

FLAG



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INCORPORATED

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VIA E-MAIL: comments.gipsa@usda.gov

Ms. Tess Butler
Grain Inspection, Packers and Stockyards Administration
United States Department of Agriculture
1400 Independence Avenue SW
Room 1643-S
Washington, DC 20250-3604

Dear Ms. Butler:

Re: Comments on Proposed Rule to Amend Packers and Stockyards Act Regulations Concerning Initiation, Performance, and Termination of Poultry Contracts, 72 Fed. Reg. 41,952 (August 1, 2007)

Farmers' Legal Action Group, Inc. (FLAG) submits these comments on behalf of the Campaign for Contract Agriculture and Rural Advancement Foundation International—USA concerning the proposed rule to amend the Packers and Stockyards regulations concerning records to be furnished poultry growers and sellers, as published at 72 Federal Register 41,952 (August 1, 2007).

The Campaign for Contract Agriculture Reform (CCAR) is a national alliance of organizations working to provide a voice for farmers and ranchers involved in contract agriculture, as well as the communities in which they live. The goal of the campaign is to assure that the processor-producer relationship serves as a fair partnership.

The Rural Advancement Foundation International—USA (RAFI) is a nonprofit organization based in North Carolina. RAFI's mission includes strengthening family farms and rural communities. RAFI advances its mission through its Contract Agriculture Reform program. RAFI works to empower farmers by providing critical information and to ensure that the contract arrangements between individual farmers and processors are fair and equitable.

FLAG is a nonprofit, public interest law center dedicated to the preservation of family farms. For two decades, FLAG has provided legal services to thousands of small and mid-sized family farmers throughout the nation in class action lawsuits, administrative proceedings, public education initiatives, and legislative technical assistance involving agricultural issues. FLAG has long worked to help contract poultry growers to understand their legal rights and responsibilities, and to improve fairness in the livestock and poultry sector.

CCAR and RAFI commend GIPSA for issuing this proposed rule to begin to address the imbalance of power in the poultry industry. The lack of information and the lack of bargaining power experienced by thousands of poultry growers in their dealings with a handful of poultry integrators distort the market. The distorted market creates an unfair playing field for poultry growers and for those poultry integrators which seek to treat poultry growers fairly. Therefore, CCAR and RAFI deeply appreciate the rules proposed by GIPSA, while at the same time they call upon GIPSA to take more far-reaching steps, commensurate with the problems identified.

The Proposed Rule Accurately Describes Key Dynamics in the Poultry Industry

The preamble to the proposed rule published in the Federal Register accurately described the essential character of the poultry industry as it exists today. It is certainly true that poultry growers are offered contracts on a “take it or leave it” basis. This is particularly true after the grower has invested enormous sums of (borrowed) money in a piece of real property complete with single-use poultry barns. Once the grower has taken on this long term risk, he or she has little negotiating power. The poultry company can easily substitute with another grower, but the grower cannot easily substitute with another poultry company, in part because of consolidation in the industry.

In discussing the proposed rule with growers in many poultry-growing states, RAFI and CCAR heard from many growers who lacked information when entering into poultry-growing agreements. Some growers reported receiving only income projection sheets. Some growers reported receiving only a letter of intent. Some reported receiving assurances from their lenders. Some growers reported not receiving their contract until after the chicken houses were built or older houses were purchased and the first flock of chicks was delivered. Some growers reported making repeated requests for a copy of their contract, only to be rebuffed or refused. This last category of incidents reported by growers is of particular concern, and may warrant investigation by GIPSA to determine whether poultry integrators are engaging in widespread violations of the existing regulation, which requires each live poultry dealer who enters into a growout contract with a poultry grower to furnish the grower a true written copy of the contract. 9 C.F.R. § 201.200(a).

In addition to lack of information about the details of their own arrangement with their poultry integrators, poultry growers generally encounter barriers when they attempt to access information about contract terms offered by their integrator to other growers, or

the terms offered by other integrators. In contrast, poultry integrators have detailed information about all of their own activities, as well as a great deal of information about the industry as a whole.

