

Rules and Regulations

Federal Register

Vol. 74, No. 231

Thursday, December 3, 2009

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

9 CFR Part 201

RIN 0580-AA98

Poultry Contracts; Initiation, Performance, and Termination

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture's Grain Inspection, Packers and Stockyards Administration (GIPSA) is amending the regulations issued under the Packers and Stockyards P&S Act, 1921, as amended, (7 U.S.C. 181 *et seq.*) (P&S Act) regarding the records that live poultry dealers must furnish poultry growers, including requirements for the timing and contents of poultry growing arrangements.

The amendments to the regulations will require that live poultry dealers timely deliver a copy of an offered poultry growing arrangement to growers; include information about any Performance Improvement Plans (PIP) in poultry growing arrangements; include provisions for written termination notices in poultry growing arrangements; and notwithstanding a confidentiality provision, allow growers to discuss the terms of poultry growing arrangements with designated individuals.

DATES: *Effective Date:* January 4, 2010.

FOR FURTHER INFORMATION CONTACT: S. Brett Offutt, Director, Policy and Litigation Division, P&SP, GIPSA, 1400 Independence Ave., SW., Washington, DC 20250, (202) 720-7363, s.brett.offutt@usda.gov.

SUPPLEMENTARY INFORMATION: As the Grain Inspection, Packers and Stockyards Administration (GIPSA), one

of our functions is the enforcement of the Packers and Stockyards Act of 1921, as amended. Under authority granted to us by the Secretary of Agriculture (Secretary), we are authorized (7 U.S.C. 228) to make those regulations necessary to carry out the provisions of the P&S Act. Section 201.100 of the regulations (9 CFR 201.100) specifies the terms of the poultry growing arrangement that must be disclosed to poultry growers by poultry companies.

We believe that the failure to disclose certain terms in a poultry growing arrangement constitutes an unfair, discriminatory, or deceptive practice in violation of section 202 (7 U.S.C. 192) of the P&S Act.

It is common knowledge in the industry that because of vertical integration and high concentration, live poultry dealers normally present poultry growers with poultry growing arrangements on a "take it or leave it" basis. The poultry growers do not realistically have the option of negotiating more favorable poultry growing arrangement terms with another live poultry dealer because there may be no other live poultry dealers in the poultry grower's immediate geographic area or there may be significant differences in equipment requirements among live poultry dealers. There is considerable asymmetry of information and an imbalance in market power. Growers sometimes do not know or understand the full content of their own poultry growing arrangement with the poultry companies and are constrained by confidentiality clauses from discussing their poultry growing arrangement with business advisers. This final rule ensures that all poultry growers are fully informed and can make sound business decisions prior to entering into a poultry growing arrangement with a live poultry dealer. In addition, growers often have much of their net worth invested in poultry houses, which have limited value for purposes other than raising and caring for poultry. At the same time, live poultry dealers may have a staff of accountants, economists, attorneys and other business advisors whose job is to perform market research and advise the live poultry dealers' management on how poultry growing arrangements with poultry growers should be structured to protect the live poultry dealers' financial interests. Growers who have

invested heavily in poultry houses may face the choice of signing a poultry growing arrangements in which disclosure of terms is incomplete and/or not provided in a timely fashion or facing financial difficulties, including possibly exiting the poultry growing business or going bankrupt. In some cases, live poultry dealers already provide complete information in a timely fashion. This final rule, however, will level the playing field by requiring that all live poultry dealers adopt fair and transparent practices when dealing with poultry growers.

The failure of a live poultry dealer to deliver a written poultry growing arrangement in a timely manner is considered by GIPSA to be an unfair and deceptive practice because growers could not otherwise know what the poultry growing arrangement terms will be or whether the terms accurately reflect the agreement reached between the parties. This practice could also be considered discriminatory if some growers receive written poultry growing arrangements in a timely fashion and others do not. A live poultry dealer's failure to include written notice of termination procedures in the poultry growing arrangement and failure to provide a written notice of termination is also considered unfair, discriminatory and deceptive for the same reasons.

A live poultry dealer's failure to include information about Performance Improvement Plans (PIPs) is similarly unfair and discriminatory if some growers receive this information and others do not, and deceptive if growers are unaware that such a program exists until they fail to meet a minimum performance threshold that was not specified in their poultry growing arrangement.

GIPSA considers prohibiting growers from discussing poultry growing arrangement terms with business advisers unfair because growers are not typically attorneys or accountants. Depriving growers of professional advice before they commit to a poultry growing arrangement, particularly when the live poultry dealers have access to such advice in drafting their poultry growing arrangements, is considered unfair as well.

