POLICY PENNINGS

USDA Claims New GIPSA Section 202 Rules Clarifies Original Intent

BY DARYLL RAY
Ag Policy Analyst

On June 22, 2010, the United States Department of Agriculture's (USDA) Grain Inspection, Packers, and Stockyards Administration (GIPSA) published a proposed rule, as required by the 2008 Farm Bill, that is designed to provide significant new protections for producers against unfair, fraudulent, or retaliatory practices.

One of the new rules concerns Section 202 of the Packers and Stockyards Act (PSA) that lists seven unlawful acts by the meat packing industry. Each one of those subsections describing a particular unlawful act is separated by a semicolon and the word "or." Grammatically, each of those clauses is an independent clause, which means that each one stands alone.

Subsection (a) makes it unlawful for the industry to "engage in or use any unfair, unjustly discriminatory, or deceptive practice or device." Subsection (b) makes it unlawful for the meat packing industry to "make or give any undue or unreasonable preference or advantage to any particular individual or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect." The two subsections describe individual harms while the remaining five deal with actions that restrain competition.

In Terry v. Tyson Farms, Inc., Tyson argued "that because the PSA is essentially an antitrust statute, subsections (a) and (b) require a party to allege an adverse effect on competition in order to sustain a cause of action." The Sixth Circuit Court of Appeals, which heard Terry v. Tyson Farms, Inc. noted that seven circuits "have addressed this precise issue" and declined to deviate from the findings of the others.

In terms of grammar, the eight circuits—now including the Sixth—have, in effect, made subsections (a) and (b) dependent clauses that can only be invoked if one of the remaining five independent clauses dealing with harm to competition is also proved.

The USDA has disagreed with the courts' interpretation and consistently held that under sections 202 (a) or (b) of the PSA, an unfair practice can be proven without proof of predatory intent, competitive injury, or likelihood of competitive injury.

Despite USDA's long-held position, the courts failed to defer to USDA's interpretation of the statute because that interpretation was not enshrined in regulation even though the USDA had filed an amicus brief in support of Terry. As a result the USDA asserts that their newly proposed regulations would constitute a material change in circumstances that would warrant judicial reexamination of this issue.

Responding to the release of the proposed rules, AMI (American Meat Institute) Senior Vice President of Regulatory Affairs and General Counsel Mark Dopp accused the USDA of "engaging in a regulatory end-run and attempting to change the law through administrative fiat."

In proposing regulations that would clarify that violations of subsections (a) and (b) of section 202 of the PSA, the USDA provides evidence that the legislative history and purposes of the PSA also support USDA's position. After providing a number of examples, the USDA concludes that the purposes of the PSA are not limited to protecting competition.

In addition to the grammatical perspective and the legislative history and purposes of the PSA, one could look at the issue from an economic point of view. From an economic point of view, it is clear that the court rulings have confined attention to violations of 202(a) and (b) that harm the retail consumer. As the USDA argues, many practices can be unfair and never have anticompetitive implications at the retail level. Examples of such practices include, but are not limited to, not allowing a poultry grower to watch birds being weighed, using inaccurate scales, providing a grower poor quality feed, giving a grower sick birds to raise, failing to provide a grower the growing contract in a timely manner, or retaliating against a grower.

While not ignoring the grammatical, historical and purpose arguments, it could be argued that the courts have ignored half of the anticompetitive equation. And that half is the purchase of product by the packing firm and/or integrator—called by economists a monopsony or oligopsony when one or a very small number of buyers control a market. At the national level and on the buying side, the meat industry is an oligopsony, and at the local level it is usually a monopsony.

Poultry integrators usually offer contracts to growers within a limited radius from the plant. And on the occasion that two integrators draw from the same area, they do not poach each others' growers. They don't even compete for the best growers. The poultry integrators are certainly not like the major sports leagues where teams are salivating to grab the others' best players when those players achieve free agency—to wit: LeBron James and the question of whether or not the Cleveland Cavaliers can offer a contract that will keep him in town.

While the integrators do not compete with each other for growers, the growers are in competition with other growers. In the tournament system that is used in the poultry industry, the growers are in competition with each other to be among the top producers. Their level of pay depends upon their tournament placement.

