

DEPARTMENT OF AGRICULTURE

**Grain Inspection, Packers and Stockyards Administration**

**9 CFR Part 201**

**RIN: 0580-AB07**

**Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Suspension of Delivery of Birds, Additional Capital Investment Criteria, Breach of Contract, and Arbitration**

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

**ACTION:** Final rule.

**SUMMARY:** The U.S. Department of Agriculture (USDA) Grain Inspection, Packers and Stockyards Administration (GIPSA) is amending the regulations issued under the Packers and Stockyards Act, 1921, as amended and supplemented (P&S Act). GIPSA is amending the regulations to clarify conditions for industry compliance with the P&S Act pursuant to the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill). In response to comments and other public input received in response to the proposed rule published in the *Federal Register* on June 22, 2010, making necessary changes. The provisions finalized with this action will clarify conditions for industry compliance with the P&S Act. Other provisions listed in the June 22, 2010, proposed rule are not being finalized at this time.

**DATE:** This rule is effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** 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:**

The supplemental information of this final rule is composed of four sections. Section I provides a background of the rulemaking. Section II provides a summary of provisions not being finalized by this action. Section III provides a summary of provisions being finalized. Section IV provides a summary of the comments received on the proposed rule and at the relevant USDA/Department of Justice (DOJ) Joint Competition workshops that occurred during the comment period and describes how sections of the proposed rule have been modified based on these comments. Section V provides the revised impact analyses including those required by Executive Orders 12866 and 13563, the Regulatory Flexibility Act, and the Paperwork Reduction Act.

**I. Background**

**The P&S Act, As Amended by the 2008 Farm Bill**

The P&S Act was enacted in 1921 “to comprehensively regulate packers, stockyards, marketing agents and dealers.”<sup>1</sup> The P&S Act provides that “[t]he Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter.”<sup>2</sup> The P&S Act also sets forth procedures for administratively adjudicating certain enforcement actions.<sup>3</sup> Title XI of the 2008 Farm Bill requires the Secretary of Agriculture to issue a number

---

<sup>1</sup> *Hays Livestock Comm’n Co. v. Maly Livestock Comm’n Co.*, 498 F.2d 925, 927 (10th Cir. 1974).

<sup>2</sup> *Id.* section 408.

<sup>3</sup> *Id.* sections 203, 309, 411..

of regulations under the P&S Act, 1921, as amended. Among these instructions, the 2008 Farm Bill directed the Secretary to identify criteria to be considered in determining:

- whether an undue or unreasonable preference or advantage has occurred in violation of the Act;
- whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement;
- when a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of the Act;
- if a live poultry dealer or swine contractor has provided a reasonable period of time for a poultry grower or a swine production contract grower to remedy a breach of contract that could lead to termination of the poultry growing arrangement or swine production contract; and
- whether the arbitration process provided in a contract provides a meaningful opportunity for the grower or producer to participate fully in the arbitration process.

In addition to developing criteria, the 2008 Farm Bill provided that livestock and poultry contracts must specifically disclose the right of the contract producer or grower to decline the requirement to use arbitration to resolve any controversy that may arise under the livestock or poultry contract.

On June 22, 2010, GIPSA published a Notice of Proposed Rulemaking in the *Federal Register* that proposed language for implementing both the Farm Bill provisions described above

and a number of discretionary provisions, including a ban on packer-to-packer livestock sales, a requirement that dealers disclose their contracts, and more. Some of these provisions proved to be controversial, and the rule attracted more than 61,000 comments from the public (discussed below). As a result of information obtained from the public, GIPSA has reconsidered each of its proposed provisions. GIPSA has opted not to finalize some of those provisions at this time; others are finalized with changes. We will discuss in detail which provisions are finalized by this action, which are not, and the input we received from the public.

## **II. Summary of Provisions Not Being Finalized**

### *Value-Added Production and Premiums*

The proposed rule included several provisions related to the potential use of price premiums and related types of contracts such as marketing agreements in a manner that are potential violations of the P&S Act. However, comments identified a number of concerns raised by the proposed regulations related to price premiums and defining certain production arrangements. Specifically, many felt that, taken together, the proposed regulations would increase the potential for litigation thereby jeopardizing the continued use of these agreements. The rapid growth of value-added segments of the livestock industry based on alternative marketing agreements (e.g. breed certifications, source verification, production method certification) has been beneficial for many producers and supported by consumer demand. GIPSA did not intend to limit the use of such arrangements and we determined this final rule would not include sections relating to price premiums and marketing agreements. This includes subsection 201.211(b) of the proposed rule. Related definitions in the proposed rule (i.e., "Forward Contract," "Marketing Agreement," and "Production Contract," proposed in sections

201.2(q), (r) and (s)) are also not being finalized at this time as the sections with which the definitions were associated are not included in this final rule.

#### *Recordkeeping*

Section 201.94(b) of the proposed rule that would have required packers, swine contractors and live poultry dealers to retain records justifying differential pricing decisions is not included in this final rule. As with sections related to price premiums, many comments suggested this requirement would contribute to a potential unintended consequence of eliminating or reducing the practice of offering price premiums.

While many comments indicated this requirement would have required the creation of new records, this was not the intention of the proposed rule. While this final rule does not contain the proposed changes regarding recordkeeping, this does not change the existing recordkeeping requirements. We expect covered entities to continue to comply with the existing requirements of 7 U.S.C. 221.

#### *Packer-to-Packer Sales and Relationships with Dealers*

Section 201.212 related to packer-to-packer sales and packer relationships with dealers will not be finalized. Although some comments supported inclusion of these provisions, many comments raised serious concerns about potential adverse effects on the marketplace, such as encouraging further vertical integration and reducing the number of dealers and other buyers. While this section will not be finalized, we expect covered packers and dealers to continue to comply with the related portions of the Act (7 U.S.C. 192 c-g) and existing regulations (9 CFR 201.69-70).

#### *Prohibitions and Requirements Related to Capital Investments*

While section 201.217 of the proposed rule establishing specific requirements related to capital investments is not included in this final rule, the criteria required by the 2008 Farm Bill are being finalized, in modified form. Considering the variation that exists with respect to capital investments and payment terms in contracts, we believe stating criteria that the Secretary may use to determine whether certain terms in arrangements and contracts are in violation of the P&S Act is more appropriate. The associated definition of “Capital Investment” (proposed section 201.2(n)) will also not be included in this final rule.

*Definition of Competitive Injury and Likelihood of Competitive Injury*

Sections 201.2(t) and (u) of the proposed rule provided definitions for “competitive injury” and “likelihood of competitive injury” in an attempt to provide more clarity on the meaning of these terms. These definitions are not necessary for the purposes of this final rule and therefore are not included.

*Applicability of Contracts*

We believe this paragraph is unnecessary considering the sections related to price premiums and discounts are not included in the final rule. To avoid confusion over whether GIPSA regulations cover transactions between non-subject entities, we are deleting this paragraph from this final rule.

*Scope of Section 202(a) and (b)*

Comments were sharply divided with respect to proposed provision 201.3(c) with respect to harm to competition. Those supporting the proposal pointed out it would provide legal relief for farmers and ranchers who suffer because of unfair actions, such as false weighing and retaliatory behavior, without having to show competitive harm. Opposing comments relied

heavily on the fact that several of the United States Courts of Appeals have ruled that harm to competition (or the likelihood of harm to competition) is a required element of a violation of sections 202(a) and (b)<sup>4</sup> of the P&S Act.

*Unfair, Unjustly Discriminatory, and Deceptive Practices or Devices*

Section 201.210 of the proposed rule listed examples of conduct GIPSA considers to be unfair, unjustly discriminatory or deceptive practices or devices, in violation of section 202(a) of the P&S Act.

*Undue or Unreasonable Preference or Advantage*

Section 201.211 established criteria the Secretary may consider in determining if conduct would violate section 202(b) of the P&S Act. While many commenters provided examples of similarly situated poultry growers and livestock producers receiving different treatment, several comments asked for additional clarification about the language proposed and were concerned about the impacts of the provision on marketing arrangements and other beneficial contractual agreements.

*Livestock and poultry contracts*

Section 201.213 of the proposed rule required the submission and potential publication of sample contracts. Most supporting comments stated that implementation of this rule would assure fairness and market transparency which would allow farmers and ranchers the opportunity to make informed decisions, it would promote fair competition, and it would allow efficient and evenhanded enforcement of the P&S Act. Some comments expressed concern with the lack of clarity and the ambiguity of this section of the proposed rule.

---

<sup>4</sup> All cases in question have ruled relative to section 202(a), while only one case has also referenced 202(b).

### *Tournament systems*

Section 201.214 of the proposed rule required live poultry dealers that pay poultry growers on a tournament system to pay all poultry growers raising and caring for the same type of poultry the same base pay, and that would prohibit paying poultry growers less than the base pay amount. The proposed provision also required that poultry growers be ranked in settlement groups with other poultry growers that raise and care for poultry in the same type of houses. Several comments were received indicating that the proposed provision needs to be revised.

### **III. Summary of Provisions Finalized by this Rule**

The majority of the sections of the proposed rule that were required by the 2008 Farm Bill are being finalized with modifications. These sections include criteria regarding suspension of the delivery of birds (§201.215 of the proposal), additional capital investment (§201.216 of the proposal), breach of contract (§201.218 of the proposal), and arbitration (§201.219 of the proposal).

#### *Suspension of the Delivery of Birds*

This section indicates the various criteria the Secretary may consider when determining whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement. These criteria include, but are not limited to, a written notice at least 90 days prior to suspension, written notice of the reason for the suspension of delivery, the length of the suspension of delivery, and the anticipated date the delivery of birds will resume.

#### *Additional Capital Investments*



This section indicates the various criteria the Secretary may consider when determining whether a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of the P&S Act.

#### *Breach of Contract*

This section indicates the various criteria the Secretary may consider when determining if a packer, swine contractor, or live poultry dealer has provided a reasonable period of time for a poultry/swine grower to remedy a breach of contract that could lead to termination of a production contract. These criteria include, but are not limited to, the form and substance of the notice following the discovery of a breach of contract.

