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THE Stevenson REPORT

Time To Start Discussing a Solution

BY RANDY STEVENSON, PRESIDENT

Controversy has erupted over the proposed new GIPSA rules. This disagreement is not unusual in a discussion of the details of the role of government in the marketplace. Nearly everybody agrees that government involvement ought to be "just right", and not too much nor too little. The disagreement comes over what constitutes "just right".

One argument brought forth by both sides is that the nature of the marketplace has changed. Whereas cattle for slaughter were previously purchased at auctions, that is no longer true. Therefore, new methods of transaction should be acceptable in the absences of those auctions. The question is what new methods should be acceptable.

It is evident that new technology has provided new possibilities in the marketplace. Some of those possibilities have not been implemented. We believe it is time to do so. Perhaps their implementation can help us arrive at a marketplace that is "just right".

It is time to start discussions about an electronic marketplace. There are some features of such a marketplace that we can, even now, describe, in order to make it workable as an open and competitive market.

It would be brokered and contract based. Like the stock exchanges, every transaction would be brokered and would constitute a contract for delivery. This is unlike some of the attempts that have been made in the past to post show lists on the internet. These would be actual contracts made between buyers and sellers and brokered by a third party. This pattern has worked in the stock market for a very long time. Unlike the futures market, every contract would actually culminate in the delivery of cattle. It would not replace the futures market, but would have some similarities to it.

It would only be compulsory for large firms. Perhaps the best device to use to determine who should be compelled to buy or sell through the exchange would be the HHI (Herfindahl–Hirschman Index), which measures concentration level of firms. Either buyers or sellers who have a certain level as measured by the HHI, would be compelled to buy or sell

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What's
INSIDE...

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Packers and Stockyards Act;

Nullified by Judicial Activism! – Must We Let It Rest In Peace?

THOMAS F. "FRED" STOKES
Executive Director

"The Rule doesn't reinvent the Packers and Stockyards Act of 1921 (PSA) but rather reinvigorates it", so says David Domina, OCM General Counsel of the Proposed GIPSA Rule published on the federal register June 22, 2010. The rule was issued pursuant to the 2008 Farm Bill to clarify and interpret the 89 year old Packers and Stockyards Act, but the PSA (sometimes called the producer's protection act) may well be nullified by judicial activism rather than reinvigorated by the GIPSA Rule.

Producers will remain unprotected and alone.

PSA came into being to protect livestock producers during a period of rampant abuses by meat packers. At the time, the packing industry was under the ruthless domination of five firms: Armour, Cudahy, Morris, Swift, and Wilson who controlled some 70% of the meatpacking business. They used their concentration and resultant market power to unduly enrich themselves to the detriment of both livestock producers and consumers.

The PSA was intended to curb these abuses and provide for a more competitive and equitable market for livestock and poultry. But the PSA has fallen short of its intended purpose due to lack of clarity and proper promulgation and judicial distortions. The Food, Conservation and Energy Act of 2008 (Farm Bill) tasked USDA with writing a rule which would further promulgate and clarify the PSA.

When the rule was published on the federal register on June 22 of last year, there was a spontaneous wailing and gnashing of teeth by the meat packers and pork and poultry integrators. Aided and abetted by their political minions, lobbyists and farm publications influenced by their big advertising buys, they precipitated a veritable firestorm of opposition.

While the packers have been opposed to most every aspects of the GIPSA Rule; their strongest opposition is to the provision that would reverse the several appellate court rulings requiring a showing of harm to competition before considering damages to an individual or class. The relevant part of PSA reads:

Section 202. Unlawful practices enumerated.

It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or

(b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect;

Since at least 2005, federal appellate courts have ruled that this provision requires a showing of harm to competition

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Let's Look at the Statute. Surprise! It's Not About Efficiency!

BY C. ROBERT TAYLOR DAVID A. DOMINA

Many academic economists have blinders on: All they see is efficiency, efficiency, efficiency. This is true of recent comments about GIPSA proposed regulations and the *Packers & Stockyards Act* of 1921. It is also true of numerous economic analyses by government and academic economists.

