

QUESTIONS AND ANSWERS FOR PROPOSED RULE
Grain Inspection, Packers and Stockyards Administration (GIPSA)

Q. Why is USDA promulgating this rule?

A. Title XI of the Food, Conservation and Energy Act of 2008 (Farm Bill) (P.L. 110-246), requires USDA to promulgate rules to remedy specific concerns within the livestock and poultry industries. Additionally, USDA, within its existing rulemaking authority under the Packers and Stockyards Act, has identified areas requiring changes because existing rules were outdated or too broad to allow proper enforcement.

Q. What is the Packers and Stockyards Act?

A. The Packers and Stockyards Act was enacted in 1921 to promote fair and competitive marketing in livestock and poultry for the benefit of consumers, livestock producers, and poultry growers. The Act fosters fair competition, provides payment protection, and guards against deceptive and fraudulent trade practices in the livestock and poultry markets. GIPSA is charged with administering and enforcing the Act. One of the purposes of the Act is to halt unfair trade practices in their incipiency, before harm has been suffered.

Q. What are some examples of how this proposed rule would help livestock and poultry producers?

A. Producers will have a more balanced and transparent marketplace and protections from companies' retaliatory actions, coercion, or other unfair practices. For example, a producer should be able to speak freely against something he or she sees as wrongful treatment by a company without being retaliated against or having their contract terminated.

The proposed regulations make clear for packers, swine contractors and live poultry dealers what practices that are acceptable and what practices are not by removing ambiguity from the existing regulations. Smaller producers will have restored ability to compete with larger-sized operators. Producers who make large capital investments to get into or stay in animal agriculture will have basic protections from being forced further into debt.

The proposed new protections would create a more positive environment that would encourage young and beginning farmers as well as socially disadvantaged farmers to see animal agriculture as a viable employment option for their future.

Q. Why would this proposed rule be needed more now than in years past?

A. Consolidation and vertical integration in the livestock and poultry sectors has increased in the past 15 years. This level of concentration and vertical integration increases the possibility that packers, live poultry dealers and swine contractors may engage in unfair or other types of practices that undermine a producer's ability to compete freely in the marketplace. There are now fewer buyers with whom producers can conduct business. If a producer does not like the treatment he or she is receiving from a specific buyer, he or she does not always have options to conduct business with another buyer and fewer buyers increases the potential for take-it-or-leave-it contracts or other unfair actions.

Q. In the proposed rule, how would USDA enforce the “criteria” for undue preferences or advantages, arbitration, suspension of delivery of birds, capital investments, and for establishing a reasonable period of time to remedy a breach of contract. Would some criteria be weighed more heavily than other criteria?

A. USDA would not enforce the criteria in the proposed rule; USDA will enforce the Act when violations are discovered. These violations may come to USDA's attention through complaints made by the industry or through USDA's regular inspection and monitoring activities. The criteria provided in the proposed rule establish the standards against which certain behaviors would be measured. The facts and evidence of each case would be evaluated in the context of these criteria to determine whether a subject entity has committed a violation of the Act. USDA examines alleged unlawful conduct on a case-by-case basis.

Q. Why does the proposed rule require packers, swine contractors or live poultry dealers to maintain written records to justify differential pricing or contract terms?

A. Currently packers, swine contractors or live poultry dealers do not always keep sufficient data and other information to detail why they provide certain pricing or contract terms to producers. Certain types of differential pricing or contract terms can be unfair or otherwise violate the Packers and Stockyards Act. The lack of documentation currently complicates enforcement and increases the number days required to complete investigations or audits and increases costs for USDA. Likewise, the lack of readily available information increases costs and time for packers, swine contractors and live poultry dealers that may have to create the information needed for USDA to complete its audits or investigations.

Q. Why does the proposed rule provide that the Secretary would consider whether similar terms are offered to producers or growers who individually or collectively can meet the same contract terms as larger-sized producers when determining whether an undue or unreasonable preference or advantage has occurred under the Act?

A. The Food, Conservation and Energy Act of 2008 requires USDA to develop criteria the Secretary may use in determining if an undue or unreasonable preference or advantage has occurred in violation of the Packers and Stockyards Act. GIPSA has received numerous complaints from producers that firms only want to do business with very large producers, leaving smaller producers without marketing options. If a producer or group of producers can meet the same contract terms as a large producer and such terms require a large number or specific volume of livestock, it would be unreasonable for the packer, swine contractor or live poultry dealer to not also offer similar contract terms to the smaller producer or group of producers.

Q. Will packers, swine contractors or live poultry dealers be required to do business with smaller-sized producers?

A. No. Nothing in this proposed rule requires packers, swine contractors or live poultry dealers to do business with any specific producer. The proposed rule simply requires that if the packer, swine contractor, or live poultry dealer does business with a smaller producer or group of producers, the company cannot unfairly discount or provide less favorable contract terms to the smaller producer or group of producers than it would a larger producer in a specific region on any given day. The smaller producer or group of producers would need to provide the same quality characteristics and volume, and otherwise fully meet the contract terms.