#### *Arbitration*

This section requires production contracts that require the use of arbitration to include language on the signature page that allows the producer or grower to decline arbitration. This section also includes the criteria the Secretary may consider when determining if the arbitration process provided in a contract provides a meaningful opportunity for the poultry growers, swine production contract growers, or livestock producers to participate fully in the arbitration process. To implement this provision, it is necessary to clearly identify the applicability of the regulations to live poultry dealers.

### **IV. Comments and Responses**

The proposed rule published on June 22, 2010, (75 FR 35338) provided a 60-day comment period to end on August 23, 2010. In response to requests for an extension of time to file comments, on July 28, 2010, GIPSA extended the comment period to end on November 22, 2010 (75 FR 44163). GIPSA considered all comments postmarked or electronically submitted

by November 22, 2010. Over 61,000 comments were received. The following discussion addresses written comments as well as comments received at two public meetings, on June 25, 2010, and August 27, 2010, that were conducted jointly by USDA and DOJ. Because two of these “Workshops on Competition in Agriculture” were held during the comment period for the proposed rule, the Secretary announced that any comments made in those forums would be considered comments on the rule. Only a portion of the sections of the proposed rule are being finalized at this time. The majority of the sections of the proposed rule that were required by the 2008 Farm Bill are being finalized with modifications. These sections include criteria regarding suspension of the delivery of birds (§201.215 of the proposal), additional capital investment (§201.216 of the proposal), breach of contract (§201.218 of the proposal), and arbitration (§201.219 of the proposal).

*Definition-Principal Part of Performance*

*Summary of Comments:* GIPSA received a few comments on this term suggesting some clarification be added. For example, commenters suggested that “principal part of performance” should be redefined to say “the forum for contentious proceedings (i.e., arbitration or litigation) cannot be other than where the majority of the poultry or livestock are located.” An additional suggestion stated that this definition should be revised to specifically apply to swine marketing agreements, swine producers, and packers. Commenters recommended the definition be divided into sections by contract type and species.

*Agency Response:* This term references the services provided under livestock and poultry contracts and are used in conjunction with the location where those services are rendered. These services involve the raising and caring for livestock or poultry and would be provided in the

location where the livestock or poultry is located. Any “contentious proceedings,” however, concern the quantity or quality of the services provided by the poultry grower or livestock producer and not the location of the livestock or poultry. We determined no changes to the definition were needed to address the location related comments. Given the diverse and dynamic nature of the livestock industry, we are not limiting the definition to swine marketing agreements, swine producers, and packers, as suggested by the commenter.

*Definition-Additional Capital Investment*

*Summary of Comments:* Many comments suggested the definition for “additional capital investment” should specify how additional capital investment would be calculated. Some comments also suggested the threshold was set too low if applied to the total operation. Comments stated that if “combined” is meant to be a cumulative figure over years, then that should be explained. In addition, they stated the word “combined” should be redefined to specify “additional capital investment means \$25,000 or more... beyond the initial investment...”. Another comment suggested “additional capital investment” should provide for a percentage of the initial capital investment such as 10%, instead of a set amount of \$25,000.

*Agency Response:* With respect to the comments requesting more clarity, we have reduced the dollar amount from \$25,000 to \$12,500 and added the phrase “per structure.” These changes were included to make the definition more applicable across a range of sizes of operations since those investments could vary depending on the number of houses a poultry or swine production contract grower operates. Specifically, we reduced the dollar amount so it would be more in relation to additional investments on a per structure basis. We have also

modified the definition to clarify that the dollar amount relates to the total aggregate investment “over the life of the poultry growing arrangements or the swine production contracts.”

With respect to the comment on defining additional capital investment as a percentage of the initial investment, we did not adopt this suggestion. We believe the dollar amount of the additional capital investment should stand alone and not be tied to the amount of the initial capital investment.

#### *Definition-Suspension of Delivery of Birds*

*Summary of Comments:* We received only a few comments on this definition. They presented some disagreement with the idea that a flock should be delivered before the next payment date. The comments expressed the belief that this was not practical, citing an example where a flock was picked up on a Thursday and under the terms of the contract, payment was due the next Thursday. In this example the commenter argued it would be highly unusual for the next flock to be delivered before that following Thursday and suggested some dealers might have to lengthen the payment period for the current flock.

*Agency Response:* Because the definition bases the payment date on section 410 of the P&S Act, which specifies a payment due date under poultry growing arrangements as the fifteenth day after the week in which the poultry was slaughtered, the example described by the commenter would not have required a notice of suspension of bird delivery under this rule. We made no changes to this definition based on the comments received.

#### *Applicability to Live Poultry Dealers*

*Summary of Comments:* Almost all of the comments related to the proposal to extend the regulations to all stages of a live poultry dealer’s production, including the hatcheries, were

favorable. They felt that pullet and breeder growers needed the same protections as those growing broiler chickens. Opponents said the USDA had no legal authority to subject eggs to the P&S Act. Other comments also indicated the term “laying hen” was not typically used in the broiler or turkey industry and the term “pullets” usually referred to birds that would become broiler breeders.

*Agency Response:* Commenters are correct that the P&S Act provides USDA no authority over eggs. It is for this reason we specifically excluded hens that only produce table eggs from this provision. The proposal does not include table eggs but rather those poultry classes involved in producing birds for slaughter. In response to comments on pullets, we are clarifying the exclusion by using the phrase "excluding egg-type pullets, hens that only produce table eggs, and breeder flocks for the egg industry."

#### *Effective Dates*

*Summary of Comments:* In a comment to the rulemaking proposal one party noted the “Effective Dates” was “very curiously drafted” as it would leave open a comparison between a spot market transaction after the effective date of the final regulations with a sale transaction based upon a pre-effective date marketing agreement. That commenter also asked whether a packer must “justify” a price differential in such a case.

*Agency Response:* The final regulations will require no such justification. A spot market transaction negotiated today will be inherently different in form and substance from a marketing agreement transaction consummated today based on terms negotiated when the market agreement was signed and made effective. This will be true with or without this rulemaking. The effective dates listed in this final rule would not necessitate documentation for price

differences between spot market- and marketing agreement-based transactions. We made no changes to the wording of this paragraph.

### *Suspension of Delivery of Birds*

*Summary of Comments:* GIPSA received several comments in favor of this provision. The comments generally said that growers were struggling financially because there was too much time between flocks and too few flocks. One comment stated that growers need 90 days to make financial arrangements to mitigate the effects of a reduction in cash flow caused by a suspension of deliveries. This time could be used to adjust loan payments with banks or to arrange to grow poultry for another poultry company. In addition, many growers agreed this would cause a reduction in the use of extended layouts as a form of retaliation, usually with no notice, for arbitrary reasons or to force upgrades.

There were a few opposing comments from live poultry dealers, stating that forcing them to work with a terminated grower for 90 days would put their birds at risk. They argued that suspended growers have no incentive to do a good job with their last flock and may even abandon their operation putting the birds at risk. Also, growers who are suspended because of poor flock management would put the birds at risk and cause the live poultry dealer to receive inferior product. An additional concern was for the safety of the live poultry dealer's employees from physical threats following the suspension of deliveries.

Other comments opposed the rule saying it did not give live poultry dealers the flexibility they needed to adjust to market conditions. For example, live poultry dealers may need to suspend the delivery of birds when the demand for product suddenly falls. There are times when a business forecaster cannot know 90 days ahead of time that the company will need to curtail

production. Certain grower-specific reasons would make it practically impossible to give 90 days' suspension notice, they said.

One comment suggested the exact date of re-delivery following suspension may be impossible to determine. They said GIPSA should change the requirements for suspension of delivery notices to say the notices did not have to state the date deliveries would resume.

A commenter suggested bankruptcy be added to the list of emergency situations for which live poultry dealers might see a waiver of the notice requirement in subsection (c) of the proposed rule.

*Agency Response:* While those in general support of and in opposition to this provision spoke of bird delivery suspensions in the same context as grower contract terminations, this section applies only to extended layouts and not to terminations. Growers receiving a written suspension of delivery notice would still have a growing arrangement with the live poultry dealer and would expect to receive additional flocks. Additionally, this section is a list of criteria the Secretary may consider in determining whether reasonable notice of suspension of birds has been given; not a list of prohibitions.

With respect to concerns that providing a notice of suspension while the grower was in the midst of raising a flock would risk grower neglect or nonperformance, we feel poultry growing arrangements generally have other terms related to animal welfare or neglect that could be exercised to address this concern. Therefore, we decided not to adjust the section based on this comment. Similarly, threats against live poultry dealer employees can be addressed through other contract terms or reporting such actions to local law enforcement.

Some commenters suggested live poultry dealers could not plan 90 days in advance because of changes in the market. Considering the fact live poultry dealers coordinate the production process from the hatchery to slaughter, we believe planning is generally possible under the 90-day timeframe. Within this timeframe, live poultry dealers would usually know with some certainty what their production needs were for the current flock under production. A 90-day notice period would obligate a live poultry dealer to place at most one additional flock after the current flock. Finally, the rule provides a criterion to consider in determining whether a live poultry dealer's ability to provide notice has been impacted by a variety of unforeseen emergency situations.

While we agree the exact date that flock deliveries will resume may not be known, this final rule only establishes some criteria to be considered, and does not impose a specific requirement. Additionally, the rule discusses the "anticipated date," which implies some level of uncertainty and adjustment if conditions change. We generally feel providing an idea about the length of the suspension is an important part of these criteria and included this in this final rule. With respect to bankruptcies as emergencies, there have been bankruptcies of live poultry dealers in recent years and we agree these events do create emergency situations. We included bankruptcy among the list of unforeseen emergency situations that the Secretary may consider when determining whether or not reasonable notice has been given for suspension of delivery of birds.

We made additional minor and non-substantive changes to the wording and ordering of some words within paragraphs in this section for clarity.