Current Poultry Contracting Practices

The market for poultry is vertically integrated and highly concentrated. For example, USDA-GIPSA reported in

2005 that the top four poultry slaughterers represented 53 percent of the total market share based on volume of production.¹ A majority of the nation's 20,637 poultry growers essentially receive poultry growing arrangements on a "take it or leave it" basis from a small number of live poultry dealers.² While this concentration of live poultry dealers represents certain economies of scale, it also represents a potential for asymmetrical information and a lack of transparency that can lead to market inefficiencies.

Live poultry dealers accept much of the short term financial risk. Poultry growers take the longer term financial risk by investing in the poultry houses and equipment. Live poultry dealers often use a tournament or bonus compensation system in which poultry growers compete with each other over a given period of time. Growers, who in the opinion of the live poultry dealer consistently underperform, may be placed on a PIP, have their current poultry growing arrangement terminated, or not be offered a new poultry growing arrangement or have their existing poultry growing arrangement extended.

The current contracting process may involve verbal agreements that are made prior to delivery of a written poultry growing arrangement. The process by which new poultry growers are recruited can be informal word-of-mouth, although some poultry companies solicit new growers via their Web site. Prospective poultry growers must have a line of credit sufficient to finance the construction of poultry houses in order to be a successful applicant. A live poultry dealer typically inspects a prospective grower's property to verify that the grower has sufficient space and suitable soil conditions on which to place the houses, has right of way capable of supporting truck traffic, and has means to dispose of dead birds and bird waste. The discussion between a live poultry dealer and prospective poultry growers to verify these conditions often involves verbal commitments, and therefore growers may not have a comprehensive grasp of all their rights and obligations. Likewise, growers with existing poultry growing arrangements may make similar verbal commitments for poultry house improvements to the live poultry dealer. Currently, a poultry grower may receive

specifications for the poultry houses from a live poultry dealer and use those specifications to obtain a construction loan from a lender prior to receiving a written poultry growing arrangement from the poultry company. While most new growers typically receive written poultry growing arrangements at about the same time they receive the specifications for the poultry houses, some live poultry dealers do not provide growers with written poultry growing arrangements until after construction of the poultry houses has already started.

The regulations issued under the P&S Act currently protect poultry growers by requiring that the poultry growing arrangement include, for example, the per unit charges for feed and other inputs furnished by each party, the duration of the poultry growing arrangement and conditions for its termination, and the factors to be used when grouping or ranking poultry growers.

The requirements contained in this final rule are intended to help both poultry growers and live poultry dealers by providing the growers with more information about the poultry growing arrangement at an earlier stage. This final rule will "level the playing field" by requiring live poultry dealers to include these provisions in all poultry growing arrangements. Growers will have more information upon which to decide whether to accept the terms of the poultry growing arrangement. Growers will benefit from a freer flow of information and better pricing efficiencies because they are able to discuss the terms of their poultry growing arrangement with business and financial professionals before committing to building or upgrading poultry houses. With these requirements, poultry growers will be informed of the criteria used to place them on a PIP. Live poultry dealers will benefit from having growers who better understand the obligations of their poultry growing arrangement and benefit further by having more specific contract language to resolve performance issues and the termination of their poultry growing arrangements.

Notice of Proposed Rulemaking

GIPSA published a Notice of Proposed Rulemaking in the **Federal Register** on August 1, 2007, (72 FR 41952) seeking comments on amending the regulations issued under the P&S Act to require that poultry companies timely deliver a copy of an offered poultry growing arrangement to growers; to include information about any PIPs in poultry growing arrangements; to include provisions for

written termination notices in poultry growing arrangements; and notwithstanding a confidentiality provision, allow growers to discuss the terms of poultry growing arrangements with designated individuals. The comment period ended on October 30, 2007, and we received 449 comments on the proposed rule. Based on these comments, GIPSA will modify three of the four amendments proposed.

Discussion of Comments

We received 237 postcards containing identical comments from poultry growers. While all of these commenters supported adoption of the four amendments in the proposed rule, six commenters added wording of their own in the margins of the postcards. Three of the six written comments referenced housing specification requirements and two commenters suggested that we extend the duration of poultry growing arrangements for longer periods than typically stated in existing poultry growing arrangements. Because these issues are not raised in the four amendments in our proposal, we are making no change to the final rule based on these five comments.

We received 92 letters containing identically worded comments from individuals identifying themselves as "taxpayer(s)." All comments were in support of the proposed rule, and made no suggestions for modifying the proposal.