The essential market imbalance in the poultry industry is well-documented. For example, RAFI and FLAG partnered with Professor Lee Schrader of Purdue University and Professor John Wilson of Duke University to survey over 1,400 poultry growers in 1999.¹ The survey responses demonstrated the lack of transparency and lack of negotiating power experienced by growers. These problems remain unabated; indeed, further consolidation and growers' rising costs have exacerbated them.

CCAR and RAFI support GIPSA's conclusions that the practices described in the preamble are unfair and deceptive practices which violate the Packers and Stockyards Act, 7 U.S.C. § 192.

Proposal to Require Poultry Dealers to Provide a True Written Copy of the Contract at the Time of Offering Poultry House Specifications Is Reasonable

Proposed section 201.200(a) is reasonable. The existing regulation, which requires poultry integrators to provide growers with a true written copy of the contract, but fails to specify the point at which this should occur, does not adequately protect growers. We understand the phrase in the proposed regulation "the date you provide the poultry grower with poultry house specifications" to include plans and specifications for both new houses and for modifications or upgrades to existing houses. The regulation must cover both construction of new houses and purchase of existing houses. CCAR and RAFI believe that poultry house specifications will be provided by the integrator in most instances, but provision of a letter of intent or letter of approval by the poultry integrator should serve as alternative triggers for the duty to provide the contract. Linking receipt of the contract to receipt of specifications or to the alternatives suggested is reasonable because they represent stages in the process where both parties have expressed strong interest in moving forward with an agreement. To be a meaningful right, growers must see the contract before they begin building or upgrading facilities, purchase land, or take out a loan.

GIPSA should clarify in the regulatory text or in the preamble that the regulation applies when the integrator, or an agent of the integrator, or anyone acting on behalf of the integrator provides the poultry house specifications to the growers. The integrator should not be able to evade application of the regulation by having another party act on its behalf. GIPSA may also want to explain what is meant by "specifications" in either the regulatory text or the preamble to the final rule.

¹ ASSESSING THE IMPACT OF INTEGRATOR PRACTICES ON CONTRACT POULTRY GROWERS (Farmers' Legal Action Group 2001), available at www.flaginc.org.

Many growers report receiving the contract too late in the process, and some growers actually report being refused a copy of the contract which is ostensibly being offered by the poultry company. Establishing a specific point in the decision-making process by which growers must be provided with the contract will provide a greater opportunity for growers to make informed decisions. In addition, it will provide a bright line test of whether poultry companies are in compliance with the regulation. This will likely improve compliance and greatly facilitate enforcement.

Growers also expressed concern that the contract they are shown might be changed by the poultry integrator after a grower moved forward with the purchase or construction of poultry barns in a kind of "bait and switch." This is one example of a larger concern expressed by growers about their vulnerability to changes in the contract. While they take on long term risk in the form of a mortgage that typically lasts at least 10-15 years, the contracts are typically flock-to-flock. Under many current contracts, an integrator may typically terminate without cause, if the integrator wishes to offer new contracts with different terms. Many growers expressed the strong feeling that fairness demands that the length of the contract match the length of their financial commitment, i.e. the length of their mortgage. CCAR and RAFI urge GIPSA to adopt a regulation that establishes entering into a contract with the intent to change it soon thereafter as an unfair and deceptive practice. This could be done by adopting a presumption that if the poultry integrator changes the contract within the first 60 months of the contract, then the integrator intended to do so at the time it entered into the contract.

GIPSA may also wish to consult with the Farm Service Agency to review whether and how its guaranteed loan procedures should be modified in order to coordinate with GIPSA's efforts to correct imbalances in the poultry industry. At a minimum, guaranteed lenders of any type should be required to collect and review the actual contract upon which a loan is based. The Farm Service Agency should engage in a review of its guaranteed loan procedures to determine how it could more effectively screen the loans and protect the taxpayer dollars which are used to guarantee many of these contracts.

Limitation on Confidentiality Clauses Should Be Expanded in Scope and Execution

The 2002 Farm Bill included a provision stating,

Notwithstanding a provision in any contract between a producer and a processor for the production of livestock or poultry, or in any marketing agreement between a producer and a processor for the sale of livestock or poultry for a term of 1 year or more, that provides that information contained in the contract is confidential, a party to the contract shall not be prohibited from discussing any terms or details of the contract with--

- (1) a Federal or State agency;
- (2) a legal adviser to the party;
- (3) a lender to the party;
- (4) an accountant hired by the party;

- (5) an executive or manager of the party;
- (6) a landlord of the party; or
- (7) a member of the immediate family of the party.