*Additional Capital Investments Criteria*



*Summary of Comments:* The comments on this section were mixed between support for the criteria and opposition. Supporters generally felt capital investment burdens were almost exclusively borne by the producers and growers and at the same time, they had little choice about whether or not to make the investments. These commenters felt the criteria provided a framework for establishing a more equitable balance. Comments opposed to this section generally expressed concern the criteria could result in not being able to terminate long-term contracts with poor producers or growers. Some comments also indicated the need to differentiate between capital investments that are required to repair or maintain a facility, which should be considered as capital investments, and those that are an upgrade or to implement new technology.

GIPSA also received some comments on specific criteria within the section. The first criterion involved consideration of whether growers had discretion in deciding against making capital investments. Comments in support of this provision believed it would provide growers and producers the ability to negotiate reasonable contract terms for animal production including the ability not to be forced to upgrade or change equipment without having input. Supportive comments also claimed this was necessary because upgrades were usually required by the companies although the grower or producer is the one who paid for them. Comments opposed to this criterion argued it would hinder growers or producers from making necessary improvements such as insurance requirements or mandatory capital investments. Comments also noted typical production contracts include insurance requirements and require insurance be used to reconstruct and repair facilities in the event of a fire or tornado or other natural damage. Under the proposal,

these standard provisions may be unfair practices because the grower or producer cannot elect to keep the insurance proceeds.

Comments related to the paragraph on retaliation or coercion were only supportive. The comments said this rule was necessary to protect growers and producers from forced upgrades, retaliation or fear of losing their production contracts or poultry growing arrangements. Several commenters stated they had been or knew growers or producers who were being threatened with reduced placements, pay reductions, or contract revocation if they did not make upgrades.

There were a few comments related to the criteria about capital investments required within 12 months of a planned significant reduction or end of operations that stated the proposed rule confused swine contractors with packers. Many comments from producers and growers supported this section because they made expensive upgrades only to see a decrease in the size of placements or to see the processing facility shut down. One grower stated he was required to retrofit his houses to grow bigger birds. The live poultry dealer declared bankruptcy a short time later and the grower did not get chickens for several months.

Two comments questioned the need for a waiver for natural disasters. They said such events should not give packers, swine contractors or live poultry dealers opportunity to require upgrades that go beyond necessary repairs. The comments also questioned why the waiver would only apply to live poultry dealers.

A comment in support of the criteria related to whether some growers or producers are required to make capital investments that other similarly situated growers or producers do not have to make claimed a particular firm required some growers to make more new capital investments to their facilities than was required of others. A few comments were against this

criteria stating the phrase “similarly situated” was not defined. Another comment said that to require all poultry growers or swine production contract growers to make the same additional capital investment is not always possible. There will be circumstances that support requiring additional capital investments of only some growers or producers but not all, even if the growers or producers are otherwise similarly situated.

We received numerous comments in support of the criteria related to the age of prior upgrades or capital investments and whether recent upgrades had been completed. Comments from growers and producers expressed concern with having to make frequent upgrades, receiving no additional compensation for upgrades, and being given no choice about making the upgrades or not. Some expressed the belief that the criteria would discourage packers, swine contractors and live poultry dealers from demanding often unnecessary upgrades which tended to keep poultry growers and livestock producers in debt. One comment recounted being required to make changes to their poultry houses only a short time after the houses had been built according to company specifications. Two comments argued the provision was unintelligible and it provided no standards for determining whether additional capital investments constituted an unfair practice.

Almost every comment received concerning the criteria related to whether a grower or producer can be expected to recoup a required capital investment was favorable. Comments by growers and producers argued that any added compensation or enhanced efficiencies that might result from additional capital investments did not cover the cost of the investments. One comment stated that the wording regarding recouping the investment was vague and would invite litigation. Another comment said this criterion should be deleted because it was redundant or in

conflict with a paragraph in the proposed Capital Investment Prohibitions (proposed section 201.217).

We received a small number of comments on the criterion which would have the Secretary examine the amount of time a grower was given to make a required capital investment. All of the comments supported this criterion. Those commenting said that when the same capital investment was required of all growers, resources and equipment would be in short supply and expensive due to the increased demand. Growers therefore need a reasonable amount of time to make the required capital investment.

*Agency Response:* With regard to comments that the criteria could eliminate the ability to terminate poor growers or producers, we note that the section consists of criteria and not specific requirements. Additionally, other terms within poultry growing arrangements and swine production contracts provide for ways to terminate based on non-performance and provide incentives to improve performance. We decided to include this section in this final rule with some modifications.

Some commenters suggest that the criterion addressing the provision of discretion to growers or producers would prevent any requirement for additional capital investments or even contract terms that require insurance proceeds to be used to rebuild. We believe these comments ignore the fact that this section provides criteria and not prohibitions. In the 2008 Farm Bill, Congress directed the Secretary to establish criteria and not specific prohibitions. This criterion is only a factor the Secretary may consider to evaluate whether a firm's investment requirement practices violate the P&S Act. With regard to comments that capital investments

should not include maintenance and repair costs, we note that this distinction was made as part of the definition of “additional capital investment.”

With respect to the comments regarding a waiver due to natural disasters, we replaced the waiver provision with criterion and thereafter merged it with the criterion related to significantly reducing or ending operations. This will allow the Secretary to take into account whether a packer, swine contractor or live poultry dealer proffered justification, such as a catastrophic or natural disaster, or other emergency, when a poultry grower or swine production contract grower was required to make additional capital investments over the life of the production contracts or growing arrangements. We also added bankruptcy as a possible justification to be considered. A related comment questioned why a waiver would only apply to live poultry dealers. In the modified section, these justifications would not be limited to live poultry dealers.

With respect to the comment on the meaning of the phrase “similarly situated,” we believe the meaning is plain and does not require a definition within regulation. In determining whether two or more growers are “similarly situated,” the Secretary will consider whether poultry raised is of the same type, facilities are similar, and if the houses are in the same geographic area, among other factors.

With respect to comments on the criterion related to the age of and whether recent upgrades had been made, which felt the criteria was too vague to identify what practices were prohibited, we disagree. Since the criteria only provide factors that the Secretary may consider, these are not meant to be bright-line prohibitions. The Secretary will determine on a case-by-case basis whether the facts related to any applicable criterion are a violation of the P&S Act.

The only change made to the wording of this criterion as a result of comments was to include the phrase “the number of” before the phrase “recent upgrades or capital investments.”

With respect to the comment suggesting that criterion related to recouping a capital investment was redundant with part of the proposed section 201.217, we note section 201.217 was not included in this final rule. Therefore this criterion was not removed. In addition to the above modifications to proposed paragraphs in this section, this final rule includes an additional criterion as a new paragraph (h) on whether required equipment changes were for previously approved and functioning equipment. This criterion is based on section 201.217(c) of the proposed rule that we felt was better included in this section as a criterion. The proposed paragraph required packers, swine contractors and live poultry dealers to provide adequate compensation incentives to poultry growers and swine production contract growers when requiring equipment changes on previously approved equipment, provided that equipment was in good working order.

Several comments on proposed section 201.217(c) said that GIPSA failed to define what constituted “adequate compensation incentives” and “good working order.” The comments said that this would cause disputes between the parties to poultry growing arrangements and livestock production contracts. It was also argued that the paragraph would preclude even necessary upgrades if a company could not afford to provide funding. Some said that discouraging technological advances would put the United States at a comparative disadvantage with other competing countries by decreasing efficiency and providing disincentives for innovation, including those that could improve food safety. Although there were many comments received

in favor of this paragraph, many of them requested GIPSA define adequate compensation as the full cost of the upgrade at the time the upgrade was required.

Regarding the discussion of adequate compensation incentives, we feel this would place too large a financial burden on packers, swine contractors and live poultry dealers. By moving this paragraph from § 201.217 to § 201.216, we changed this provision from a requirement to that of a criterion the Secretary would consider to determine whether, in a particular instance, requiring a grower to make additional capital investments is a violation of the P&S Act. Based on the comments received, we feel this is the appropriate function for this provision. With regard to the capital investment criteria (§ 201.216 in the proposed rule), we feel using these criteria to determine whether certain arrangements are a violation of the P&S Act is more appropriate given the variation that exists with respect to capital investments and payment terms in contracts.

We made non-substantive wording changes to the introductory paragraph for this section to emphasize there were several criteria listed.

#### *Reasonable Period of Time to Remedy a Breach of Contract*

*Summary of Comments:* The 2008 Farm Bill required the Secretary to establish criteria the Secretary would use to determine if a reasonable period of time has been afforded to remedy a breach of contract that could lead to termination of a growing relationship. The majority of the comments supported the proposed section and felt that the list of criteria was reasonable. Several parties commented that the regulation did not allow processors to immediately terminate a growing agreement if the grower failed to comply with the processor's internal food safety or animal welfare requirements. Processors could be at risk for product liability suits, recalls,

adverse press and damage to reputations if required to allow a grower to operate following a breach involving food safety or animal welfare standards.

We received many comments on the paragraph related to providing reasonable time to rebut an allegation that there was a breach of contract. Many of the comments argued against allowing growers time to provide rebuttals to significant breaches. Typical examples of significant breaches included those affecting animal welfare, abuse or food safety. Several comments said describing a sufficient amount of time for rebuttal as being “generally 14 days” was too vague and should be eliminated or explained further.

There were a few comments that stated certain paragraphs were vague or unclear and that the section should be rewritten so it would be more precise and less confusing.

*Agency Response:* With regard to the comments on animal welfare and food safety, we agree with the concerns raised by these comments. As a result, we added a sentence to the introductory paragraph which allows the terms of a livestock contract or poultry growing arrangement to control the actions of a packer, swine contractor or live poultry dealer when food safety or welfare of animals is at stake.

With respect to the commenter that felt the term “generally 14 days” in proposed section 201.218(d) needed revision, we agree and changed the wording to “adequate time” for rebuttal from the date of the breach notice. Since this section is criteria and not specific requirements, setting an exact time also did not seem appropriate.

With respect to the general comments regarding the need for better clarity and suggested revisions to make the paragraphs more precise, we agree. We made a number of changes to wording within criteria to make their meaning more clear. Additionally, several criteria either



seemed redundant (e.g. the criterion related to arbitration) or duplicative of other criteria (e.g. criteria regarding notice within 90 days of breach) were not included in this final rule.