We received 82 identical comments advocating:

- Expanding the phrase "business advisor" as used in the proposed rule, to include appraisers, realtors or other growers for the same company,
- Adding a provision prohibiting live poultry dealers from adding riders to poultry growing arrangements or otherwise changing the terms of poultry growing arrangements after the grower "sees the first [poultry growing arrangement]."
- Prohibiting the placing of growers on PIPs for factors beyond their control,
- Requiring poultry growing arrangements to include information regarding the financial consequences of placement on PIPs, and
- Requiring that live poultry dealers give poultry growers at least 180 days written notice of termination.

We received 38 additional comments from individuals and trade associations which varied in their response to our proposed amendments. These 120 additional comments are discussed below.

As stated above, commenters advocated expanding the phrase "business advisor" as used in proposed

¹ "Assessment of the Livestock and Poultry Industries, FY 2006 Report" <http://archive.gipsa.usda.gov/pubs/06assessment.pdf>.

² Data compiled from live poultry dealer annual reports filed with GIPSA.

§ 201.100(b) to include appraisers, realtors, or other growers for the same live poultry dealer. We are not in favor of adding appraisers and realtors to the list of those with whom growers may discuss their poultry growing arrangements. We believe that appraisers and realtors should not look to a current grower's poultry growing arrangement for guidance on property values.

We see no benefit for a live poultry dealer to forbid its growers from discussing the terms of their poultry growing arrangements with each other. To do so would impede the growers' ability to determine whether they have been treated unfairly or discriminated against in violation of the P&S Act. We will therefore include poultry growers who have entered into poultry growing arrangements with the same live poultry dealer in the final rule based on the comment received.

One commenter suggested that we add family members, banks and anyone on a need-to-know basis to the list of "business advisors" in proposed § 201.100(b). Another suggested that we allow growers to discuss their contracts with attorneys and farmer organizations. Section 10503 of the Farm Security and Investment Act of 2002 (7 U.S.C. 229b) clearly sets forth that a party to the poultry growing arrangement shall not be prohibited from discussing any terms or details of the poultry growing arrangement with: (1) A Federal or State agency; (2) a legal advisor 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. We believe that, with the exception of farmer organizations and poultry growers who have entered into poultry growing arrangements with the same live poultry dealer, the groups enumerated in the proposed regulation encompass those named by the commenters. While we are not including farmer organizations in the final rule, we are adding poultry growers who have entered into poultry growing arrangements with the same live poultry dealer. The remaining individuals and groups named in the regulation reflect those named in the statute. We consider "Immediate family" to mean an individual's father, mother, stepfather, stepmother, brother, sister, stepbrother, stepsister, son, daughter, stepson, stepdaughter, grandparent, grandson, granddaughter, father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, the spouse of the foregoing, and the individual's spouse in accordance

with the definition under the Federal crop insurance program, administered by USDA's Farm Service Agency.

Commenters suggested that we add a provision to proposed § 201.100(a) to prohibit live poultry dealers from adding riders to poultry growing arrangements or otherwise changing the terms of poultry growing arrangements after the grower "sees the first one." We believe that the switching of poultry growing arrangements after the grower "sees the first one" is not a common problem in the poultry industry. The final rule, however, will require that live poultry dealers give growers a "true written copy" of the offered poultry growing arrangement. Some poultry growing arrangements are flock-to-flock agreements. A true written copy of a poultry growing arrangement must cover the production of at least one flock. If a live poultry dealer makes changes to the original poultry growing arrangement, or substitutes a new poultry growing arrangement for the "true written copy" that was provided at the same time as the house specifications, but prior to picking up a new grower's first flock, there is a basis for questioning whether the original poultry growing arrangement is the "true written copy" of the parties' agreement. Based on the above analysis of these comments, we believe that no change to the final rule is necessary.

A comment received from a poultry grower organization requested that we require a live poultry dealer to disclose fully the existence (or the lack thereof) of the company's PIP program in its poultry growing arrangements. A comment filed by another suggested that all original poultry growing arrangements disclose fully a live poultry dealer's PIP information. The commenter stated that a live poultry dealer should not be able to add riders containing PIP clauses to existing poultry growing arrangements. We have reviewed our proposal and agree with the comments. We will therefore modify § 201.100(c) in the final rule to require that a live poultry dealer specifically disclose in all future poultry growing arrangements whether it has a PIP program in existence and the guidelines for the program.

Commenters advocated prohibiting live poultry dealers from placing growers on PIPs for factors beyond their control. We acknowledge that all growers run the risk of having a flock perform poorly for reasons they may not control. We have found that placement on a PIP, however, generally does not occur unless a grower performs poorly over an extended period of time. If a poultry grower believes a live poultry

dealer systematically has manipulated inputs to the grower's disadvantage, GIPSA can investigate the grower's complaint. However, prohibiting live poultry dealers from placing growers on PIPs because of factors beyond the control of growers is vague and could result in both growers and live poultry dealers being uncertain of when PIPs are justified, and are so subjective that GIPSA might be asked to investigate every PIP placement made. Moreover, it is impractical for us to attempt to list every possible factor not under the control of growers that could negatively affect performance. We are therefore making no change to § 201.100(c) in the final rule based on these comments.