. . .

This section applies to each contract described in subsection (b) that is entered into, amended, renewed, or extended after the date of enactment of this Act [enacted May 13, 2002].²

Proposed section 201.100(b) largely carries out this statutory requirement, though it could be greatly improved by some changes in approach and substance. At the time the statutory provision was written, confidentiality clauses were found in a variety of production contracts. Recognizing this fact, Congress drafted the statute in such a way as to account for those existing provisions, and to set forth the rule “notwithstanding” those existing provisions. However, more than five years later, it is reasonable for the regulation implementing the statute to simply prohibit confidentiality provisions which apply to enumerated parties. A regulation that prohibits such contract provisions outright will be more effective in protecting grower rights, particularly in an industry characterized by lack of transparency and by an imbalance in access to information. Even five years after passage of the 2002 Farm Bill, many growers and prospective growers are likely to be unaware of the lack of enforceability of any confidentiality provisions that may be contained in their poultry contracts. Those growers and potential growers who are unaware will not gain the benefit intended by Congress, but will instead believe themselves bound by any confidentiality provision, however written. But the poultry integrators have reason to be well aware of the change made in the 2002 Farm Bill. It is not unreasonable at this late date to require removal of all such provisions, or in the alternative to require poultry companies to list the regulatory exceptions of parties to whom a confidentiality provision does not apply.

CCAR and RAFI urge the addition in the regulatory language of two additional categories to whom confidentiality provisions may not apply. First, many growers reported that it was essential for growers to be able to freely share their contracts with real estate agents and appraisers, so that these professionals may give prospective buyers and sellers an informed assessment of the value of the property, which depends in part upon the terms of the contract. Second, many growers argued that they should not be prohibited by integrators from sharing their contracts with other growers for the same company. Growers argued that integrators could suffer no competitive disadvantage with respect to an information exchange that was confined to growers for the same company. Removing barriers to such exchanges would contribute to greater transparency and more informed decision-making.

² 7 U.S.C. § 229b.

In any case, the statutory language “a party to the contract shall not be prohibited from discussing any terms or details of the contract,” is preferable to the proposed regulatory language that requires poultry integrators to “allow” poultry growers to discuss the terms of their contracts. Such a word choice would subtly ratify the power imbalance between poultry integrators and poultry growers in the name of ameliorating it.

Proposal Relating to Performance Improvement Plans is Reasonable But Additional Information Is Needed

CCAR and RAFI agree that poultry growers must receive detailed written information about any performance improvement plan utilized by the poultry integrator at the outset of the contractual relationship between grower and integrator. The factors that will be utilized in placing a poultry grower on a plan, if any, should be included in the contract.

Many growers noted that the ranking system is an imperfect means of determining the need for a performance improvement plan. For example, many growers noted that growers could have a poor ranking for reasons outside of their control. Reasons outside a growers’ control might include poor quality chicks, poor quality feed, power outages, disease, and natural disaster.³ Growers noted that ranking below average for one flock typically remained part of the grower’s average for well over a year. Many growers also reported that growers have no way of knowing whether their small ranking group is representative of their complex or the company as a whole, and suggested that being evaluated on their individual performance by one set standard might be more fair.

CCAR and RAFI recognize that the ranking system has long been a topic of controversy and elicits a range of opinions from growers, but in light of the belief of many growers that the ranking system is subject to bad luck as well as intentional manipulation, CCAR and RAFI urge GIPSA to adopt regulations specifying factors which would not provide a permissible basis for placing a grower on probation. Such factors should include factors beyond the grower’s control. Measuring whether performance was beyond a grower’s control will require individualized determinations, but it is an enforceable standard often used in the law.