### *Arbitration*

*Summary of Comments:* Almost all the comments on this section were supportive. Comments from growers and producers felt this was an important provision to protect their rights. Two comments expressed concern that live poultry dealers may terminate their relationship with growers that opted-out of arbitration when the live poultry dealers need to decrease production. Several comments expressed general opposition to the entire section and that anyone who did not like the arbitration terms in a contract should simply not enter into the contract instead of having a right to opt-out. One commenter identified the criterion related to whether arbitration procedures comply with the terms of the Federal Arbitration Act as an unnecessary addition to the rule. There were several comments on the provision that said failure to sign either the arbitration acceptance or declination statement voided the contract. Comments from two parties recommended that in the alternative, the rule should state failure to sign one of the elections meant the grower was opting-out of arbitration without voiding the contract. One other party suggested that if neither election is made the required arbitration clause portion of the contract was void.

*Agency Response:* With regard to comments concerning growers or producers being subject to retaliation for exercising their right to opt-out, we agree with this concern. We also point out that terminating relationships with growers because they exercised their right to opt-out of required arbitration under §201.219 would be an unlawful practice. With regard to general comments against the right to opt-out of arbitration, we point out this provision was included in

the 2008 Farm Bill. This provision implements section 210 of the P&S Act added by the 2008 Farm Bill. We have not included the criterion related to the Federal Arbitration Act in this final rule. We have concluded that if terms in a contract violate the Federal Arbitration Act, the remedies provided under that statute are better suited to address the issue than the P&S Act. With regard to the comments on failure to select the option to decline or to be bound by the arbitration terms, we tended to agree with the comments that voiding the entire contract was not necessary. We have modified the provision to say a failure to sign either of the “Right to Decline Arbitration” statements will be treated as if the contract producer or grower declined to accept the required arbitration clause in the contract.

While the comments generally did not focus on the specific arbitration criteria, we made a few changes to improve clarity. For example, one criterion said GIPSA would examine the extent to which impartial and unbiased neutrals would be used as arbitrators in deciding if contract producers and growers were allowed to participate fully in the arbitration process. In practice it is often the case that each party to the dispute names a non-neutral arbitrator to serve on an arbitration panel to hear and decide the dispute. Often, use of non-neutral arbitrators is necessary so that the arbitrators are qualified and have appropriate foundational knowledge of the industry to understand the facts of the case so a proper ruling can be made. The naming of a non-neutral arbitrator by a party to the arbitration process does not necessarily restrict a contract producer or grower from participating fully in the process. For these reasons, we removed this criterion. As another example, we combined the provision about the cost of arbitration with that of whether there are reasonable time limits in the arbitration process.

*Regulatory Impact Analysis*

*Summary of Comments:* Thirty-seven comments were received on GIPSA's compliance with the analytical requirements of Executive Order 12866. Many of the comments favoring the proposed changes pointed to what they viewed as the deleterious effects of increased concentration on competition. For example, a number of commenters referred to declining farm prices and the declining farm share of the retail value of meat and poultry as indications that increased concentration had adversely affected producers. However, few comments provided numerical estimates of the economic benefits of the proposal.

Three comments, consisting of over 1000 pages, expressed concern that the economic impacts of the proposed rule would be economically significant and submitted evidence that the proposed provisions might have costs of more than \$1 billion per year. Comments also suggested the rule would hurt innovation and food safety and increase costs and prices to consumers. Commenters noted that for the cattle and hog industries adjustment costs would be related to the shifting away from the use of marketing arrangement forms of procurement and contracts in favor of the spot market and for poultry would entail overall losses of production efficiency in the conversion of factor inputs to product output. In the study prepared for the National Meat Association by Informa Economics, 75 percent of the economic costs associated with the proposed rule were associated with, in their view, relieving plaintiffs from the burden of proving competitive injury.<sup>5</sup>

---

<sup>5</sup> Informa Economics, Inc. "An Estimate of the Economic Impact of GIPSA's Proposed Rules," prepared for the National Meat submitted as Appendix C to the National Cattlemen's Beef Association and Appendix D of the National Pork Producers Council comment submissions (henceforth referred to as the Informa Study).

The Informa study estimated the aggregate impact of the June 22, 2010, proposed GIPSA rule for the U.S. meat and poultry industry at \$1.64 billion (Table 1). The Informa study further estimated the value of lost production based on their estimated on-going and adjustment costs. The value of lost production totaled almost \$1.1 billion or about 66 percent of the total estimated costs. The estimates differ because the total on-going and adjustment costs represent the cost to each industry before markets adjust to the changes in output. The value of lost industry production represents the cost to each industry after markets adjust to changes in output.

**Table 1. Informa Study - adjustment cost and industry output effects, June 22, 2010 proposed rule**

Sector	Total Informa Costs	Efficiency Costs	Quality and Demand Costs	Total Efficiency and Quality and Demand Costs	Value of Lost Industry Production	Lost Production as a % of Total Informa Costs
	Million \$					%
Beef	879.8	401.9	377.7	779.6	591	67
Pork	401.4	176.7	82.2	258.9	246	61
Poultry	361.6	302.2	0.0	302.2	236	65
Turkey	na	na	na	na	14	na
Total	1,642.8	880.8	459.9	1,340.7	1,087	66

na = not applicable

*Agency Response:* This final rule contains several significant changes based on the comments received during the comment period for the June 22, 2010 proposed rule. Many of the proposed provisions identified by commenters and in the Informa analysis as having the largest effect in the market are not included in this final rule.

We have considered all the analyses and information provided in comments as we completed the analysis for this final rule, but in some cases it was of limited use and refinement of estimates was difficult. For example, though the Informa study provided some insight into

understanding the costs and benefits associated with many of the major proposed rule changes, it also has limitations. As detailed in the Informa study, "...it is important to recognize that it was impossible to structure the interview process in a way that provided a pure random sample and thus the information gleaned from the surveys should not be used to make statistical inferences about industry populations in a strict sense".<sup>6</sup>

It is also not clear whether those responding to the Informa survey based their input on the estimated cost associated with the proposed rule or a "worst case" scenario. As discussed by *Gresenz et al.*, without a history of claims on which to base a prediction, it is difficult to accurately estimate the potential threat.<sup>7</sup> *Gresenz et al.* further notes that individuals are likely to over-estimate the likelihood that plaintiffs will win cases and decision makers may over-react to the small possibility of having to pay large penalties. To the extent this tendency to over-react to the small possibility of having to pay large penalties is reflected in the Informa study estimates, the Informa study costs over-estimate the costs associated with the proposed rule. Similarly, the estimates of the economic costs provided by Elam<sup>[3]</sup> are potentially an over-estimate of the true costs because of the significant changes to the proposed rule.

## **V. Executive Orders 12866, 13563 and Other Analyses**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches

---

<sup>6</sup> Informa Economics, Inc. "An Estimate of the Economic Impact of GIPSA's Proposed Rules," p.4.

<sup>7</sup> Gresenz, Carole Roan, Deborah H. Hensler, David M. Studdard, Bonnie Dombey-Moore, and Nicholas M. Pace (1998). "A Flood of Litigation? Predicting the Consequences of Changing Legal Remedies Available to ERISA Beneficiaries." RAND Issue Paper, IP-198.

<sup>[3]</sup> Elam, Dr, Thomas E. "Proposed GIPSA Rules Relating to the Chicken Industry: Economic Impact." FarmEcon LLC (November 16, 2010).

that maximize net benefits (including potential economic, environmental, public health and safety effects, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. 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.

### **Need for Regulation**

As discussed previously, Title XI of the 2008 Farm Bill requires the Secretary of Agriculture to issue a number of regulations under the P&S Act, 1921, as amended. Among these instructions, the 2008 Farm Bill directed the Secretary to identify criteria to be considered in determining:

- whether an undue or unreasonable preference or advantage has occurred in violation of the Act;
- whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement;
- when a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of the Act;
- if a live poultry dealer or swine contractor has provided a reasonable period of time for a poultry grower or a swine production contract grower to remedy a breach of contract that could lead to termination of the poultry growing arrangement or swine production contract; and

- whether the arbitration process provided in a contract provides a meaningful opportunity for the grower or producer to participate fully in the arbitration process.

In addition to developing criteria, the 2008 Farm Bill provided that livestock and poultry contracts must specifically disclose the right of the contract producer or grower to decline the requirement to use arbitration to resolve any controversy that may arise under the livestock or poultry contract.

This rulemaking is necessary to fulfill statutory requirements.

### **The Use of Contracts in the Pork and Poultry Industry.**

Formal contractual arrangements cover a considerable share of U.S. poultry and livestock production. Contracting can minimize transaction costs, induce firms to make optimal investments in relationship specific asset and create production efficiency gains. Agricultural contracts can also lead to improvements in efficiency throughout the supply chain for products by providing farmers with incentives to deliver products consumers want and produce products in ways that reduce processing costs and, ultimately, retail prices.<sup>8</sup>

**Table 2. Share of commodity production under contract, by commodity**

Commodity	1991-93	1996-97	2001-02	2005	2008
	Share of production under contract (percent)				
Cattle	na	17.2	21.0	17.6	29.4
Hogs	na	34.2	62.5	76.2	68.1
Poultry and eggs	88.7	83.8	92.3	94.2	89.9

na = Data not available for commodity detail.

Source: USDA, Economic Resource Service using data from USDA's Agricultural Resource Management Survey, 1996-2008 (all versions); and USDA's Farm Costs and Returns Survey, 1991-93.

<sup>8</sup> A comprehensive study of the benefits and costs associated with contract marketing was conducted by RTI International (RTI). The study did not examine poultry production. See RTI International. 2007. GIPSA Livestock and Meat Marketing Study. Prepared for Grain Inspection, Packers and Stockyard Administration. U.S. Department of Agriculture. Contract No. 53-32KW-4-028.