Comments received recommended that we require that live poultry dealers state in their poultry growing arrangements the financial impact poultry growers would face if placed on a PIP. We have found that live poultry dealers often place smaller flocks on the farms of poultry growers on PIPs. This may allow these growers to manage a flock more easily and efficiently. Poultry growers on PIPs may experience other adjustments to normal practices intended to help them prepare fully for raising and caring for poultry. These changes, while helping to improve performance, may reduce payouts to PIP growers. We believe that poultry growers need to know what changes to normal practices will occur when placed on a PIP so they may better judge how placement on a PIP will affect them.

One association commented that advanced notice of termination would be especially problematic and impractical to implement for growers on PIPs. In most cases, they said, the decision to terminate a grower could not be made until the last flock had been picked up, processed and the results analyzed. This rule would allow the live poultry dealer to follow through on the PIP, including picking up and processing the flock before making a decision regarding whether the grower met the conditions of the PIP. If the grower did not meet the conditions of the PIP, the live poultry dealer would then provide notice of termination. The notification that the grower did not meet the PIP and the termination notice would be sent at the same time. Allowing a live poultry dealer to provide written termination notices to a grower on a PIP after picking up the last flock would not allow the PIP grower sufficient time to establish business relationships with other live poultry dealers. GIPSA believes poultry growers on PIPs should receive advance written notice of termination in the same

manner prescribed for poultry growers not on PIPs. Therefore, GIPSA will make no change to the final rule based on the above comment.

Commenters requested that we modify our proposal to require that poultry growers receive written notice of termination at least 180 days in advance of the date the termination would be effective. The majority of the comments submitted recommended that poultry growers receive a minimum of 180 days written termination notice. Another commenter wrote that he/she typically receives only 10 days notice of termination, but the commenter did not specifically suggest what the minimum number of days should be. The minimum number of days of advance written notice of termination recommended by other commenters ranged from 30 days to 2 years. Lastly, one commenter recommended that we prohibit the termination of poultry growing arrangements for growers with federally guaranteed loans.

Most poultry growing arrangements contain clauses that state that the live poultry dealer will provide written notice of termination to growers. We have found in most cases that these clauses provide a minimum number of days advance notice of termination that a grower will receive under the poultry growing arrangement. The minimum number of days varies from 3 to 30 days prior to picking up the final flock, or prior to the anticipated delivery date for the next flock.

The majority of comments to the notice of proposed rulemaking indicate 30 days advance notice of termination is insufficient to allow poultry grower's time to make other business arrangements. The majority of the commenters recommended that we change the time period for requiring advance written notice of termination from 30 days to 180 days. On review, we agree that 30 days is not sufficient enough time to provide an opportunity for a live poultry dealer or grower to make business adjustments. However, we believe that 180 days is too long and may be a burden on the party that intends to terminate the agreement. In reviewing the concerns raised by the comments that advocated the 180 day period, we believe that 90 days advance written notice of termination should be adequate in order to give the affected parties time to make adjustments in their business operations. This is especially important given the long-term financial risks that an affected party may face. This change will provide the grower with more time to work with the live poultry dealer to improve his/her performance, obtain legal and/or

financial advice or guidance, obtain a new contract with a new live poultry dealer, and/or sell his/her poultry growing business. We are therefore changing § 201.100(h) in the final rule based on the comments discussed above to require that written termination notices be provided by one party to the other at least 90 days prior to the effective date of termination of the poultry growing arrangement.

Many commenters suggested that we expand the requirements for written termination notices to include situations in which a live poultry dealer discontinues an existing poultry growing arrangement, or elects not to renew or replace an expiring poultry growing arrangement. The commenters said that the requirement for written termination notices should encompass all situations where one party ends the poultry growing relationship. In our reviews of agreements, we have found that poultry growing arrangements have a set duration, such as 1-year or flock-to-flock. We believe that our proposed amendment works well in situations where one party chooses to end the poultry growing arrangement before the termination date noted in the arrangement. A live poultry dealer could also end its relationship with a grower by simply allowing a poultry growing arrangement to expire without renewal or offer of replacement. A live poultry dealer may also discontinue the use of an established poultry growing arrangement and offer a different agreement in its place—one that the poultry grower may or may not accept. Requiring written notice of termination in all situations where one party elects to end the poultry growing relationship would ensure that a grower is informed when termination is imminent no matter what manner or reason is used for termination. Under these circumstances, we will modify § 201.100(h) in the final rule to require written notice of termination in instances of a poultry growing arrangement's termination, expiration, non-renewal and non-replacement.