The guidance and support that will be provided to a grower while on a performance improvement plan should also be specified in the contract, as the proposed regulation would require. Some growers reported that field representatives for their integrator were sometimes wholly absent or difficult to find, even when they were on a performance improvement plan. Fairness demands that the integrators meet their commitments to growers, just as the growers are held to their commitments to the integrator. Other

³ ASSESSING THE IMPACT OF INTEGRATOR PRACTICES ON CONTRACT POULTRY GROWERS (Farmers’ Legal Action Group 2001), at 4 available at www.flaginc.org. Seventy-eight percent of growers surveyed agreed that, “My pay depends more on the quality of chicks and feed supplied by the company than on the quality of my work.”

growers reported receiving inconsistent or contradictory advice from representatives of the integrator. The contract should specify the grower's options if the grower receives contradictory advice, or if the grower disagrees with the advice of the integrator's representative.

The most critical piece of information to be included in the contract is of course the factors that would either remove the grower from the poultry improvement plan and place him or her back in good standing or result in termination of the contract.

One more critical piece of information that should appear in the contract but that is not contained in the proposed rule is the financial consequences, if any, of being placed on a performance improvement plan. Growers need this information in the contract so that they can make informed decisions about the risk they undertake when they enter into a poultry contract. This information should also be in the contract in order to facilitate investigations of whether integrator payments to growers on a performance improvement plan are consistent with requirements under the Packers and Stockyards Act.

Proposal to Require Written Termination Notices is Reasonable, But Must Go Farther

There is much in proposed section 201.100(h) that CCAR and RAFI enthusiastically support. In particular, requiring a written notice that sets forth the reason(s) for termination, when the termination is effective, and any appeal rights, is an essential step toward protecting poultry growers from unfair and deceptive practices such as retaliation. However, CCAR and RAFI urge GIPSA to make the changes discussed below to the proposed regulations in order to more effectively counter unfair and deceptive practices.

Broaden Circumstances for Which Notice is Required

Proposed section 201.100(h) must be broadened in order to more effectively achieve the goals set forth in the preamble to the proposed rule. Contract termination is only one way for poultry integrators to sever their relationships with poultry growers, or otherwise subject growers to dramatic changes in their expected income. Prospective poultry growers are often given oral assurances that their contracts will be renewed in the ordinary course of events. These oral assurances are generally unenforceable. Other steps with the same effect as terminating a contract which a poultry integrator might take include allowing a contract to lapse, failing to renew a contract, and discontinuing a contract. The requirements of the proposed section 201.100(h) should apply to these situations as well.

One other situation should also be addressed in the regulations; that is, the practice of holding the grower out for long periods in between flocks. The number of flocks a

grower is given to raise per year has been identified as a critical factor in the grower's economic success.⁴ In many contracts, poultry integrators reserve to themselves sole discretion over the size of flocks as well as the timing of flock delivery, the length of time the flocks are to be kept by the grower, and thus over the number of flocks to be raised in a year. As the number of flocks per year decreases with the longer periods between flocks, growers' income is dramatically reduced, often causing them to default on loans and fail to pay their family living and farm operating expenses. In this way, poultry integrators exacerbate the long term financial risks taken by poultry growers, by displacing the short term financial risk of ebbs and flows in the demand for poultry onto the growers as well. This deprives poultry growers of what is supposed to be one of the chief benefits of production contracts—insulation from fluctuations in the market. Holding a grower out for longer periods of time between flocks may also be a means used by integrators to retaliate against growers.

While practices vary somewhat, it is customary to have approximately two weeks in between flocks, in order to allow the grower time to clean out the barns and perform other functions that cannot be performed while birds are housed in them. Advance notice should be required of poultry integrators before they hold poultry growers out between flocks for longer than three weeks. At five flocks per year, this would amount to approximately fifteen weeks of down time per year. A regulation requiring written notice of extended layouts 180 days in advance of the extended layout would begin to address the uncertainty and income loss experienced by contract growers as a result of current integrator practices.

A more comprehensive solution would require poultry integrators to set forth in the contract the number and size of flocks to be provided to a grower annually. Requiring advance notice of extended layouts is a much more modest proposal. GIPSA should consider whether a more comprehensive solution is warranted, based upon the unequal bargaining power and imbalance in access to information set forth in the preamble to the proposed rule.