Q. Why does the proposed rule require dealers who operate as packer buyers to only purchase livestock for the packer it identifies as its packer buyer? How is this different than current regulations?

A. Currently, a dealer may operate as an exclusive agent for multiple packers, which creates the potential for sharing of pricing information between packers, manipulation of prices and a decrease in the number of buyers competing for livestock. This proposed rule would prevent apportioning territory by independent dealers and packers and would open the market to other buyers, increasing participation in the cow and bull slaughter market and could prevent collusion between multiple packers using one dealer as an exclusive agent with the potential to manipulate prices.

Q. Why does the proposed rule require that a reasonable period of time be provided to a poultry grower for any suspension of the delivery of birds under the poultry growing arrangement?

A. The 2008 farm bill requires that the Secretary develop criteria in 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. There have been instances in which a live poultry dealer has failed to place poultry on a poultry grower's farm for an extended period of time without notifying the poultry grower of the reasons for or the anticipated length of the delay in placing additional birds. Without sufficient information, a poultry grower is unable to protect his or her financial interests and make informed business decisions. (§201.215)

Q. How would this proposed rule address tournament (ranking) systems in poultry growing arrangements?

A. The proposed rule provides that if a poultry company is paying growers on a tournament system, all growers raising the same type and kind of poultry must receive the same base pay. Under the proposed rule, a poultry growing arrangement cannot contain provisions that decrease or reduce grower compensation below the base pay amount. Additionally, companies would be required to rank growers in settlement groups with other growers with like house types.

Q. Why does the proposed rule prohibit packer to packer sales?

A. The proposed rule prohibits packers from purchasing livestock from another packer. When one packer buys livestock from or sells livestock to another packer, the information transfers signals about the price that packers will pay producers. GIPSA has received complaints from market participants that packer-to-packer sales may have the intended or unintended effect of manipulating market prices. A waiver will be allowed for emergency situations so that in the event of a catastrophe or natural disaster a packer may buy from or sell livestock to another packer.

Q. How will posting sample contracts on GIPSA's website help producers?

A. In a consolidated market with few buyers, the lack of information available to producers has put them at a disadvantage. By posting sample contracts on the GIPSA website, producers would be more aware of what current contracts look like and allow them to make educated decisions and know which companies are offering better contracts thus improving transparency and competition in the marketplace.

Q. Does every producer's contract need to be submitted by the company?

A. No. A packer, swine contractor or live poultry dealer only needs to submit to GIPSA samples of the types of contracts they are offering to producers.

Q. Does the proposed rule address concerns associated with captive supply?

A. The proposed rule carries out requirements as mandated by the 2008 farm bill. USDA identified additional areas to clarify conduct that is in violation of the Packers and Stockyards Act, such as in defining unfair practices, prohibiting packers from purchasing, acquiring, or receiving livestock from other packers, and improving transparency in the market regarding dealers that operate as packer buyers. USDA is aware there are other concerns that exist in the market, including concerns regarding captive supply. USDA is currently evaluating information and data on this topic, and additional information as it becomes available, and in particular the data, analysis and testimony of the USDA and Department of Justice competition workshops to evaluate where further actions may be needed.

Q. Would this proposed rule raise meat prices?

A. These proposed regulations address unfair and anticompetitive practices of livestock packers, swine contractors and live poultry dealers. In the case of the unfair practices, primarily live poultry dealers but not exclusively, use their market power to reduce income (e.g., by extracting rent) to contract producers by imposing additional costs through contracts of adhesion. In particular, once a grower makes a significant investment in a production facility for poultry or hogs, the slaughterer or live poultry dealer may pay lower than fair prices to the producer because they are locked into a contract and have limited or no options. The proposed regulations would eliminate this opportunistic behavior. Improving market fairness and competition would have the effect of reducing retail prices and increase the share provided to producers.

Payments to growers are an extremely small portion of the eventual retail cost of poultry meat, that is, less than 4 percent in 2009, and significantly less than the current processor margin. Given that the total income share to growers is likely to be a very small portion (less than 0.01 percent of the 4 percent paid to growers in 2009), it is doubtful that the proposed rules would have a significant or noticeable effect on the retail cost of poultry products; indeed, it is possible that they could reduce retail prices by contributing to increased competitiveness and efficiency in production.

With respect to the proposed regulations targeted to anticompetitive behavior, particularly packer-to-packer sales, there has been a growing increase in the volume of hogs traded through packer-to-packer transactions within the last four years. Given that these transactions may be a mechanism for packers to communicate prices and affect collusion, the overall effect of the proposed regulation would be to increase competition and would likely lead to more favorable prices.