So even if the courts were to continue to ignore grammar, history, and purpose, it could be argued from an economic perspective that giving a particular grower poor feed or sickly birds harms competition at the grower level. The same could be argued for the other practices that were identified as examples by the USDA.

As it stands, the courts have adopted an asymmetric understanding of the nature of competition in the poultry industry to the detriment of the poultry grower. The USDA's rule goes a long way toward restoring the original intent of the statute.

As "Supreme Court Justice Peckham, in one of the first substantive decisions interpreting the Sherman Antitrust Act, said, 'It is not for the real prosperity of any country that such changes should occur which result in transferring an independent businessman…into a mere servant or agent of a corporation…having no voice in shaping the business policy…and bound to obey orders issued by others.'" (Quoted in Domina and Taylor: http://www.competitivemarkets.com/index.php?option=com_content&task=view&id=347&Itemid=50).

The proposed rule was published in the June 22, 2010, Federal Register. GIPSA will consider comments received by August 23, 2010. Comments may be sent via email to comments.gipsa@usda.gov or sent by mail to Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW, Room 1643-S, Washington, D.C. 20250-3604. Copies of the proposed rule and additional information can be found at: http://www.gipsa.usda.gov by clicking on Federal Register.

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Mitchell Technical Institute Expands Farm And Ranch Business Management Program

The Farm and Ranch Business Management program at Mitchell Technical Institute is in the process of expanding the program to reach much of eastern South Dakota. With the addition of a third instructor and the movement to online-based instruction, the expansion is underway and plans to start enrolling farm families are in process.

Current instructors Roger DeRouchey and Calvin Pietz have been localized to a 90 mile radius of Mitchell until now. With the addition of Lori Christensen, former agriculture teacher at Madison High School, the school plans to move the entire curriculum online and enroll 40-50 new participants to begin instruction in 2011. If the transition goes as planned, the program will be adding additional instructors in northeast South Dakota and western South Dakota as the expansion progresses.

"This program is the hidden gem of agriculture management in the State. The average net cash income of participants in the program is 35 percent higher and net cash income per acre is 3 percent higher than that of those South Dakota producers not participating in the program according to the 2007 USDA/NASS Census. The resources that our instructors provide to individual farm families in helping them achieve success are invaluable. I firmly believe this expansion will be a great asset for the entire state when completed;" said MTI President Greg Von Wald.

The Farm and Ranch Business Management program has partnered with Farm Credit Services of America to help with farm family recruitment and the use of office space to work regionally with participants. South Dakota Pork Producers Council, South Dakota Wheat Commission, South Dakota Corn Utilization Council, and the South Dakota Soybean Research and Promotion Council have also partnered with Mitchell Technical Institute to ensure that the expansion is successful.

MARKET INSIDER

July Report Reveals Decline In Crop Ratings Since June

BY BRIAN HOOPS
Yankton


Brian Hoops

On July 9, the USDA released its July Supply/Demand forecast. After the bullish quarterly stocks and acreage report, traders had been expecting a bullish supply/demand report as the USDA was expected to use less corn acres than the June report and possibly a smaller production figure as crop ratings have declined since the last crop report's release in June.

The USDA estimated 1.478 billion bushels of corn will be in U.S. grain bins at the end of this marketing year and 1.373 billion bushels at the end of next summer. Traders had expected 2009/10 end stocks of 1.4 billion bushels and 2010/11 end stocks of 1.292 billion bushels. U.S. corn supplies are being drawn down by strong demand for animal feed, estimated at 5.350 bb, exports of 1.950 bb and record large ethanol production of 1.330 bb. In all, total demand for U.S. corn is estimated at 13.360 bb, meanwhile a near record large crop is forecast to be harvested this fall of 13.245 bb. This means demand will outpace supply by 115 mb, based today's supply/demand figures. The USDA forecast the corn supply would be 250 million bushels smaller in 2010/11 than USDA estimated a month ago, thanks due to a reduction in the current harvested acres. A month ago, USDA said this year's end stocks would be 1.603 billion bushels, and for the new marketing year 1.573 billion bushels.

