

“Regulatory Freeze” notice puts scheduled GIPSA rules on ice

This past December the Grain Inspection, Packers and Stockyards Administration (GIPSA) issued an “interim final rule; request for comments” titled, “Scope of Sections 202(a) and (b) of the Packers and Stockyards Act [PS Act],” and two proposed rules, “Poultry Grower Ranking Systems” and “Unfair Practices and Undue Preference in Violation of the Packers and Stockyards Act.” These rules are the consequence of a “proposed rule published in the Federal Register on June 22, 2010” and a final rule published on December 9, 2011.

“Prior to issuing the initial proposed regulations in 2010, GIPSA held three public meetings in October 2008, in Arkansas, Iowa, and Georgia to gather comments, information, and recommendations from interested parties.” A year-and-a-half later the “USDA and the Department of Justice held five joint public workshops to explore competition issues affecting agricultural industries in the 21st century and the appropriate role for antitrust and regulatory enforcement in those industries.”

We covered the issues surrounding the enforcement of GIPSA rules that protect livestock producers from unfair practices by the processing and packing industry in articles we published in June, July, August, and November 2010 (<http://tinyurl.com/mrst2v4>); September and December 2011 (<http://tinyurl.com/kf75w8o>); and January 2012 (<http://tinyurl.com/kr9254c>).

These rules were never fully finalized because in the “fiscal year (FY) 2012 appropriations act, USDA was precluded from finalizing some of the regulations as proposed in June 2010.” This restriction was included in subsequent appropriation acts through FY 2015. In FY 2015 the Secretary of Agriculture was required by an act of Congress to rescind part of the 2011 final rule.

“Neither the FY 2016 appropriations act nor the FY 2017 continuing appropriations act precludes GIPSA from publishing §§ 201.3(c), 201.210, 201.211, or 201.214 as final rules.” Thus, GIPSA published the interim final rule and the two proposed rules.

“Section 202 of the P&S Act provides that ‘[i]t shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry’ to engage in certain prohibited conduct. Section 202(a) prohibits ‘any unfair, unjustly discriminatory, or deceptive practice or device.’ Section 202(b) prohibits ‘any undue or unreasonable preference or advantage’ or ‘any undue or unreasonable prejudice or disadvantage.’”

“As [GIPSA] explained in the proposed rule, the longstanding agency position that, in some cases, a violation of section 202(a) or (b) can be proven without proof of likelihood of competitive injury is consistent with the language and structure of the P&S Act, as well as its legislative history and purposes. Neither section 202(a) nor section 202(b) contains any language limiting the application of those sections to acts or practices that have an adverse effect on competition, such as acts ‘restraining commerce.’ Instead, these provisions use terms including ‘deceptive,’ ‘unfair,’ ‘unjust,’ ‘undue,’ and ‘unreasonable’—which are commonly understood to encompass more than anticompetitive conduct.”

GIPSA issued the interim final rule to clarify its interpretation of the language of 202(a) and (b) because “four courts of appeals have disagreed with USDA’s interpretation of the P&S Act and have concluded...that plaintiffs could not prove their claims under sections 202(a) and/or (b) without proving harm to competition or likely harm to competition. In the interim final

rule, GIPSA listed a number of unfair practices including false weighing and retaliatory behavior that had an adverse impact on livestock and/or poultry producers but did not have an adverse effect on competition.

The agency also issued the two proposed rules to clarify its position on poultry grower ranking systems as well as unfair practices and undue preferences that it considered to be in violation of the P&S Act.

The interim final rule was to go into effect on February 21, 2017 while accepting comments on the interim final rule until that same date. The same date was set for the two proposed rules.

On February 7, 2017, the new administration issued a notice of delay of the effective date and extension of the comment period, until March 24, 2017, for the interim final rule, “Scope of Sections 202 (a) and (b) of the Packers and Stockyards Act. In explaining the change, GIPSA wrote delay was “Consistent with the memorandum of January 20, 2017, to the heads of executive departments and agencies from the Assistant to the President and Chief of Staff entitled ‘Regulatory Freeze Pending Review.’”

It also issued an extension of the comment period for the “Poultry Grower Ranking Systems” and “Unfair Practices and Preferences in Violation of the Packers and Stockyards Act” proposed ruled using the same rationale.

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