Many commenters recommended that we remove language referencing "pen and paper" in proposed § 201.100(h). The commenters believe that the reference to "pen and paper" is confusing and that the term "written" is sufficient. We agree with the commenters that the phrase could be confusing and will modify the amendment in the final rule to delete the phrase "pen and paper."

Commenters also urged GIPSA to require that the delivery of written termination notices be made by certified mail, return receipt requested. The

commenters argued that e-mail terminations were not acceptable because verifying that an e-mail was sent and received is difficult.

Our proposal requires that live poultry dealers "provide" poultry growers with written termination and does not favor one mode of delivery over another. We believe that any mode of delivery, whether it is by regular mail, certified mail, registered mail, overnight mail, e-mail, facsimile, or personal service is acceptable as long as notice is "provided." Proof that written notice was "provided" is the responsibility of the live poultry dealer. GIPSA's past poultry investigations reveal that most live poultry dealers send written termination notices by verified delivery means. We believe that live poultry dealers should not be restricted to a specific mode of delivery of a notice of termination. Therefore, we are making no change to the final rule based on the above comments.

One comment suggested that growers should receive less than 30 days written advance notice of termination. That commenter was concerned that once a live poultry dealer gave notice of the termination of a poultry growing arrangement for cause, the grower would neglect the flocks in its possession. Poultry growing arrangements contain clauses allowing live poultry dealers to enter upon the property of poultry growers in order to raise and care for flocks that the live poultry dealer believes may not be receiving adequate care. Once written termination notice is provided to the poultry grower, if the live poultry dealer believes the poultry grower is not providing sufficient care, the live poultry dealer can exercise its right to raise and care for the flock. We will therefore not modify § 201.100(h) in the final rule to permit a shorter period for advance notice of termination as suggested.

According to one commenter, growers should have 14 days to accept or reject a new or the renewal of an existing poultry growing arrangement. We believe that a 14-day rejection period is unnecessary provided that the grower receives a true written copy of the offered poultry growing arrangement from the live poultry dealer at the time that the grower receives the poultry house specifications for the offered poultry growing arrangement. This should give the grower sufficient time to read the poultry growing arrangement, consult with advisors, and decide whether to sign the poultry growing arrangement before committing to loans. Therefore, we are making no change to the final rule based on the comment.

The commenter agreed with the proposed rule for timely delivery of poultry growing arrangements to growers presented in the August 1, 2007 notice. The commenter, however, suggested in this same section that we also require that subsequent changes to poultry growing arrangements, whether in oral or written form, be incorporated into a new true written complete copy and presented as a new offer of a poultry growing arrangement, not as a unilateral change to the existing poultry growing arrangement. Because this suggestion is outside the scope of our proposal for the timely delivery of poultry growing arrangements to growers, we are making no change to the final rule based on the comment.

One commenter recommended that we require that live poultry dealers provide growers with a letter of intent or written approval of a grower in addition to the poultry growing arrangement. Another commenter recommended that we also require delivery of letters of intent or written grower approvals at the same time the live poultry dealer provides the poultry house specifications. While a letter of intent is a written record of a live poultry dealer's intention to sign or enter into a poultry growing arrangement with a grower, we believe that the poultry growing arrangement would contain the substantive information that a grower would need in order to decide if he/she will grow poultry for a live poultry dealer. Also, linking the delivery of poultry growing arrangements with receiving a letter of intent would not necessarily guarantee that the prospective grower would receive his/her poultry growing arrangement before committing to a construction loan for poultry houses. We believe that the delivery of a poultry growing arrangement should instead be linked to the receipt of the poultry house specifications so that a grower is assured of his/her contractual relationship with the live poultry dealer prior to financing a construction loan. We are therefore making no changes to § 201.100(c) in the final rule based on these comments.

One comment argued that it is not necessary to require that live poultry dealers deliver poultry growing arrangements at the time written house specifications are delivered. The commenter said that provisions for delivery are normally addressed in poultry growing arrangements between live poultry dealers and growers. Since we have received numerous complaints regarding the slow delivery of poultry growing arrangements, we continue to believe that our proposed amendment

regarding the timing of the delivery of poultry growing arrangements is needed. We are therefore making no change to the final rule based on that comment.

One organization said that we should require that live poultry dealers give growers information about the feed and medications supplied to them. They also wanted growers on PIPs to have the right to reject flocks. One individual argued that live poultry dealers should be required to let growers see the hatchery and mortality records of other growers in their settlement groups so they could judge the fairness of the performance rankings. We are not requiring that live poultry dealers provide information on feed, medications, hatchery origins or mortality rates of poultry growers by other growers. If a poultry grower believes a live poultry dealer has systematically manipulated inputs to the grower's disadvantage, the grower may choose to report their complaint to GIPSA for investigation. Furthermore, these issues go beyond the scope of the subject matter of the proposed rule. We are therefore making no change to the final rule based on this comment.