Generations of economists have recognized that economic efficiency is necessarily a value-laden concept, and a particularly narrow view of economic affairs at that. Nevertheless, economists responsible for numerous government studies of livestock and poultry markets can't seem to see anything but "efficiency."

Attorneys, unlike economists, often deal with issues involving equity, fairness, and justice. So it is surprising that two academic lawyers, Ferrell and Rumley, are seemingly blind to equity and fairness issues in a recent article titled *The Role of Economic and Legal Analysis in the GIPSA Debate* published by the American Agricultural Economics Association. (see http://www.aaea.org/publications/policy-issues/)

After carefully laying out the proposed GIPSA Rules, Ferrell and Rumley implicitly wear economists' blinders. They state, *"While some believe that the need for the rules is self-evident and requires no further study, other believe that the proposed rules ignore what current scholarship suggests for improving the livestock industry … Notably absent from the proposed rules' economic analysis section are any significant discussions of a number of GIPSA-funded studies on concentration in the livestock and poultry industries … The omission of these studies (from proposed Rules) surprised many scholars, as they were regarded as the most comprehensive studies on the topic of market concentration and the impacts of alternative marketing arrangements (AMA). … Sound, objective research on the effects of industry structure changes in the livestock and poultry sector is already available."*

The so-called objective studies Ferrell and Rumley refer to focus on efficiency. Yet the word "efficiency" is not to be found in the PSA. Not once.

Prevalent words in the PSA are unfair, unjustly discriminatory, undue or unreasonable preference, deceptive practice, and manipulating prices.

Yet the numerous studies addressed only efficiency. Equity and fairness were not considered. The price a poultry grower—a serf with a mortgage–pays for being at the mercy of an integrator was not mentioned. Loss of economic freedom was not mentioned. Preferential treatment was considered in the government studies, but quickly dismissed by the blinded economists.

Ferrell and Rumley go on to state that, *"Producer-proponents of the rule hold that it will bring balance, transparency, and fairness to the livestock and poultry markets …"*

True. Key words are "balance", "transparency," and "fairness." What they refer to as "sound, objective research" did not consider these aspects of the debate. Ferrell and Rumley fail, however, to note a recent study of the subject published in mid-2010 and co-authored by us. We made an effort deemed worthy of publication after peer review in a leading ag law journal. We focused on the actual words of the *Packers & Stockyards Act*, not some absent ephemeral and non-statutory "efficiency". See, Domina & Taylor, "The Debilitating Effects of Concentration Markets Affecting Agriculture," 15 DRAKE J. AGRICULTURAL L. 61-108 2010.

While we hesitate to commend our own work, surely there is something to be said for both lawyers and economists to stick to the language of a governing statute when commenting or Rules or Regulations to be issued under the statute's authority! We think this is good policy. We invite others who write in this area to give the same a try!

Economic efficiency is important, but it is not the only consideration, and may not be the main consideration in debate over the structure of livestock and poultry markets. The key issues are fairness, preferential treatment of the "chosen ones," economic freedom and economic liberty. Economists, take your blinders off! CRT|DAD

Bacon

BY RICHARD OSWALD

According to National Public Radio, (1), the one thing vegans can't resist is a slice of crispy fried pork. That makes bacon the gateway meat for wavering vegetarians.

Bacon lures us first through smell, which has a lot to do with the way taste buds do their job. It has salt, protein, and fat—things human bodies crave. That's why a scientist named Johan Lundstrom claims the bacon/human love affair happens simply because our brains are wired to want it. Arun Gupta goes Lundstrom three better by identifying six types of umami, or savoriness, (4) that elicit an addictive neurochemical response in omnivore brains.

Newspaper columnist Doug Larson summarizes the dilemma: "Life expectancy would grow by leaps and bounds if vegetables smelled like bacon." (3)

True, bacon can be fried in 10 minutes or less. It's quick. On the other hand, the 18-hour maple cure makes it anything but fast food. When I read Mark Bittman's first Food Manifesto column in the New York Times I hoped he'd leave bacon, the gateway meat, alone. I got my wish.

