DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

9 CFR Part 201

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RIN 0580-AB26

Poultry Grower Ranking Systems; Withdrawal of Proposed Rule

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule; withdrawal.

SUMMARY: The United States Department of Agriculture's (USDA) Agricultural Marketing Service (AMS) is withdrawing a proposed rule published in the *Federal Register* on December 20, 2016. The proposed rule would have identified criteria that the Secretary of Agriculture (Secretary) could consider when determining whether a live poultry dealer's use of a system for ranking poultry growers for settlement purposes is unfair, unjustly discriminatory, or deceptive or gives an undue or unreasonable preference, advantage, prejudice, or disadvantage. Proposed amendments would also have clarified that, absent demonstration of a legitimate business justification, failing to use a poultry grower ranking system in a fair manner after applying the identified criteria is unfair, unjustly discriminatory, or deceptive and a violation of the Packers and Stockyards Act, regardless of whether it harms or is likely to harm competition. The Secretary has determined to withdraw the 2016 proposed rule and develop revised proposals pertaining to poultry grower ranking systems.

DATES: The proposed rule published at 81 FR 92723 on December 20, 2016, is withdrawn as of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: S. Brett Offutt, Chief Legal Officer/Policy Advisor, Packers and Stockyards Division, USDA AMS Fair Trade Practices Program, 1400 Independence Ave. SW, Washington, DC 20250; Phone: (202) 690-4355; or email: *s.brett.offutt@usda.gov*.

SUPPLEMENTARY INFORMATION: A proposed rule published at 81 FR 92723 on December 20, 2016, would have identified criteria the Secretary could consider when determining whether a live poultry dealer's use of a poultry grower ranking system for ranking poultry growers for settlement purposes is unfair, unjustly discriminatory, or deceptive or gives an undue or unreasonable preference, advantage, prejudice, or disadvantage. Further, the 2016 proposed rule would have amended regulations under the Packers and Stockyards Act (regulations) to clarify that, absent demonstration of a legitimate business justification, failure to use a poultry grower ranking system in a fair manner after applying the identified criteria is unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the Packers and Stockyards Act, 1921, as amended and supplemented (Act), regardless of whether it harms or is likely to harm competition.

The December 2016 proposed rule published by USDA's former Grain Inspection, Packers and Stockyards Administration (GIPSA) was a modification to an earlier GIPSA proposed rule (75 FR 35338; June 22, 2010) that included requirements regarding a live poultry dealer's use of a poultry grower ranking system when

determining payment for grower services. The 2010 proposed rule would have required live poultry dealers paying growers on a tournament system to pay growers raising the same type and kind of poultry the same base pay and would have required that growers be settled in groups with other growers with like house types. Upon review of public comments received both in writing and through public meetings held during the comment period in 2010, GIPSA elected not to finalize the 2010 proposed rule, and instead modified the earlier proposal, published the modification in the December 2016 proposed rule, and requested further public comment.

The comment period for the December 2016 proposed rule was originally scheduled to close on February 21, 2017. GIPSA extended the comment period until March 24, 2017 (82 FR 9533; February 7, 2017), consistent with the memorandum of January 20, 2017, to heads of executive departments and agencies from the Assistant to the President and Chief of Staff entitled "Regulatory Freeze Pending Review." In total, GIPSA received 239 comment submissions on the December 2016 proposed rule. A number of submissions included lists of signatories or multiple copies of identical form letters signed by different individuals.

In November 2017, responsibility for GIPSA activities was transferred to AMS, which now administers the Packers and Stockyards Act and regulations, and which has assumed responsibility for this rulemaking.

Comments submitted on the December 2016 proposed rule, as well as comments submitted in response to a related Packers and Stockyards proposed rule (85 FR 1771; January 13, 2020) and input from the industry, reflected both support for and opposition to the December 2016 proposals.

Comments on the December 2016 rule were submitted by individual poultry growers and processors, associations representing poultry growers and processors, other livestock producers and producer associations, individual consumers and consumer advocacy groups, and other interested entities. Many grower and consumer commenters supported proposals, saying the criteria in proposed § 201.214 offered tools with which poultry growers and family farms could protect themselves from severe economic losses under potentially unfair contract terms. Commenters further suggested adoption of the proposed rule and its grower protections would strengthen rural economies and the U.S. poultry industry's position in the global marketplace. Some commenters said that provisions of the proposed rule would help level the playing field between poultry growers and processors by giving growers greater contracting power. Other commenters said the proposed criteria for evaluating contract terms would ensure farmers can continue to operate with basic protections under the law. A comment from an animal welfare organization supported the proposed rule because they believe its provisions would protect growers who speak out about inhumane practices from retaliation.