Finally, the amendments in the proposed rule for "Written Termination Notice; furnishing, contents" listed three items that termination notices must contain. In addition, the phrase, "In the case of termination * * *," was inadvertently included in the proposed regulatory text and will be removed from § 201.100(h) in the final rule. The authority citation in the proposed rule has also been revised in the final rule to reference the entire P&S Act (7 U.S.C. 181–229c) as the authorizing statute. The authority citation has been further revised in the final rule to delete references to 7 CFR 2.22 and 2.81, which refer to the delegation of authority of the Secretary of Agriculture to administer the P&S Act to the Under Secretary for Marketing and Regulatory Programs, and to further delegate that authority to the Administrator of GIPSA, respectively. For clarity and consistency with the statutory definition of a poultry growing arrangement, we are also replacing the term "contract" with the term "poultry growing arrangement" everywhere the word "contract" appears throughout the final rule. In addition, proposed new paragraph (h) has been revised in the final rule into (h), (h)(1), (h)(1)(i), (h)(1)(ii), (h)(1)(iii), and (h)(2) in order to make the regulatory text clearer.

Executive Order 12866 and Regulatory Flexibility Act

This final rule has been determined to be significant for the purposes of Executive Order 12866, and therefore, has been reviewed by the Office of Management and Budget.

We have prepared an economic analysis for this final rule. The economic analysis provides a cost-benefit analysis, as required by Executive Order 12866. The provision in this final rule addresses the records that live poultry dealers must furnish poultry growers, including the requirements for the timing and contents of poultry growing arrangements. Vertical integration and high concentration in the poultry industry cause considerable asymmetry of information, lack of transparency, and an imbalance in market power.

The asymmetry of information at the time of contract negotiation, and the initial fixed investments poultry growers must pay to enter into the poultry growing business, make the typical grower vulnerable to hold-up costs.³ Hold-up costs arise in poultry production because of the relatively high fixed costs incurred by poultry growers for poultry houses that have no value outside of poultry production.⁴ For example, without full and timely information, the poultry grower may not be able to negotiate compensation rates that effectively cover all costs, including annualized depreciation on its fixed investment. An incentive exists for the live poultry dealer to compensate the grower at a rate that covers all but a portion of the grower's annualized depreciation cost.⁵ The poultry grower has no recourse after signing a contract with a live poultry dealer but is responsible for a large investment. The poultry grower cannot likely sell the investment and leave the business because a poultry house has no value outside the poultry business. If the poultry grower chooses to stay in business, however, the grower may

³ Nigel Key and Jim M. MacDonald. "Local Monopsony Power in the Market for Broilers? Evidence from a Farm Survey" selected paper American Agri. Economics Assn. meeting Orlando, FL, July 27–29, 2008.

⁴ The empirical evidence for hold-up costs is discussed by T. Vukina and P. Leegomonchai in "Oligopsony Power, Asset Specificity, and Hold-up: Evidence from the Broiler Industry", *Amer. J. of Agri. Economics*, pp. 589–605, Aug., 2006. A general discussion of the hold-up problem by Paul Milgrom and John Roberts is found in "Economics, Organization, and Management" pg. 136, 1992.

⁵ Rachael E. Goodhue, Gordon C. Rausser, and Leo K. Simon discuss poultry contracts and grower compensation issues in: "Understanding Production Contracts: Testing Agency and Theory Model" selected paper American Agri. Economics meetings Salt Lake City, UT, May 15, 1998.

learn too late that its earnings will not cover as much of the costs as originally expected.

Poultry growers have few options for negotiating more favorable contract terms among live poultry dealers because of geographic distance or equipment requirements. Growers often have much of their net worth invested in poultry houses, which have limited value for purposes other than raising and caring for poultry. And, without full and timely information, growers sometimes do not know or understand the full content of their own poultry growing arrangements with the live poultry dealers and are constrained by confidentiality clauses from discussing their terms with business advisers. These factors combined lead to market failures that cannot be resolved through private treaty negotiation to achieve an efficient market solution.⁶ GIPSA believes that § 201.100(b) of this final rule will free poultry growers from these constraints by allowing them to discuss the terms of their poultry growing arrangements with business and financial advisers. By fostering the flow of business and financial information to growers, this final rule will lead to greater pricing efficiencies in the poultry industry.