The stocks to usage ratio for corn is expected to narrow to 10.3 percent, the tightest since 2003/04.

The USDA also estimated 175 million bushels of soybeans would be in storage at the end of this marketing year, down 10 million bushels from its previous estimate, and 360 million bushels would be available at the end of 2010/11, unchanged from June. Soybean exports were increased by 20 mb in the 2010/11 marketing year to 1.370 bb, however this figure trails the 2009/10 marketing year which has the U.S. on pace to reach the USDA forecast of 1.460 bb, an all time record export pace. It is very likely the USDA will be forced to increase the 2010/11 export forecast as the marketing year matures. Crush and mill usage was increased slightly to 1.645 bb and total usage was increased to 3.170 bb. This leaves U.S. ending stocks rebuilding compared to a year ago as total production, 3.345 bb, would outpace demand.

The USDA will make its first estimates of the fall harvest on Aug. 12. The estimates will include actual field surveys. Currently, the USDA's projections assume normal weather and yields. USDA has projected a corn yield of 163.5 bushels an acre, the second-highest ever. USDA says its corn crop projections are within 7 percent of the year-end figure, on average, but end-stock projections vary by as much as 35 percent from the final figure.

The USDA raised its forecast of this year's wheat crop to 2.216 billion bushels, up 7 percent from June due to higher yields. Winter wheat production is forecast at 1.51 billion bushels, up 2 percent from last month but down 1 percent from 2009. The United States yield is forecast at 46.9 bushels per acre, up 0.3 bushel from last month and up 2.7 bushels from last year. If realized, this will be tied for the third highest yield on record, trailing only 1999 and 2008. Its winter wheat forecast has a margin of 7 percent.

The U.S. has not seen anything as fundamentally bearish as the current U.S. balance sheets since the mid-1980s situation with stocks near 2.0 billion bushels and stocks/usage ratios of near 100 percent. The USDA balance sheet estimates ending stocks at 1.093 billion bushels and a stocks/usage ratio estimate at an extremely large 49.8 percent. World ending stocks were lowered from 193.93 mts to 187.1 mts due to crop problems being reported in Canada (too wet) and in Russia and Kazhatzan (too hot and dry).

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Soil Testing May Help Determine Cause Of Yellowing Corn

BROOKINGS — Corn growers are seeing a lot of yellow corn due to excess water.

South Dakota Cooperative Extension Soils Specialist Ron Gelderman said that the yellowing comes when the soil is saturated with water for periods of time.

"All the soil pore spaces contain water and little oxygen, and most producers know that plants utilize carbon dioxide and through photosynthesis can produce carbohydrates," Gelderman said. "But many of us don't realize that plants also need oxygen to burn or respire those food products that they have created. Likewise, plant roots require oxygen to utilize carbohydrates to produce energy to move minerals from the soil into the plant."

Hence, the leaves will often turn yellow because of less nitrogen and other nutrients taken up by the plant, Gelderman explained.

"Even with all the rain, many soil tests have shown much available plant nitrogen remains in the root zone but the plant can't use it because the roots can't take it up because they are suffocating," said Gelderman. "However, now we see many field areas where the soils are no longer saturated with water but the plants are still yellow, and it leads producers to wonder what the problem truly is."

Does this yellowing corn need more nitrogen? More sulfur? Surprisingly, Gelderman said that soil tests, in many cases, show plentiful amounts of both.

"When plants suffer from flooding, drought, or other stresses, they typically produce some chemicals generally referred to as stress-response hormones, and these chemicals will reduce normal plant functions, such as protein synthesis, to a low level as an act of survival for the long term, and will also cause a change in root structure to cope with oxygen deprivation in the roots," Gelderman said. "Once the stress disappears, such as when the soil dries out, the stress hormones may not dissipate immediately, and the changes in the root structure remain, which can also reduce nutrient uptake, so the effects of the stress linger for a period of time."

Gelderman said that observations in previous flooding situations confirm this. The plant eventually may recover but it has been severely stunted, maturity delayed, and yield potential has been limited.