Some commenters expected the rule to make changes they would have considered more favorable to growers, such as the abolition of grower ranking systems. According to one commenter, "a tournament system is itself an undue preference in any case where the farmer's pay is penalized based on input factors that affect farmer performance beyond their control." Other commenters supported the proposed rule, but asked USDA to provide a codified list of behaviors that in and of themselves would be violations of the Act, including clear examples of actions that may be unfair, discriminatory, or deceptive; a non-exhaustive list of Section 202(a) violations; or provisions clarifying that failing to

comply with 9 CFR 201.100 is inherently unfair, unjustly discriminatory, or a deceptive practice. Several commenters also recommended requiring live poultry dealers to disclose critical information regarding acquiring, handling, processing, and quality of poultry to all producers in the tournament if such information is disclosed to one. Commenters suggested this type of information would allow growers to make better-informed decisions about entering into production contracts.

Many commenters, while supportive of the proposed rule generally, opposed inclusion of the criterion (proposed § 201.214(d)) that would have allowed the Secretary of Agriculture to consider whether a live poultry dealer has demonstrated a legitimate business justification for use of a poultry grower ranking system that might otherwise be unfair, unjustly discriminatory, or deceptive; give an undue or unreasonable preference or advantage to any poultry grower; or subject any poultry grower to an undue or unreasonable prejudice or advantage. Commenters asserted that this criterion could offer live poultry dealers a "loophole" through which they could justify actions that otherwise might be considered violations of the Act. These commenters recommended this criterion be eliminated from the proposed rule. Several commenters further speculated that the vagueness of the term "legitimate business justification" could lead to increased litigation and expense as courts attempt to interpret its meaning, and further that every judge or jury could interpret the term differently.

One commenter wrote that the use of the "legitimate business justification" is a recognized "monopoly defense" that is unfounded and misplaced in the proposed rule. According to the commenter, Sections 202(a) and (b) of the Act were designed by Congress to address wrongful and unlawful acts "not of the anti-trust variety." The

commenter asserted the defense should not be included in the proposed rule because the term "monopoly" does not appear in Sections 202(a) and (b) of the Act, whereas Sections 202(c) through (e) clearly address anti-trust related unlawful practices. The commenter cited examples of "unfair practices" under the Act where proof of competitive injury is not required, such as failure to pay livestock sellers "before the close of the next business day" following livestock purchases (see Sec. 409), or late payments to a poultry grower (see Sec. 410). The commenter argued that the Secretary has no authority to effectively amend the Act by proposing to inject the monopoly defense into the regulations. According to the commenter, such inclusion exceeds the legal authority granted the Secretary under the Act, violates the separation of powers as established by the United States Constitution, defies Congressional intent, and practically guarantees litigation against the Secretary for violation of the Administrative Procedures Act. Further, the commenter claimed that use of the "legitimate business justification" defense would embolden poultry integrators to "wrench away what few rights growers have left."

A number of poultry grower commenters opposed the December 2016 proposed rule entirely, some saying the rule is simply unnecessary. Others asked that USDA not force changes on the poultry grower ranking system they claimed has worked well for decades. Commenters contended changing the system could eliminate growers' incentive to maximize efficiency and adopt innovative production practices, and that such changes would unfairly reward mediocre performers who do not invest effort and capital into continuously improving production.

A number of commenters stated that proposed criteria were too vague, citing for example the terms "fair manner" in proposed § 201.210(b)(10), "pattern or practice" in

the introductory paragraph of proposed § 201.214, and "sufficient business information" and "informed business decisions" in proposed § 201.214(a). Commenters asked USDA instead to identify specific behaviors that would be considered violations of the Act to eliminate confusion for contracting parties.

Comments from several poultry processors and associations representing poultry and other meat and food processing industries opposed the proposed rule for various economic and legal reasons. A number of commenters said the rule "ran afoul" of Executive Order 13771[1] regarding regulatory reform in that GIPSA's impact analysis predicted administering and litigating the rule would be costly, although GIPSA did not quantify benefits of the rule. Some commenters speculated that actual costs of litigating the rule could be much higher than GIPSA's estimates because the inclusion of vague regulatory terminology would increase uncertainty for contracting parties and invite further litigation. Commenters asserted the proposed rule was unsound because it was premised on the "fatally flawed" interim final rule titled "Scope of Sections 202(a) and (b) of the Packers and Stockyards Act" (81 FR 92566, December 20, 2016) that was published by GIPSA on the same date as the proposed Poultry Grower Ranking Systems rule. Commenters claimed the "Scope" rule erroneously asserted that claimants do not need to demonstrate injury to competition to establish a violation of Sections 202(a) and (b) of the Act.