GIPSA has considered and collected input on potential alternative and believes that no viable alternatives to this final rule exist. This final rule imposes on live poultry dealers primarily office costs (e.g. revising poultry growing arrangements). GIPSA believes that these costs will be significantly less than the benefits that will be achieved from a reduction in general market inefficiencies.

Copies of the analysis are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT** or on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov).

The Small Business Administration (SBA) defines small businesses by its North American Industry Classification System Codes (NAICS).⁷ The affected entities and size threshold under this final rule are defined by the SBA under

NAICS codes, 112320 and 112330, broiler and turkey producers, respectively, if sales are less than \$750,000 per year. Live poultry dealers, NAICS code 31165, are considered small businesses if they have fewer than 500 employees.

GIPSA maintains data on live poultry dealers from the annual reports that these firms file with the agency. Currently, there are 140 live poultry dealers (all but 16 are also poultry slaughterers and would be considered poultry integrators) that will be subject to this final rule. According to U.S. Census data on County Business Patterns, there were 64 poultry slaughterers/firms that had more than 500 employees in 2006. The difference yields approximately 75 poultry slaughterers/integrators with fewer than 500 employees and would be considered as small business that will be subject to this final rule.

Another factor, however, which is important in determining the economic effect of the regulations, is the number of poultry growing arrangements held by a live poultry dealer. Poultry growers enter into a poultry growing arrangement with one live poultry dealer, whereas a live poultry dealer may have a number of poultry growing arrangements with many growers. While growers may have sophisticated growing facilities, many are independent family owned businesses that are focused on growing poultry to the specifications outlined in their poultry growing arrangements. Most live poultry dealers, however, are much larger integrated commercial entities that breed, hatch, slaughter and process poultry for the retail market. Given the business size differential between a poultry grower and a live poultry dealer and the regional monopsony power a live poultry dealer may have, the live poultry dealer has much more information to consider when establishing the terms of and entering into a poultry growing arrangement. The live poultry dealer is much more likely to have a staff of financial and business advisers on which to rely. By contrast, the poultry grower operating under an existing poultry growing arrangement may not be allowed to share the terms of the poultry growing arrangement with its advisers.

GIPSA records for 2007 indicated that there were 20,637 poultry growing arrangements of which 13,216, or 64 percent, were held by the largest 6 live poultry dealers, and 95 percent (19,605) were held by the largest 21 live poultry dealers. These 21 live poultry dealers are all in SBA's large business category, whereas the 19,605 poultry growers

holding the other side of the poultry growing arrangement are all small businesses by SBA's definitions. The situation in general for the nation's poultry growers operating under poultry growing arrangements is that the growers are almost all small businesses with a poultry growing arrangement held by one of the very large live poultry dealers. To illustrate the magnitude in size differences between the growers and the live poultry dealer, using grower gross sales revenue of \$750,000 per year and the average gross sales revenue of three of these very large live poultry dealers, yields a ratio of roughly 1:23,000. We believe that providing poultry growers with the ability to discuss the terms of their poultry growing arrangements with business and financial advisers will enable the growers to make more informed decisions as they negotiate the terms of their poultry growing arrangements with the live poultry dealer. This final rule will help to level the playing field for poultry growers by providing them with access to financial and business information and advice that is accessible to live poultry dealers, and therefore will help to balance market asymmetric inequities.

Although the costs and benefits are largely intangible, GIPSA believes that the costs to both poultry growers and live poultry dealers firms will be essentially negligible. This final rule does not impose significant additional requirements on the actions firms must enact; merely the timeliness of those actions. While this final rule requires that poultry growers and live poultry dealers commit in writing to terms and conditions that are already in effect, it does not mandate what those terms and conditions must be. Thus, the only additional cost is simply the cost of producing and transmitting the printed document. GIPSA did not receive any comments from live poultry dealers or others that suggested that there would be any significant costs of implementing the provisions in this final rule.

Collectively, the provisions in this final rule mitigate potential asymmetries of information between poultry growers and live poultry dealers, which lead to better decisions on the terms of compensation and reduce the potential for expressions of anti-competitive market power. The provisions in this final rule achieve this primarily through improved quality and timeliness of information to poultry growers, and to some extent to live poultry dealers as well. Benefits will accrue to growers from an improved basis for making the decision about whether to enter into a poultry growing arrangement, and from

⁶ Paul Milgrom and John Roberts discuss market failure arising in the context of property rights imperfection as developed here in "Economics, Organization, and Management", 1992, Chap. 9, Ownership and Property Rights. Note, for perfectly efficient property rights structures resources must be privately held and entitlements completely specified. All benefits and costs of ownership accrue to the owner. All property rights are transferable from one owner to another in voluntary exchange. And all rights from ownership are enforceable and secure from involuntary seizure.

