benefit-cost basis of any pricing differentials received or paid, which may include such things as higher or lower trucking costs, market price for meat, volume, labor, energy or maintenance costs.

Factors to determine if an undue or unreasonable preference/prejudice or advantage/disadvantage has taken place (Proposed Rule § 201.211)

The final section in this grouping outlines criteria that will be considered when determining if an undue or unreasonable preference/prejudice or advantage/disadvantage has taken place. One criteria given is that the same price should be given to all producers who individually or collectively meet the number or volume of animals, if a specific price has been offered for a specific number or volume of animals. Another criteria questions whether price premiums (for quality, time of delivery and production methods) are offered to all producers or groups of producers that can meet the same standards. Finally, the Secretary will consider if the information is disclosed equally to all producers.

Arbitration

The final group of proposed regulations addresses the use of arbitration as a "meaningful opportunity" for participation. There are two main sections. One outlines factors to consider whether

the arbitration allowed in the contract actually provides that “meaningful opportunity,” while the other delineates the precise statement that must appear in the contract, allowing a producer to opt out of arbitration.

Clauses providing a “meaningful opportunity” for participation (Proposed Rule §201.219)

The first section discusses some of the criteria that will be considered when determining if the clauses are appropriate. Those factors include a determination of whether the disclosure is made in “bold, conspicuous print,” and describes the cost of arbitration to be paid by the producer, the arbitration process and any limitations on the legal rights and remedies of the producer. Whether the process complies with the terms of the Federal Arbitration Act is important, as is whether the costs- including administrative and filing fees as well as arbitrator deposits and fees- are reasonable compared to a typical arbitration. Other considerations include whether impartial and qualified neutral parties will be used as arbitrators, and if those arbitrators provide a reasoned, written opinion based on applicable law, legal principles and precedent for the award to both parties. Finally, the Secretary would consider whether there are reasonable time limits to the arbitration process and outcome, and if arbitration is used only to resolve disputes relevant to the contractual obligations of the parties.

Right to Decline Arbitration language (Proposed Rule §201.219)

The second part outlines the specific language that must appear in “bold conspicuous print” immediately following the discussion of arbitration in the contract. That language, according to the proposed regulations, is:

Right to Decline Arbitration. A poultry grower, livestock producer or swine production contract grower has the right to decline to be bound by the arbitration provision set forth in this agreement. A poultry grower, livestock producer or swine production contract grower shall indicate whether or not it desires to be bound by the arbitration provision by signing one of the following statements:

I decline to be bound by the arbitration provisions set forth in this Agreement: _____

I accept the arbitration provisions as set forth in this Agreement:

Failure to choose an option by signing one of the above renders the contract void.

How Do You Make Comments?

The comment period is open until November 22, 2010. That means that GIPSA must receive your comments on or before that date in order for them to be considered. You may make comments the following ways:

Email:

comments.gipsa@usda.gov

Mail:

Tess Butler
GIPSA, USDA
1400 Independence Avenue, SW
Room 1643-S
Washington, DC 20250-3604

Fax:

(202) 690-2173

Online:

Federal eRulemaking Portal
<http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480b0803e>

Other Resources Discussing the Proposed Rules

The following is a sampling of the many resources that are available discussing the proposed GIPSA rule changes from various points of view. Many are written by individuals and/or organizations involved in advocacy work and expressing their opinion on the proposed rules. The National Agricultural Law Center is providing these links, in alphabetical order, solely for educational and informational purposes and does not advocate for any of the following positions. This publication, including hyperlinks, is available at www.nationalaglawcenter.org/gipsaworkshops.