What Bittman wants is "sustainability" in our food supply. That's been on the radar since eco-movements of the '70s. In the '80s the UN put it on their list of all that is good and righteous. Since then there have been attempts to link all our food on a sustainable to-do list. Not much has happened with "sustainability" because up to now there's been a wrestling match between big food and committed foodies over sustainable definitions.

The whole movement has slowed because corporations would rather burn breakfast than lose control of markets.

This is what the new *New York Times* food columnist seems to miss — the connection between who controls markets and what happens on the farm and at the retail level. If you miss the connection between the lack of competition in agriculture and the nature of food, then you've overlooked the whole game.

> If people want truly sustainable food, the first order is to respect both the health of consumers and the realities of food production without watering down rules on safety AND competition.

For instance, Bittman writes that he doesn't like subsidies. But subsidies are linked to how agriculture has changed and what it has become.

The truth is that grain subsidies rose just as we allowed livestock production to be controlled by ever-larger integrators (like Tyson, Cargill, Smithfield) and by opaque markets (where farmers and ranchers were never sure they received a fair price). Now, the livestock that once ate the grain family farms grew has moved off the farm and is increasingly under the control of a handful of companies.

That means the only remaining reason to produce corn was handed to farmers in the form of a government check.

Just for the record, during the time U.S. livestock producers were losing money and consolidating in the 70's, 80's and 90's, not once did Congress offer them a routine subsidy or floor price as they did with grains.

Grain subsidies for farmers amounted to feed subsidies for CAFO agriculture.

Grain subsidies came right along with corporate control of the livestock markets. But cheap grain policies and subsidies are more or less meaningless today as prices seek new lifetime highs among the many new uses for corn.

Stratospheric grain prices and falling dollars may have a silver lining. Food industrialists (whom Bittman doesn't mention in his column) will have to cut back livestock production or do more work for less money. There's a certain justice in that, because those are the same choices imposed on family farms during 40 years of consolidation.

Choice number three is that America imports cheaper foreign food at the expense of US markets and the health of our consumers.

Paradoxically our economic situation might be creating an opportunity for exactly the type of food we'd like more of (8), like home grown bacon, as the cheap grain subsidy for big agribusiness takes the cure.

The other problem with what Bittman advocates it's that the definitions of sustainability are open to interpretation. When it comes down to sticking on the label, big packers and retailers of

the world are there to smoke the rules. While guidelines will undoubtedly favor bacon in one form or another, they won't do much to eliminate corporate gunk from human diets, especially if gunk can be defined sustainably, or possibly taco meat filler. (9)

The same thing happened not long ago when super retailer Wal-Mart tried a rewrite of organic rules (6). China was able to supply "certified organic" products (beyond sight of US inspectors), and Whole Foods found (10) the Chinese to be a premier (though doubtful) source of cheap organic supplies.

Now Wal-Mart may be moving toward perceived higher quality via a new private label. (5) Whether or not Wal-Mart delivers a truly healthful product or just a promise is up to consumers to decide, but the world's largest retailer has identified a trend.

Spread across America, a number of foodies hope to grow the local food movement into a healthy sustainable cash crop for small farms that reap good consumer health in the bargain. But as these programs wind their way through state legislatures, we can only hope the markets favor farmers more than Safeway.

Mark Bittman wants to break up USDA and give more power to the Food and Drug Administration. For farmers, that's like jumping from the frying pan into the fire.

If people want truly sustainable food, the first order is to respect both the health of consumers and the realities of food production without watering down rules on safety AND competition. Historically those aren't things FDA or USDA have been universally good at doing. In order to make sustainability real, real people will have to barricade the doors of the conference hall when final rules are written. Otherwise big business will be there in force with agendas of their own.

That's what's going on today, and it's the reason a lot of farm and food groups are laying low on sustainability. Whether or not we truly achieve it relies on how it is defined.

In the end, that depends upon ***who*** defines it.

The battle is far from won. Intervention by bureaucratic executives on their way up the career escalator could end up writing sustainable rules for food Bittman abhors, food that looks, tastes, and is ***exactly*** the same stuff we've been eating for decades.