In general, contracts are used more widely in pork and poultry production compared to cattle production. For example, in 2008 contracts covered 29 percent of cattle production. In comparison, contracts covered about 90 percent of poultry production and about 68 percent of hog production. While both hog and poultry operations use contracts extensively, there are important distinctions between the two industries. As discussed by MacDonald and Korb<sup>9</sup> (2011), hog contract enterprises are usually part of larger, diversified farming businesses, with the hog segment providing a relatively small share of the farm income. The farmers typically have a range of alternative outlets for contract hog production, and farm diversification provides a range of alternative uses for their own time. Farm households that engage in contract hog production have relatively high incomes compared with other households—both farm and nonfarm.

In contrast, contract broiler enterprises are likely to be part of smaller and less diversified farm businesses, and many broiler operations have only a single live poultry dealer in their area. As a result, their farm businesses are much more dependent on contract production, and their income from contract production is much more dependent on a single live poultry dealer. Operators of broiler farms have lower household incomes, on average, than operators of hog farms, and they depend far more on off-farm employment and income.

GIPSA maintains data on cattle, hogs, and sheep (collectively referred to as ‘livestock’) slaughterers and live poultry dealers from the annual reports these firms file with GIPSA. Currently, there are 140 live poultry dealers (all but 16 are also poultry slaughterers and would

---

<sup>9</sup>MacDonald, James M. and Penni Korb, USDA Economic Research Service. James M.. “Agricultural Contracting Update: Contracts in 2008.” Info. Bulletin No. 72, Feb. 2011.



be considered poultry integrators) that would be subject to the final rule. The Census of Agriculture (Census) indicates there are 727 swine contractors. An important factor in determining the economic effect of the regulations is the number of contracts held by a firm. Poultry/swine growers enter into a contract with one live poultry dealer/swine contractor, whereas a live poultry dealer/swine contractor may have a number of contracts with many growers. GIPSA records for 2007 indicated there were 20,637 poultry growing arrangements (contracts) 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. By comparison, there were 8,995 contract swine producers. Although there is a significant amount of concentration in the poultry and livestock industries (Table 3), the literature has typically not shown that buyers are able to exercise significant amounts of market power against sellers nationally. As shown in Table 3, the concentration of the four largest hog slaughterers rose from 34 percent in 1980 to a high of 64 percent in 2003 and has remained relatively stable since then.

**Table 3. Four-firm concentration in selected livestock and poultry slaughter, 1980-2009**

Year	Steers & Heifers	Hogs		Broilers	Turkeys
	Percent of slaughter from four largest firms				
1980	36	34		--	--
1995	81	46		--	--
2000	81	56		--	--
2001	80	57		--	--
2002	79	55		--	--
2003	80	64		--	--
2004	79	64		--	--
2005	80	64		--	--
2006	81	61		--	--
2007	80	65		57	51
2008	79	65		57	51

2009	81	63		53	58
------	----	----	--	----	----

Source: USDA, Grain Inspection, Packers and Stockyards Administration, Packers and Stockyards Program, 2010 Annual Report.

Though the four firm concentration for the poultry industry is relatively lower than other industries, the poultry industry has been almost completely vertically integrated for several decades.<sup>10</sup> As a result, the use of spot markets for poultry is virtually nonexistent. Concentration in broiler and turkey slaughter has trended upwards since 2000. In 2009, the four largest broiler slaughterers posted a 4 percent decline to 53 percent of the market share compared to 57 percent in 2008. The four largest turkey slaughterers posted a noticeable increase of 7 percent to control of 58 percent of the market share in comparison to 2008 at 51 percent.

The data in Table 3 are estimates of national concentration, but the relevant economic markets for livestock may be regional or local, and concentration in relevant economic markets is generally higher than national measures indicate. For example, while poultry markets may appear to be the least concentrated in terms of the four-firm concentration ratios presented in table 3, markets for poultry growers are much more localized than markets for fed cattle or hogs, and local concentration in poultry markets, in part due to the limited range in transporting live birds compared to hogs or cattle, is much greater than in hog and other livestock markets.

Insight into the need for the specific provisions specified by Congress in the 2008 Farm Bill can be found in the testimony provided at the joint USDA-DOJ hearing held on competition in the poultry industry on May 10, 2010 in Normal, Alabama. Additionally, the need for the provisions can be highlighted by examining data GIPSA collects on poultry industry contract

---

compliance which GIPSA initiated in fiscal year 2009. These compliance reviews involve both determining whether the live poultry dealer is complying with applicable regulations such as sufficient notice of termination and checking whether a sample of payments made under the terms of the contract were made properly. The firms reviewed in the sample are drawn randomly and with a sample size so that a 90 percent confidence level holds when inference is made about the overall industry compliance based on the sample compliance rate. In 2009, the overall industry compliance rate for livestock dealers, markets, and packers over four areas (financial payments, trade practices, records retention and contract terms) was 79.6 percent. This rate compares to a 60.0 percent rate for contract compliance in the poultry industry.

### **Provisions of the Final Rule**

As discussed earlier in the preamble, we are finalizing proposed provisions that are required by the 2008 Farm Bill. Below we provide a short summary of each provision.

#### *Suspension of Delivery of Birds*

Section 201.215 of this final rule establishes the criteria the Secretary may consider when determining whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement. These criteria include, but are not limited to, a written notice at least 90 days prior to suspension, written notice of the reason for the suspension of delivery, the length of the suspension of delivery, and the anticipated date the delivery of birds will resume.

#### *Additional Capital Investments Criteria*

Section 201.216 of this final rule provides the criteria the Secretary may consider when determining whether a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of the P&S Act.

*Reasonable Period to Remedy Breach of Contract*

Section 201.217 of this final rule provides the criteria the Secretary may consider when determining if a packer, swine contractor, or live poultry dealer has provided a reasonable period of time for a poultry/swine grower to remedy a breach of contract that could lead to termination of a production contract. These criteria include, but are not limited to, the form and substance of the notice following the discovery of a breach of contract.

*Arbitration*

Section 201.218 of this final rule requires production contracts that require the use of arbitration to include language on the signature page that allows the producer or grower to decline arbitration. Section 201.218 also includes the criteria the Secretary may consider when determining if the arbitration process provided in a contract provides a meaningful opportunity for the poultry growers, swine production contract growers, or livestock producers to participate fully in the arbitration process.

**Economic Assessment**

**Benefits**

In the June 22, 2010 proposed rule, we asserted that the proposed rule would have benefits but they are not quantified; however, we discuss below the qualitative benefits that we believe are associated with the final rule. In addition to the benefits expected from the various

provisions as outlined below, this action fulfills the mandates specified in Title XI of the 2008 Farm Bill.

*Suspension of Delivery of Birds*

These new criteria may benefit poultry growers by allowing them to make informed decisions on the future use of resources. Adequate notice of suspension would give growers sufficient time to consider other options for their poultry houses and for keeping up with loan payments, and would help to address perceived equity concerns between dealers and growers.

*Additional Capital Investments Criteria, Breach of Contract, and Arbitration*

To the extent that market power exists and affects contracting, these criteria will provide greater parity in contractual relations between producers and the packer, swine contractor or live poultry dealer. A fundamental decision facing both growers and integrators or processors is given an uncertain future, how much capital should be invested and what percentage of the risk should be borne by the grower and the integrator or processor. To the extent integrators or processors have market power, they can shift more risk on the grower. The relatively large investment in poultry growing facilities makes it difficult financially for growers to exit the industry once they enter into the contract and contract compensation rates may be below the grower's initial expectations. Additionally, poultry growers are also restricted to a limited number of markets, frequently a single live poultry dealer, due to the limitations on transporting live poultry. Similarly, the breach of contract criteria may result in the packer, swine contractor, or live poultry dealer opting to provide adequate notice to a grower or provide sufficient time to remedy the breach. Finally, the arbitration provisions are expected to facilitate poultry growers,

livestock producers, and swine production contract growers' access to an effective arbitration process.

### **Costs**

In conducting the cost-benefit analysis two comments submitted for the proposed rule were used to develop initial cost estimates. These comments are: "An Estimate of the Economic Impact of GIPSA's Proposed Rules," by Informa Economics, Inc.<sup>11</sup> and "Proposed GIPSA Rules Relating to the Chicken Industry: Economic Impact," by Thomas. E. Elam, President, FarmEcon LLC.<sup>12</sup> The data from the two comments were combined into a single data set to form industry wide average cost estimates (nether study cited quantifiable benefits). The average cost data constructed from the two comments, while useful, had two limitations for the current analysis. First, the cost data had to be allocated across the provisions. The procedure to allocate costs across provisions was to identify the market failure the provisions were attempting to mitigate as well as the potential costs of specific provisions and to assign costs based on these two factors. Second, the reported cost data, even if accurately allocated across provisions, was for the original proposed rule whereas the provisions in the final rule were modified based on submitted comments to reduce, and in some cases substantially reduce the single greatest cost, which was the cost that could potentially arise due to the potential for litigation or administrative action.

Litigation costs were considered to have two cost components costs related to adjustments in the industry to avoid potential litigation and additional attorney fee costs. The industry adjustment cost varied between the livestock and poultry sectors. Within the cattle and

---

<sup>12</sup> Elam, Dr, Thomas E. "Proposed GIPSA Rules Relating to the Chicken Industry: Economic Impact." FarmEcon LLC (November 16, 2010)

hog industries comments suggested the adjustment costs would arise from the reduction in market contracts with a corresponding increase in the marketing of livestock on the spot market. The adjustment costs reported in the comments that are associated with these changes were related to percentage point decrease in market contracts associated with the cattle and hog industries. In order to arrive at the percentage point reduction in market arrangement usage due to perceived threat of litigation in either industry, data on consumer and producer surplus costs from reductions in marketing arrangements were utilized. These data are reported in the 2006 GIPSA Livestock and Meat Marketing study conducted by RTI.<sup>13</sup> Associated with this surplus data were data in the report on retail and farm prices, and quantities produced and consumed. This data was used to obtain a cost measured in consumer and producer surplus terms related to a unit percentage point reduction in marketing contract usage. This unit cost data was then used to determine the percentage point reduction implied by the species specific industry adjustment costs. For example the \$9.6 million adjustment cost for Section 201.216 in hogs implies a 0.09 percentage point reduction in the use of marketing contracts in the hog industry.