Source:	Website:	Resources Available:
Agricultural Policy Analysis Center	http://agpolicy.org/present/2010/OCMGIPSAAug2010.pdf	PowerPoint slides highlighting proposed GIPSA rules and changes.
Agwired	http://agwired.com/2010/09/07/gipsa-proposed-rule-video-interviews/	Video interviews of industry professional regarding the proposed GIPSA rules.
Agwired	http://agwired.com/2010/09/13/concerns-with-proposed-gipsa-rule/	Articles regarding proposed rules.
American Meat Institute	http://www.meatami.com/ht/d/sp/i/61286/pid/61286	Memos, Fact Sheets, Government Documents, Testimony, Comments, and Press Releases
Beef Magazine	http://beefmagazine.com/government/	Articles regarding proposed GIPSA rules
Cattle Network	http://www.cattlenetwork.com/SearchResults.aspx?q=gipsa	Archive of articles discussing the proposed GIPSA rules

Choices, the Magazine of Food, Farm, and Resources Issues	http://www.choicesmagazine.org/magazine/article.php?article=121	Articles on the impact of GIPSA on the beef packing industry.
Dakota Rural Action	http://www.dakotarural.org/index.php?option=com_content&view=article&id=133:usda-gipsa-proposed-rule-supported-by-dakota-rural-action&catid=21:take-action	Letter to Congress in support of GIPSA proposed rules.
Farm and Dairy	http://www.farmanddairy.com/news/gipsa-rule-changes-could-devastate-seedstock-producers-in-cattle-industry/15625.html	Article discussing affect of proposed rules on seedstock producers in cattle industry.
Food and Water Watch	http://www.foodandwaterwatch.org/food/agricultural-policy/why-antitrust-laws-matter-for-agriculture-and-food/	Article “Why Antitrust Laws Matter for Agriculture and Food.”
Grain Inspection, Packers and Stockyards Administration	www.gipsa.usda.gov	GIPSA news releases; Under Secretary Avalos Statement about proposed rules; Misconceptions and Explanations; USDA News Release; Outline of Proposed Rule; Questions and Answers about Proposed Rules; Examples of Market Behavior; and link to the recent USDA/DOJ Public Workshops.
National Cattlemen’s Beef Association	http://www.beefusa.org/goveGIPSAProposal.aspx	GIPSA Proposal fact sheet; Talking Points; NCBA Comments on Extension of GIPSA; and link to video of Executive Director of Legislative Affairs, Colin Woodall, Discussing Proposed GIPSA Competition Rule.
National Chicken Council	www.nationalchickencouncil.com	Press release regarding the National Chicken Council’s stance on the new proposed rules
National Farmers Union	http://nfu.org/?s=gipsa	Archive of articles discussing the GIPSA proposed rules
National Hog Farmer	http://nationalhogfarmer.com/weekly-preview/0913-economic-analysis-gipsa-rule/	Economic Analysis of the GIPSA rule and related articles

National Livestock Producers Association	http://www.nlpa.org/html/resources.html#gipsa	GIPSA laws and regulations, and GIPSA Publications.
National Pork Producers Council	www.nppc.org	Overview of the Proposed GIPSA rules; the Actual GIPSA rules; and audio link to NPPC President San Carney discussing proposed rules
PorkMag	http://www.porkmag.com/help_desk.asp?keywords=gipsa&pgID=794&month=&year=&news_type_id=&orderby=date%2Cheadline	Archive of article discussing proposed GIPSA rules
Progressive Farmer	http://www.dtnprogressivefarmer.com/dtnag/comment/link.do?symbolicName=/free/livestock/news/template2&forceNavUpdate=false&product=TOPIC_CENTENT DTN/Ag/Production/Livestock&vendorReference=0bf7a07a-dc73-4fa2-9b96-9215dd76fe34_1283181279382	Article discussing effect of proposed rules on cattle industry
R-Calf USA	http://www.r-calfusa.com	Copy of proposed rule and articles discussing proposed rules
RAFI-USA	http://www.rafiusa.org/programs/contractag/gipsa2101rules.html	Articles and fact sheets on proposed rules
Western Organization of Resource Councils	http://www.worc.org/	Articles regarding the new GIPSA proposed rules

Note Paper