⁷ See: http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.

additional time available to plan for any adjustments in instances when the grower is subject to termination of a poultry growing arrangement. GIPSA also believes that live poultry dealers will also benefit from this final rule because all live poultry dealers will be required to provide poultry growers the same information in a full and timely manner. Disclosure of this information between the live poultry dealer and the poultry grower will lead to greater transparency in the poultry industry and promote fairer competition among live poultry dealers. In addition, GIPSA believes that net social welfare will benefit from improved accuracy in the value (pricing) decisions involved in transactions between poultry growers and live poultry dealers as they negotiate poultry growing arrangements.

Based on the discussion in the analysis above, GIPSA therefore has determined that the effect on all small businesses will not have a significant economic impact on a substantial number of small business entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. These actions are not intended to have retroactive effect. This final rule will not pre-empt state or local laws, regulations, or policies, unless they present an irreconcilable conflict. There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this final rule.

Paperwork Reduction Act

This final rule does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). It does not involve collection of new or additional information by the federal government.

Government Paperwork Elimination Act Compliance

We are committed to compliance with the Government Paperwork Elimination Act, which requires Government agencies provide the public with the option of submitting information or transacting business electronically to the maximum extent possible.

List of Subjects in 9 CFR Part 201

Contracts, Poultry and poultry products, Trade practices.

■ For the reasons set forth in the preamble, we amend 9 CFR part 201 to read as follows:

PART 201—REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 7 U.S.C. 181–229c.

■ 2. Amend § 201.100 to redesignate paragraphs (a), (b), (c), (d), and (e) as (c), (d), (e), (f) and (g); add new paragraphs (a), (b), (c)(3), and (h); remove “and” at the end of newly designated paragraph (c)(1), remove “.” at the end of newly designated paragraph (c)(2)(v), add “; and” at the end of newly designated paragraph (c)(2)(v), and revise the introductory text of newly designated paragraph (c) to read as follows:

§ 201.100 Records to be furnished poultry growers and sellers.

(a) *Poultry growing arrangement; timing of disclosure.* As a live poultry dealer who offers a poultry growing arrangement to a poultry grower, you must provide the poultry grower with a true written copy of the offered poultry growing arrangement on the date you provide the poultry grower with poultry house specifications.

(b) *Right to discuss the terms of poultry growing arrangement offer.* As a live poultry dealer, notwithstanding any confidentiality provision in the poultry growing arrangement, you must allow poultry growers to discuss the terms of a poultry growing arrangement offer with:

- (1) A Federal or State agency;
- (2) The grower's financial advisor or lender;
- (3) The grower's legal advisor;
- (4) An accounting services representative hired by the grower;
- (5) Other growers for the same live poultry dealer; or
- (6) A member of the grower's immediate family or a business associate. A business associate is a person not employed by the grower, but with whom the grower has a valid business reason for consulting with when entering into or operating under a poultry growing arrangement.

(c) *Contracts; contents.* Each live poultry dealer that enters into a poultry growing arrangement with a poultry grower shall furnish the grower with a true written copy of the poultry growing arrangement, which shall clearly specify:

- * * * * *
- (3) Whether a performance improvement plan exists for that grower, and if so specify any performance improvement plan guidelines, including the following:

(i) The factors considered when placing a poultry grower on a performance improvement plan;

(ii) The guidance and support provided to a poultry grower while on a performance improvement plan; and

(iii) The factors considered to determine if and when a poultry grower is removed from the performance improvement plan and placed back in good standing, or when the poultry growing arrangement will be terminated.

* * * * *

(h) *Written termination notice; furnishing, contents.*

(1) A live poultry dealer that ends a poultry growing arrangement with a poultry grower due to a termination, non-renewal, or expiration and subsequent non-replacement of a poultry growing arrangement shall provide the poultry grower with a written termination notice at least 90 days prior to the termination of the poultry growing arrangement. Written notice issued to a poultry grower by a live poultry dealer regarding termination shall contain the following:

- (i) The reason(s) for termination;
- (ii) When the termination is effective; and
- (iii) Appeal rights, if any, that a poultry grower may have with the live poultry dealer.

(2) A live poultry dealer's poultry growing arrangement with a poultry grower shall also provide the poultry grower with the opportunity to terminate its poultry growing arrangement in writing at least 90 days prior to the termination of the poultry growing arrangement.

J. Dudley Butler,

Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. E9–28947 Filed 12–2–09; 8:45 am]

BILLING CODE 3410-KD-P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 741

RIN 3133-AD63

National Credit Union Share Insurance Fund Premium and One Percent Deposit

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: Section 741.4 of NCUA's rules describes the procedures for the capitalization and maintenance of the National Credit Union Share Insurance