The method utilized to obtain the percent reduction, or efficiency loss, in live bird production implied by the industry adjustment cost reported by commenters used a poultry demand equation constructed from elasticity data reported by USDA's Economic Research Service.<sup>14</sup> Numeric analysis was used on the poultry demand equation while assuming a perfectly inelastic supply to solve for the quantity per capita consumption level that yielded a consumer surplus cost equivalent to the industry adjustment cost. The resulting per capita

---

<sup>13</sup> RTI International. 2007. GIPSA Livestock and Meat Marketing Study. Prepared for Grain Inspection, Packers and Stockyard Administration. U.S. Department of Agriculture. Contract No. 53-32KW-4-028.

<sup>14</sup> Elasticity data is located at the USDA-ERS website at: <http://www.ers.usda.gov/Data/Elasticities/>

reduction in quantity demanded at the retail level was translated into live production using 2009 population levels and a poultry yield per live bird rate of 0.74 computed from data obtained from the National Agricultural Statistics Service<sup>15</sup>. The cost is assumed to be absorbed by poultry processors. As example the \$45.2 million adjustment cost (table 4) implies a loss in farm level production efficiency of 0.4 percentage points.

For the provisions in the final rule, industry adjustment costs were a relatively large cost in two of the four provisions: Section 201.216 (Additional capital investment criteria) and Section 201.217 (Reasonable period to remedy a breach of contract). For example, contrasting the total costs of Section 201.215 (Suspension of delivery of birds) with Section 201.216, the respective costs estimated from the average costs reported by the comments range from less than \$100,000 for Section 201.215 compared to \$46.8 million for Section 201.216 (Table 3). While our allocation of the representative adjustment cost data from the Informa and Elam studies provides one cost estimate for the provisions, due to the limitations in the studies mentioned above, GIPSA expects these provision estimates to be upper cost limits. The basis for estimating a lower limit cost is explained in more detail below after the discussion of the other costs in Table 4.

**Table 4. USDA final rule costs (\$ million) by section and species**

	Hog-Pork (\$M)	Poultry (\$M)	Total (\$M)
Section 201.215 Suspension of Delivery of Birds			
Adjustment	0	0	0
Legal	0	0	0
Administrative	0	**	**
Total	0	**	**

<sup>15</sup> NASS Agricultural Statistics Board . Poultry - Production and Value 2009 Summary April 2010. and 2010 Agricultural Statistics Annual, Chapter VIII Dairy and Poultry Statistics.



Section 201.216 Additional Capital Investment Criteria			
Adjustment*	5.6-9.6	3.7-45.2	9.3-54.8
Legal	0.2	0.7	0.9
Administrative	0.4	0.9	1.3
Total	6.2-10.2	5.3-46.8	11.5-57.0
Section 201.217 Reasonable Period to Remedy Breach of Contract			
Adjustment	5.0-6.0	2.8-7.0	7.8-13.0
Legal	0.1	0.1	0.2
Administrative	0.1	0.2	0.2
Total	5.2-6.2	3.0-7.2	8.2-13.4
Section 201.218 Arbitration			
Adjustment	0.2	1.3	1.5
Legal	0	**	**
Administrative	**	**	**
Total	0.2	1.4	1.6
Overall Total	11.5-16.6	9.8-55.5	21.3-72.1

\* Table note: For provision 201.216 and 201.217, the adjustment costs are reported as ranges. The upper bound was derived from costs allocated from the weighted average costs obtained from the combined Informa and Elam comments. The lower bound estimates were developed from changes in marketing agreement usage in the hog case and in the poultry case from reduced levels of production efficiency.

\*\* represent estimates of less than \$100,000.

In addition to industry adjustment costs, the total cost in Table 4 includes administrative costs and estimated legal fees associated with those provisions that had relative large adjustment costs. In the case of Section 201.215, the total cost is comprised entirely of administrative costs. The administrative cost itemization is described in more detail in the Paperwork Reduction section.

Legal fees were developed from data for cases filed under the P&S Act from 1926 to 2010 on the number of decisions by year; the court in which the decision was reached; and the type case, i.e., financial, trade practice, or competition. A 10-year moving average estimate of

annual legal fee cost incurred from these cases was used to derive an annual legal fee cost of \$11.7 million. This fee was doubled and allocated across the species-provision categories using initially the same proportion as the proportions generated from the allocation of the adjustment costs in the average comment cost data. Final amounts were adjusted based on the perceived risk of litigation that a provision-species category might entail. For example, Section 201.215 (Suspension of delivery of birds) was considered to have low liability based on its similarity with the earlier GIPSA regulation published in the Federal Register on Dec. 3, 2009, Vol. 74, pg. 63277 regarding poultry contract terms and written notice to poultry growers regarding production contracts

Experience with implementation of the regulations published on Dec. 3, 2009, and the absence of reports by regulated industry participants and measurable cost effects provides an alternate basis from which to project industry adjustment costs. Based on any significant reductions in marketing contract usage from past regulation affecting hog contracts, such as the swine contract library, and the mentioned poultry regulations for Section 201.216 and Section 201.217, a minimal percent reduction in marketing contract usage was established for the case of hogs and a similar percent reduction in production farm level efficiency was established for poultry and then the imputed costs were calculated using the reverse procedure described above. We assume a 0.01 percentage point reduction in contract usage and farm poultry production efficiency for Section 201.216 and a 0.001 percentage point reduction for Section 201.217. The associated adjustment costs imputed by the reductions for Section 201.216 are \$5.6 million for hogs and \$3.7 million for poultry. For Section 201.217 the imputed adjustment costs for hogs are \$5.0 million and \$2.8 million for poultry.

These values provide ranges on the adjustment cost estimates for Section 201.216 of \$5.6 million to \$9.6 million for hogs and \$3.7 million to \$45.2 million for poultry. For Section 201.217 the adjustment costs range from \$5.0 million to \$6.0 million for hogs and \$2.8 million to \$7.0 million for poultry. Summing over all costs and provisions of the final rule for hogs, the final cost estimate is expected to range between \$11.5 million to \$16.6 million. Similarly for poultry, the estimated total cost is expected to range between \$9.8 million and \$55.5 million. The overall final rule is expected to have a final cost ranging between \$21.3 million and \$72.1 million.

The range associated the adjustment costs reflect the variety of actions regulated entities could take in response to the criteria being finalized. Some entities may choose to take little or no action in response to the finalization of the criteria. In these instances, the more entities that choose this option, the lower the net cost to the industry. Conversely, some entities may choose to impose multiple changes in their business practices to limit their vulnerability to complaint. The more entities that choose this option, the higher the net cost to the industry, although the net cost is expected to be within the range stated in Table 4.

### **Impact on Small Businesses**

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 - 612), GIPSA has considered the economic impact of this action on small entities. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. The Small Business Administration (SBA) defines small businesses by their North American Industry Classification System Codes (NAICS). The affected entities and corresponding size thresholds

under the rule that would be defined as a small business are: cattle producers (NAICS 12111); hog producers and swine contractors (NAICS 112210); and broiler and turkey producers (NAICS 112320 and 112330) are considered small businesses if their sales are less than \$750,000 per year. Live poultry dealers (NAICS 311615), and hog and cattle slaughterers (NAICS 311611) are considered small businesses if they have fewer than 500 employees. The only section of the final rule that applies to the beef industry is the section related to arbitration (§ 201.218) and this only applies to a small segment (<5%) of the industry that utilizes production contracts. So the final rule would not have any impact on livestock auctions or marketing agencies, which are typically small businesses. The regulatory impact analysis found the overall impact from this section and the final rule as a whole on the beef industry to be very small. Based on this estimate, we also expect the impact on small businesses in the beef industry to not be significant. As detailed in the regulatory impact analysis, almost all of the cost associated with the rule relate to the pork and poultry industries, so we focus on those two sectors for this analysis. The Census of Agriculture (Census) indicates there are 727 swine contractors. The Census provides the number of head sold by size classes for these entities, but not value of sales. To estimate the size by the SBA classification, the average value per head for sales of all swine operations is multiplied by production values for firms in the Census size classes for swine contractors. The estimates reveal about 300 entities had sales of less than \$750,000 in 2007 and would have been classified as small businesses. Additionally, there were 8,995 hog producers with swine contracts; about half of these producers would have been classified as small businesses.

GIPSA also maintains data on cattle, hogs, and sheep (collectively referred to as 'livestock') slaughterers and live poultry dealers from the annual reports these firms file with

GIPSA. Currently, there are 140 live poultry dealers (all but 16 are also poultry slaughterers and would be considered poultry integrators) that would be subject to the proposed rule. According to U.S. Census data on County Business Patterns, there were 64 poultry slaughter firms had more than 500 employees in 2006. The difference yields approximately 75 poultry slaughters/integrators that have fewer than 500 employees and would be considered as small businesses that would be subject to the final regulation.

GIPSA records for 2007 indicated there were 20,637 poultry growing arrangements (contracts) and 19,605 poultry growers holding the other side of the poultry growing arrangement. All of these growers are small businesses by SBA's definitions.

***Section 201.215 Suspension of delivery of birds.***

In the 2008 Farm Bill, Congress required the Secretary establish criteria that he may consider when determining whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement. This 2008 Farm Bill provision is implemented through § 201.215 of the final rule. This regulation establishes some criteria to be considered by the Secretary, and does not impose specific requirements or prohibitions on either large or small businesses. Under a poultry growing arrangement, a live poultry dealer has discretion on whether it will perform under the agreement (i.e., whether it will place poultry on a poultry grower's farm). The poultry grower, however, must raise and care for poultry placed on his or her farm by the live poultry dealer as prescribed or be in breach of the contract. Poultry growers have reported to GIPSA that there have been instances in which a live poultry dealer has failed to place poultry on a poultry grower's farm for an extended period of time without notifying the poultry grower of the reasons

for or the anticipated length of delay in placing additional poultry. Without sufficient information, a poultry grower is unable to protect his or her financial interests and make informed business decisions.