Require Confirmation Written Notice Was Sent

CCAR and RAFI recommend removing the parenthetical phrase [pen and paper]. It is somewhat confusing. The word "written" seems self-explanatory, and more inclusive of modern communication such as typewriters and computers, though email should not be an acceptable means of providing notice of termination. Whether an email was sent and received is difficult to verify. CCAR and RAFI recommend that the written notice be required to be sent certified mail, return receipt requested.

Increase Length of Required Notice Period

The overwhelming concern of poultry growers facing termination is the question of how they will pay the mortgage if they lose their poultry contract. For many growers, the

⁴ Neil D. Hamilton, *Broiler Contracting in the United States: A Current Contract Analysis Addressing Legal Issues and Grower Concerns*, 7 DRAKE J. AGRIC. L. 43, 51 (2002).

poultry contract is their sole or primary source of income. For many growers, their homes are built upon the same parcel of land that houses their poultry barns. Thus, termination of a poultry contract threatens both the loss of their livelihood and the loss of their home. It is important to understand the gravity of this threat to individual growers to understand the devastation wrought when an integrator cancels a contract on days' notice, or simply never calls the grower to tell him or her when the next flock will be delivered.

Most growers strongly believed that 30 days notice was insufficient for growers to make plans to replace the income that would be lost with termination of a contract, or to consider new housing arrangements, if necessary. While growers had a range of suggested time frames, many suggested 180 days as a reasonable length of time for the notice period. In light of the long term risk shouldered by poultry growers, 180 days notice is not unreasonable. Following loss of a contract in many areas, growers will be hard-pressed to find another integrator with whom to contract. They may have trouble finding a buyer for the farm, if the integrator has closed or plans to close a processing plant. They will likely be unable to find off-farm income that would enable them to pay the large mortgage payment most growers need to finance their poultry barns. And most experts agree that poultry barns are difficult or impossible to retrofit to any other economic use. In the midst of all of this, they might be forced to stave off foreclosure by the lender if they are unable to make their quarterly mortgage payment. Weighed against these immediate and devastating threats to the individual poultry grower, any inconvenience or increased short term risk to the poultry integrator is negligible. Indeed, poultry growers facing termination of their contract are likely to strive to perform at their best in order to maximize their final payments.

These arguments are particularly compelling when the integrator intends to terminate the contract for reasons unrelated to the poultry grower's performance or conduct. But even where a poultry grower's performance has been below average, providing 180 days notice assigns only a small part of the burden of the unsuccessful agreement to the poultry integrator, while the poultry grower likely faces financial ruin. Of course, integrators would retain their remedies under the contract if a grower were to engage in conduct that constituted willful violation of his or her obligations under contract after the grower received notice of the integrator's intention to terminate.

Because the risk faced by a poultry integrator with respect to an individual poultry grower is a more short term risk, maintaining the 30 day notice for growers seeking to terminate the contract is reasonable. Integrators are much more readily able to adjust for any lost production from one individual grower than individual growers are able to adjust for the lost income of a poultry contract.

Greater Enforcement and Other Regulatory Changes Are Needed

The scope of the challenges is great. The challenges are longstanding and resistant to correction. Though GIPSA passed regulations to govern the accuracy of feed weights in

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2000, growers continue to report inaccurate feed weights recorded by their integrators, which leads to inaccurate payments. 65 Fed. Reg. 17758 (2000). The regulations are only as good as the enforcement behind them.

The proposed regulations are an important step forward. CCAR and RAFI look forward to GIPSA's publication of final regulations in the near future. Substantial regulatory action is needed to create a transparent, smoothly functioning marketplace in the poultry industry. CCAR and RAFI continue to hear from poultry growers of the need for additional regulatory changes. For example, growers report that additional information on the settlement sheets would enable them to evaluate whether they have been treated fairly by the poultry integrators. Growers also continue to state that fear of retaliation hampers the industry, and urge governmental action to address the unfair and deceptive practices of retaliating against growers who challenge unfairness.

CCAR and RAFI urge GIPSA to continue to engage in public dialogue and discussion in order to formulate plans to address the significant challenges in the poultry industry described in the preamble and the proposed rule.

Thank you for your consideration of these comments.

Sincerely,

FARMERS' LEGAL ACTION GROUP, INC.

/s/ Jill Krueger

Jill Krueger

Senior Staff Attorney

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