A number of commenters said the proposed rule was arbitrary and capricious in that GIPSA failed to provide investigative data or evidence of any actual problems with

[1] Executive Order 13771 – *Reducing Regulation and Controlling Regulatory Costs* (January 30, 2017) – has since been rescinded by Executive Order 13992 - *Revocation of Certain Executive Orders Concerning Federal Regulation* (January 20, 2021).

the current grower ranking systems or of any need for regulatory intervention, basing its proposed actions rather on anecdotal complaints.

A few commenters objected to GIPSA's use of an example in the rule's preamble that processors might supply non-comparable inputs to growers. Commenters pointed out that in the rule's economic impact analysis GIPSA stated it had no evidence processors have done this. Other commenters warned that USDA should not base the proposed criteria on the assumption that processors intentionally provide non-comparable inputs to growers. Those commenters explained it is in the best interest of processors that all their poultry growers receive high quality inputs (animals, feed, veterinary medicines) to ensure a reliable flow of high-quality poultry to plants. For that reason, according to these commenters, processors are unlikely to intentionally target and sabotage their growers, as suggested by other commenters.

Several commenters suggested that GIPSA incorrectly assumed in its impact analysis that growers carry most of the risk related to poultry production. According to commenters, processors carry a greater proportion of the risk because they supply most of the production inputs. Further, these commenters asserted that vertically integrated processors are in a better position than growers to assume most of the risk because those processors can operate on a more efficient scale than growers.

According to the comment from an association of chicken production and processing companies, GIPSA's regulatory impact analysis projected decreased certainty for regulated entities and increased risk of litigation due to the proposed rule. This commenter suggested the regulation should instead increase certainty for regulated entities and decrease risk of wasteful litigation.

Some commenters maintained that the provisions of the proposed rule would establish an "unprecedented level of government intervention" that would have negative ramifications for the industry and consumers. Others insisted that the rule contradicted the Packers and Stockyards Act's provisions and intent,[2] exceeded the Congressional mandate of the 2008 Farm Bill,[3] and/or conflicted with court precedence with respect to competitive harm.

A comment from a federation of turkey producers opposed the proposed rule. The commenter asserted that the proposed rule failed to recognize important distinctions between broiler chicken and turkey production in matters such as breeder diversity, production cycle length, gender segregation, and farm and facility size. The commenter said proposed requirements intended to address broiler production issues would not always be applicable to turkey production models and could prove to be injurious to the turkey industry. The commenter recommended that USDA rescind the proposed rule and pay significant attention to the effects on turkey production in future rulemaking attempts.

Several commenters, although purportedly responding to the proposed rule, submitted comments that were outside the scope of this particular rulemaking. For example, commenters offered suggestions about alternative contract production and pay methods the industry could adopt or discussed issues related to cattle production and marketing. Several commenters criticized GIPSA for disregarding public input about

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[2] Some commenters asserted that the Act protects individual growers from the effects of competitive harm, while other argued that a violation of Section 202(a) or (b) has not occurred unless there is harm to multiple individuals in the market. One commenter argued that the Act provides clear authority to USDA to clarify terms and interpret the Act's intent.

[3] Provisions of Title XI of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill; Pub. L. 110-234) require the Secretary of Agriculture to establish criteria to consider when determining whether the Packers and Stockyards Act has been violated.

systematic abuses suffered by contract poultry growers. According to commenters, such abuses were described by participants in a May 2010 USDA/Department of Justice-sponsored workshop held to better understand industry concerns. Other commenters addressed provisions of the two other rules GIPSA published on December 20, 2016, including the previously mentioned "Scope of Sections 202(a) and (b) of the Packers and Stockyards Act," and the proposed rule titled "Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act" (81 FR 92703).

AMS values the input of all commenters. AMS finds that many of the comments on the proposed rule—both supportive and opposed—identified reasonable concerns regarding the proposed regulation's structure and language. These concerns included uncertainties about USDA's method for applying criteria and vague criteria language. AMS recognizes that differences in broiler and turkey production systems need fair consideration. Moreover, the proposed rule may not have adequately addressed information imbalances between contracting parties. In light of these comments, AMS prefers to reexamine regulatory requirements, specific potential violations, general criteria, and recordkeeping aspects, as well as the structure, of a rule regarding poultry production contracts.

Because of the breadth of this reexamination, AMS concludes that this proposed rulemaking is unable to address many of the commenters' concerns without material changes. AMS intends to consider further the issues raised by the commenters, as well as study any developments since publication of the proposed rule. Following those activities, we plan to issue and solicit comments on a new regulatory proposal pertaining

to poultry grower ranking systems. Therefore, we are withdrawing the December 2016 proposed rule.

Authority: 7 U.S.C. 181-229c.

Erin Morris,

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