GIPSA considered making notification of suspension of birds a requirement, but that is not what the 2008 Farm Bill mandated. GIPSA also considered criteria with various notification time periods between as little as 30 days and as great as 180 days. GIPSA considered the effects of this range of days on small live poultry dealers and small growers and believes that during the normal course of the poultry production cycle, a live poultry dealer should generally know at least 90 days in advance that it will suspend delivery of poultry to a poultry grower. Providing insufficient notification of suspension of delivery would not give poultry growers, most of which are small family-owned businesses, sufficient time to consider other options for their poultry houses and for keeping up with loan payments, some of which are government guaranteed loans. We believe establishing criteria to consider when determining whether live poultry dealers have provided sufficient notice of their intention to suspend delivery of poultry to poultry growers may result in greater parity in contractual relations between the grower and the live poultry dealer.

Finally, this section lists criteria the Secretary may consider when determining if a violation of the P&S Act has occurred and not requirements.

***Section 201.216 Additional capital investments criteria.***

In the 2008 Farm Bill, Congress required the Secretary to establish criteria that may be considered when USDA is determining whether a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a

violation of the P&S Act. While some live poultry dealers/swine contractors may be considered as small businesses, there are disproportionately more poultry/swine growers that are smaller businesses. After evaluating all the alternatives identified, the option being finalized was deemed the least burdensome on small entities while fulfilling the mandate of the 2008 Farm Bill. GIPSA believes the provisions of new § 201.216 could be useful to small poultry/swine growers when they are faced with deciding whether to make financial investments in their business operations as a requirement to entering into a contractual obligation with a live poultry dealer/swine contractor. Again, as directed by Congress this regulation establishes some of the criteria that may be considered by the Secretary regarding additional capital investments, and does not impose specific requirements or prohibitions on large or small businesses.

***Section 201.217 Reasonable period of time to remedy a breach of contract.***

In the 2008 Farm Bill, Congress required the Secretary to establish criteria that may be considered when determining if a packer, swine contractor, or live poultry dealer has provided a reasonable period of time for a poultry/swine grower to remedy a breach of contract that could lead to termination of a production contract. GIPSA believes § 201.217 will benefit small poultry/swine growers because it could result in live poultry dealers providing them with adequate time to remedy a breach of contract. We believe establishing criteria to consider when determining whether a packer, swine contractor or live poultry dealer has provided a reasonable period of time to remedy a breach of contract may result in greater parity in contractual relations between them and the poultry/swine grower. After evaluating all the alternatives identified, the option being finalized was deemed the least burdensome on small entities while fulfilling the mandate of the 2008 Farm Bill. It should be noted the majority of the comments received on §

201.217 were supportive of the regulation and felt the proposed list of criteria was reasonable. This regulation establishes some of the criteria the Secretary may consider when determining if a packer, swine contractor, or live poultry dealer has provided a reasonable time for a poultry/swine grower to remedy a breach of contract and does not impose specific requirements or prohibitions. Additionally, this section satisfies the requirements of the 2008 Farm Bill.

***Section 201.218 Arbitration.***

The 2008 Farm Bill requires that livestock contracts and poultry growing arrangements contain an option for poultry growers and livestock producers to accept or reject arbitration to settle disputes. The 2008 Farm Bill also directed the Secretary to establish criteria to consider when determining if the arbitration process provided in a contract provides a meaningful opportunity for the poultry growers, swine production contract growers, or livestock producers to participate fully in the arbitration process. By establishing a list of some of the criteria the Secretary may consider when determining if a contract's arbitration provisions violate the P&S Act, the final rule should help ensure that any arbitration terms are fair to both parties to the contract. Fairness is especially important when one party to a contract is significantly smaller and may have limited alternatives such as is typically the case for cattle producers, poultry growers, and swine production contract growers. We believe establishing criteria to consider when determining whether growers and producers have been provided a meaningful opportunity to participate in the arbitration process may result in greater parity in contractual relations between them and the packer, swine contractor or live poultry dealer.

The effect of the final regulations on all small businesses described in the analysis is expected not to 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.). Within this final rule, we provide a succinct statement of the need for the rule; a summary of significant issues raised by commenters and an assessment of those comments; changes made as a result of such comments, including changes to minimize significant, negative economic impacts; and estimates of the number of small businesses. We have, therefore, complied with the Regulatory Flexibility Act.

### **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, although in some instances they merely reiterate GIPSA's previous interpretation of the P&S Act. Section 414 of the P&S Act (7 U.S.C. 228c) addresses the issue of preemption.<sup>16</sup> There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this final rule. Nothing in this final rule is intended to interfere with a person's right to enforce liability against any person subject to the P&S Act under authority granted in section 308 of the P&S Act.

### **Executive Order 13175**

This final rule has been reviewed with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. GIPSA offered opportunities to meet with representatives from Tribal Governments during the comment period for the proposed

---

<sup>16</sup> **Section 414. Federal preemption of State and local requirements.**--No requirement of any State or territory of the United States, or any subdivision thereof, or the District of Columbia, with respect to bonding of packers or prompt payment by packers for livestock purchases may be enforced upon any packer operating in compliance with the bonding provisions under the Act of July 12, 1943 (57 Stat. 422; 7 U.S.C. 204), and prompt payment provisions of section 409 of this Act, respectively; Provided, That this section shall not preclude a State from enforcing a requirement, with respect to payment for livestock purchased by a packer at a stockyard subject to this Act, which is not in conflict with the Act or regulations thereunder: Provided further, That this section shall not preclude a State from enforcing State law or regulations with respect to any packer not subject to this Act or the Act of July 12, 1943.

rule, June 22 – November 22, 2010 with specific opportunities in Rapid City, SD on October 28<sup>th</sup>, 2010 and Oklahoma City, OK on November 3<sup>rd</sup>, 2010. All tribal headquarters were invited to participate in these venues however, no tribe participated in the venues for consultation.

GIPSA has received no specific indication that the rule will have a direct or substantial effect on tribes and has received no other requests for consultation as of the date of this publication.

Should GIPSA receive any future requests for consultation, such requests will be addressed as they arise.

### **Paperwork Reduction Act**

This final rule is being issued in accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). Upon OMB approval this package will be merged with 0580-0015. The costs detailed below were reflected in the regulatory impact analysis' total costs for the final rule and were derived from both that analysis and the comments received on the proposed rule. Specifically, the proposed rule discussed the paperwork burden on section-by-section basis. Only the burden associated with those sections being finalized at this time were included in the analysis below. Further, the information in the proposed rule was amended as result of comments received in response to the proposed rule.

The hours involved in conducting tasks associated with the final rule were estimated using GIPSA expertise in administering the P&S Act to develop the time required to maintain records, complete forms, submit required information, for management review, and a legal review for possible changes in contracts or business practices. Estimates are based on GIPSA's experience reviewing business records in the normal course of enforcing the P&S Act, and its

work with data that is of similar in type and complexity to that to be reported. General cost and time parameters used across more than one rule provision are detailed in the table below.

**Table 5. General Parameters Used for Estimates**

Parameter	Value
Admin. assistant salary (\$/yr)	55,000
Manager salary (\$/yr)	75,000
Legal salary (\$/yr)	80,000
Wage full cost, admin. asst. (\$/hr)	34
Wage full cost, manager (\$/hour)	46
Wage full cost, legal (\$/hour)	49
Live poultry dealer firms (#)	199
Swine contractor	727
Poultry producer & hatchery agreements (#)	22,200
Swine production agreements (#)	8,995
Settlements per year per poultry agreement (#)	5
Swine packer plants with 35 packers (#)	55

The administrative assistant annual salary is from information obtained on average hourly earnings from the U.S. Bureau of Labor Statistics, Table B-4 (release date 8-7-09), under the other services line with added expenses outside of salary. Management salary calculations are based on a \$75,000 annual salary. Legal salary calculations are based on an average corporate attorney with an \$80,000 annual salary. All salaries are adjusted by a factor of 1.27 to account for benefits and placed on an hourly basis as  $\$/\text{hour} = (\text{salary}/\text{year} \times 1.27 \text{ for benefits}) / (40 \text{ hours}/\text{week} \times 52 \text{ weeks}/\text{year})$ . Specific administrative costs by provision were calculated as described below. The total annual administrative cost associated with the final rule is estimated at \$1.6 million (table 6).

**Table 6. USDA estimated administrative costs, by section of final rule, by species**

Section	Pork	Poultry	Total
---------	------	---------	-------

	million \$		
201.215 Suspension of delivery of birds	0.0	*	*
201.216 Additional capital investments criteria	0.4	0.9	1.3
201.217 Reasonable period to remedy a breach of contract	*	0.2	0.2
201.218 Arbitration	*	*	*
Total	0.4	1.2	1.6

\* defined as less than \$100,000.

Specific administrative costs by provision were calculated as described below.

#### *Section 201.215 Suspension of delivery of birds*

One of the criteria the Secretary may consider in determining if a live poultry dealer has provided reasonable notice of the suspension of birds to a poultry grower is whether written notice of the suspension of birds was provided. The additional information burden of providing written notice of suspension of birds is based on 4,440 notices delivered per year = (22,200 contracts x 20 percent) and an estimated \$75,480 industry cost per year = (4,440 notices x 0.50 hours to provide notice x administrative assistant wage rate of \$34 per hour)

#### *Section 201.216 Additional capital investment criteria*

Live poultry dealers and swine contractors may choose to undertake a review of their contracts in response to the list of some of the criteria the Secretary may consider in determining whether an additional capital investment requirement in their poultry growing arrangement or production contract constitutes a violation of the P&S Act. The cost of such a review includes an estimate of 0.20 proportion of the agreements expiring, or requiring review per year. This yields 6,239 contracts reviewed per year = (22,200 poultry + 8,995 swine production agreements) x 0.20. With the cost of contract review being based on 37,434 hours total burden = 6,239 contracts x 6 hour/contract to yield \$1,272,756 for the cost of review = 37,434 hours x \$34/hour

administrative assistant wage. The additional administrative cost for live poultry dealers is estimated at about \$900,000 compared to \$367,000 for swine contractors. These costs are expected to be incurred annually.