"In addition, the lack of oxygen may have caused injury or death to some of the roots and could allow for secondary disease infections," said Gelderman. "Therefore, applications of nitrogen or sulfur may do little good even if soil test levels call for added nutrients."

Gelderman said that if a producer decides to make a nutrient application, he or she should be sure to leave a check strip to determine if the application was profitable. This process will help producers make the decision the next time saturated soil conditions exist for a period of time.

"We all want to protect the investment we already made in the crop, but investing more inputs into a no-win situation is not the answer," Gelderman said. "Instead, use the drying time to sample some of the suspect fields and determine plant-available nutrient levels."

For more information, call Gelderman at 605-688-4770.

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earth, that are claimed to have natural deworming qualities, but there is no wide-scale success with these substances. Various producers, such as Arkansas producers Ken and Candy Ziemer, swear by certain plants in their pastures such as evergreens, acorns, and crabgrass. It may be that if there is a benefit from herbalism or from other untested plants, that they boost the natural immunity an individual animal may have toward parasites. Some animals, according to the National Sustainable Agriculture Information Service, are classified as resilient in that they can maintain a parasite load without feeling the health effects that another individual animal may have.

All livestock species, especially those that graze, are susceptible to the effects of internal parasites — and all livestock, including cattle and horses, have the potential to find their most common and troublesome parasites resistant to synthetic dewormers. While it's still recommended to drench cattle on a regular basis, it's helpful to employ other non-drug tactics where able to control parasites.

YOUR VIEWS

BY FRED STOKES

The July 1, 2010 issue of Beef Magazine contains an article titled "GIPSA Signals End to Value-Based Marketing" by Contributing Editor Troy Marshall. He asserts that the proposed GIPSA Rules "(is) a complete rejection of value-based marketing and differentiation and legislates us back to a commodity marketplace where everyone must receive the same price."

Mr. Marshall could not be more incorrect and still be on Planet Earth.

The proposed rules state just the opposite of what Beef Magazine asserts. And the USDA explanation makes this clear. In the USDA's words, "If a packer … believes it can justify disparate treatment of … livestock producers, it must have a legitimate business reason for that differential treatment. … Justification need not be extensive but should be enough to identify the benefit-cost basis of any pricing differentials received or paid, and may include increased or lower trucking costs; market price of meat; volume; labor, energy, or maintenance costs, etc."

GIPSA further illuminates support of value-based marketing, "For example, a packer's participation in a branded program for a particular type of beef that returns a premium to the packer could be used to justify a higher price paid to producers that sell the type of cattle that meets the specifications of the branded program. In general, the data needed to justify a different treatment would identify those pecuniary costs and benefits associated with the treatment that demonstrate its decreased costs or increased revenues from a standard business practice."

GIPSA's explanation of the proposed rule states, "One of the common complaints that GIPSA has received regarding undue and unreasonable preferences or advantages is that packers, swine contractors and live poultry dealers offer considerably better contract terms to select sellers/growers, which impedes other sellers/growers' ability to compete."

The plain language of the proposed rules reveals that GIPSA Signals a Beginning not an End to Value-Based Marketing. Proposed rules, as presently written, intend to bring an end to sweetheart deals the chosen few suppliers have had with the packers.

Is it asking too much to request that Beef Magazine and its Contributing Editor try to stick to the facts?

There is plenty to debate without distortion of the facts.

Soybean Producers Urged To Scout For Aphids

BY STEVE SUTERA
Extension Educator

Some of the soybeans in the area are or will be flowering soon. The critical time to scout for and control soybean aphids is from R2 (full bloom) to R5 (beginning seed).

The economic threshold for soybean aphids is an average of 250 aphids per plant throughout the whole field. This threshold is supported through the R5 growth state. So — producers should be scouting their fields on a weekly basis.

Aphid populations can vary greatly from field to field. Check all fields. They can start out slow but can reach damaging levels quickly. And — the only way to know is to monitor fields on a regular (weekly) basis.

Don't spray too soon. Sometimes there are enough beneficial insects in the field to keep the aphid numbers low during the entire growing season.

For more information and recommendations on insecticides and rates, call the Bon Homme extension office at 605-589-3531.