*Section 201.217 Reasonable period of time to remedy a breach of contract*

One of the criteria the Secretary may consider in determining if a packer, swine contractor or live poultry dealer has provided a poultry grower or swine production contract grower reasonable time to remedy a breach of contract that could lead to contract termination is whether written notice of the breach was provided. The estimate of the burden to provide such written notice is based on 31,195 poultry growers and swine contracts affected. This yields 6,239 notices per year = 20 percent of the contracts as the annual rate of contract breaches for a per year cost of \$212,126 per year cost = (time burden of 1 hour to provide notice x 6,239 notices x \$34 per hour administrative assistant wage rate). The additional administrative cost for live poultry dealers is estimated at about \$150,000 per year compared to \$61,000 per year for swine contractors.

*Section 201.218 Arbitration*

One of the criteria the Secretary may consider in determining if the arbitration process provides a meaningful opportunity for the grower or producer to participate fully in the arbitration process, if that is the dispute resolution mechanism they have chosen in the agreement or contract, is whether the right of the contract producer or grower to use arbitration is conspicuously stated in the contract. The estimate of the burden to provide such a statement in all contracts is based on 31,195 poultry growers and swine contracts affected. Assuming that all contracts are new, amended, altered, modified, renewed, or extended over a five year period, the

total could would be \$265,158 = (time burden of 0.25 hour to provide notice x 31,195 contract x \$34 per hour administrative assistant wage rate). The annual average cost would be \$53,032 with the additional cost for live poultry dealers estimated at about \$38,000 per year compared to \$15,000 per year for swine contractors. It is assumed that such language would eventually become part of the contract template and this cost would go down over time.

### **E-Government Act Compliance**

GIPSA is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

### **List of Subjects in 9 CFR Part 201**

Confidential Business Information, Reporting and recordkeeping requirements, Contracts, Poultry, Livestock, Arbitration

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

### **PART 201 –REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT**

1. The authority citation for Part 201 is revised to read as follows:

Authority: 7 U.S.C. 181 – 229, 229c.

2. In § 201.2, add reserved paragraph (l) and paragraphs (m) through (o) to read as follows:

#### **§ 201.2 Terms defined.**

\* \* \* \* \*

(l) [Reserved]

(m) *Principal part of performance* means the raising of, and caring for livestock or poultry, when used in connection with a livestock or poultry production contract.

(n) *Additional capital investment* means a combined amount of \$12,500 or more per structure paid by a poultry grower or swine production contract grower over the life of the poultry growing arrangement or swine production contract beyond the initial investment for facilities used to grow, raise and care for poultry or swine. Such term includes the total cost of upgrades to the structure, upgrades of equipment located in and around each structure, goods and professional services that are directly attributable to the additional capital investment. The term does not include costs of maintenance or repair.

(o) *Suspension of delivery of birds* means the failure of a live poultry dealer to deliver a new poultry flock before the date payment is due to a poultry grower for the previous flock under section 410 of the Act.

#### **§§ 201.3 and 201.4 [Redesignated as §§ 201.4 and 201.5]**

3. Sections 201.3 and 201.4 are redesignated as §§ 201.4 and 201.5 respectively.

4. A new § 201.3 is added to read as follows:

#### **§ 201.3 Applicability of regulations in this part.**

(a) *Applicability to live poultry dealers.* The regulations in this part when applicable to live poultry dealers shall apply to all stages of a live poultry dealer's poultry production, including pullets, laying hens, breeders and broilers, excluding egg-type pullets, hens that only produce table eggs, and breeder flocks for the egg industry.

(b) *Effective dates.* The regulations in this part, when governing or affecting contracts, shall apply to any poultry growing arrangement, swine production contract, or any other livestock or poultry contract entered into, amended, altered, modified, renewed or extended after [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

5. Add reserved §§ 201.213 and 201.214 and §§ 201.215 through 201.218 to read as follows:

Sec.

\* \* \* \* \*

201.213 [Reserved]

201.214 [Reserved]

201.215 Suspension of delivery of birds.

201.216 Additional capital investments criteria.

201.217 Reasonable period of time to remedy a breach of contract.

201.218 Arbitration.

\* \* \* \* \*

**§ 201.213 [Reserved]**

**§ 201.214 [Reserved]**

**§ 201.215 Suspension of delivery of birds.**

The Secretary may consider various criteria when determining whether or not reasonable notice has been given by a live poultry dealer to a poultry grower for suspension of delivery of birds. These criteria include, but are not limited to:

(a) Whether a live poultry dealer provides a poultry grower written notice at least 90 days prior to the date it intends to suspend delivery of birds under a poultry growing arrangement;

(b) Whether the written notice adequately states the reason for the suspension of delivery, the length of the suspension of delivery, and the anticipated date the delivery of birds will resume;  
and



(c) Whether a catastrophic or natural disaster, or other emergency, such as an unforeseen bankruptcy, has occurred that has prevented a live poultry dealer from providing reasonable notice.

**§ 201.216 Additional capital investments criteria.**

The Secretary may consider various criteria in determining whether a requirement that a poultry grower or swine production contract grower make additional capital investments over the life of a production contract or growing arrangement constitutes a violation of the Act. These criteria include, but are not limited to:

(a) Whether a packer, swine contractor or live poultry dealer failed to give a poultry grower or swine production contract grower discretion to decide against the additional capital investment requirement;

(b) Whether the additional capital investment is the result of coercion, retaliation or threats of coercion or retaliation by the packer, swine contractor or live poultry dealer;

(c) Whether the packer, swine contractor or live poultry dealer intends or does substantially reduce or end operations at the slaughter plant or processing facility or intends or does substantially reduce or end production operations within 12 months of requiring the additional capital investment, absent the occurrence of a catastrophic or natural disaster, or other emergency, such as unforeseen bankruptcy;

(d) Whether the packer, swine contractor, or live poultry dealer required some poultry growers or swine production contract growers to make additional capital investments, but did not require other similarly situated poultry growers or swine production contract growers to make the same additional capital investments;

(e) The age and number of recent upgrades to, or capital investments in, the poultry grower's or swine production contract grower's operations;

(f) Whether the cost of the required additional capital investments can reasonably be expected to be recouped by the poultry grower or swine production contract grower;

(g) Whether a reasonable time period to implement the required additional capital investments is provided to the poultry grower or swine production contract grower; and

(h) Whether equipment changes are required with respect to equipment previously approved and accepted by the packer, swine contractor, or live poultry dealer, if existing equipment is functioning as it was intended to function unless the packer, swine contractor, or live poultry dealer provides adequate compensation incentives to the poultry grower or swine production contract grower.

**§ 201.217 Reasonable period of time to remedy a breach of contract.**

The Secretary may consider various criteria when determining whether a packer, swine contractor or live poultry dealer has provided a poultry grower or swine production contract grower a reasonable period of time to remedy a breach of contract that could lead to contract termination. These criteria do not limit a packer, swine contractor or live poultry dealer's rights under a contract or agreement where food safety or animal welfare is concerned. These criteria, include, but are not limited to:

(a) Whether the packer, swine contractor or live poultry dealer provided written notice of the breach of contract to the poultry grower or swine production contract grower upon initial discovery of that breach of contract if the packer, swine contractor or live poultry dealer intends to take an adverse action, including termination of a contract, against the poultry grower or swine

production contract grower based on that breach of contract by the poultry grower or swine production contract grower;

(b) Whether the notice in paragraph (a) of this section includes the following:

(1) A description of the act or omission believed to constitute a breach of contract, including identification of the section of the contract believed to have been breached;

(2) The date of the breach;

(3) The means by which the poultry grower or swine production contract grower can satisfactorily remedy the breach, if possible, based on the nature of the breach; and

(4) A date that provides a reasonable time, based on the nature of the breach, by which the breach must be remedied.

(c) Whether the packer, swine contractor or live poultry dealer took into account the poultry grower's or swine production contract grower's ongoing responsibilities related to the raising and handling of the poultry or swine under their care when establishing the date by which a breach should be remedied; and

(d) Whether the poultry grower or swine production contract grower was afforded adequate time from the date of the notice of the alleged breach to rebut the allegation of a breach.

**§ 201.218 Arbitration.**

(a) In any livestock or poultry production contract that requires the use of arbitration the following language must appear on the signature page of the contract in bold conspicuous print:

*“Right to Decline Arbitration.* A poultry grower, livestock producer or swine production contract grower has the right to decline to be bound by the arbitration provisions set forth in this agreement. A poultry grower, livestock producer or swine production contract grower shall

indicate whether or not it desires to be bound by the arbitration provisions by signing one of the following statements; failure to choose an option will be treated as if the poultry grower, livestock producer or swine production contract grower declined to be bound by the arbitration provisions set forth in this Agreement:

I decline to be bound by the arbitration provisions set forth in this Agreement \_\_\_\_\_

\_\_\_\_\_

I accept the arbitration provisions as set forth in this Agreement \_\_\_\_\_”

(b)The Secretary may consider various criteria when determining whether the arbitration process provided in a production contract provides a meaningful opportunity for the poultry grower, livestock producer, or swine production contract grower to participate fully in the arbitration process. These criteria include, but are not limited to:

(1) Whether the contract discloses sufficient information in bold, conspicuous print describing all the costs of arbitration to be paid by the poultry grower, swine production contract grower, or livestock producer, and the arbitration process and any limitations on legal rights and remedies in such a manner as to allow the poultry grower, livestock producer or swine contract production grower to make an informed decision on whether to elect arbitration for dispute resolution;

(2) Whether provisions in the entire arbitration process governing the costs and time limits are reasonable;

(3) Whether the poultry grower, livestock producer, or swine production contract grower is provided access to and opportunity to engage in reasonable discovery of information held by the packer, swine contractor or live poultry dealer;

(4) Whether arbitration is required to be used to resolve only disputes relevant to the contractual obligations of the parties; and

(5) Whether a reasoned, written opinion based on applicable law, legal principles and precedent for the award is required to be provided to the parties.

---

J. Dudley Butler  
Administrator, Grain Inspection, Packers and Stockyards Administration

*[FR Doc. 2011-31618 Filed 12/08/2011 at 8:45 am; Publication Date: 12/09/2011]*