Except for the label.[RO]

(1) http://www.npr.org/blogs/health/2011/02/02/133304206/why-bacon-is-a-gateway-to-meat-for-vegetarians
(2) http://opinionator.blogs.nytimes.com/2011/02/01/a-food-manifesto-for-the-future/?emc=eta1
(3) http://www.uureading.org/sermons/sermon090405p.htm
(4) http://en.wikipedia.org/wiki/Umami
(5) http://blogs.forbes.com/elaine-wong/2011/01/20/why-wal-marts-great-value-revamp-is-a-smart-private-label-move/?boxes=Homepagecmonetwork
(6) http://www.nytimes.com/2006/05/12/business/12organic.html
(7) http://www.nytimes.com/2011/02/03/fashion/03close.html?_r=1
(8) http://www.facebook.com/pages/Tender-Belly/126655870685431
(9) http://www.foxnews.com/health/2011/01/25/wheres-beef-taco-bell-sued-ingredients/
(10) http://www.nytimes.com/2010/06/14/business/global/14organic.html

STEVENSON (continued from page 1)

through an electronic exchange. All others could participate optionally.

It would also feature grid-like discounts and premiums. Since cattle are not merely a commodity, where all are alike, an electronic exchange would have to allow for discounts and premiums for grade, yield, and other factors such as certified beef or natural beef programs.

Numerous details would also have to be worked out in implementation.

It is time to start discussions about an electronic marketplace.

How to determine delivery dates. How much could be purchased at one time. Who would guarantee the specs. But the point is that we should begin now discussing an electronic exchange for cattle. It is technologically possible. It is desirable. It can work.

But while we're at it, let's also discuss the possibility of a similar exchange on the other side of the packinghouse, where they sell their beef. An electronic exchange there would also encourage an open and competitive market. The cash beef market is entirely too thin. Packinghouses are held captive to large grocery chains and the whole process squeezes out small operators who might otherwise compete locally. Why not advance the whole cattle to consumer market technologically at the same time. Resistance to these advances is reasonable only to those who have an advantage in the current structure. In a free market, no participant should have an automatic advantage.[RS]

STOKES (continued from page 2)

before harm to an individual could be claimed. Nothing in the plain language above supports such rulings and both the U. S. Department of Justice and USDA have so stated in several Amicus Briefs filed with these courts. Yet, these rulings have been the basis for reversing a number of jury verdicts for plaintiffs.

Last October, the OCM General Counsel and three other attorneys, initiated an appeal to the U. S. Supreme Court (Alton T. Terry v. Tyson Farms, Inc.) in an effort to settle the matter. The high court declined to hear the appeal on January 21st. In so doing, the Supreme Court declined to make a supreme decision on whether the law means what it says, or whether judicial activism by pro-big business judges will stand. No action by the Supreme Court is, in fact, a pro-big business ruling.

The American Meat Institute (AMI), lobbying mouthpiece for the meat packers, commissioned a "study" by Informa (formerly Sparks Commodities) which predicting an apocalyptic outcome if the Rule is finalized. According to this study;

"Companies in the United States that produce, process, distribute and sell meat and poultry products would lose more than 30,000 jobs if the proposed GIPSA rule were implemented. In addition, almost 74,000 jobs in supplier and ancillary industries will also be lost".

The AMI study ignores the fact that 100,000 head feedyards reduce jobs by eliminating nineteen 5,000 head feedyards, and that killing 1 million cattle a year in a single plant eliminates thousands of jobs in the 5-10 plants that are put out of business by the giant. It also ignores the fact that whole towns, and implement dealers, and repair shops, and grocery stores, and car dealerships are pushed out of business by this "efficiency".

AMI's Informa study continues with its the-sky-will-fall prediction, forecasting the loss of 21,000 producers and a total economic harm of $14 billion. However, AMI has a plan for our salvation, a method of escape; —– just take out one little portion of the Rule!

"The provision that removes the burden for litigants to show competitive injury in order to seek damages is by far the largest area of concern. Informa finds that nearly 75% of the expected economic damage arising from this proposed rule can be tied directly to this provision."

The several judicial rulings are portrayed by packers and integrators as settled law and fiercely defended as their shield against any accountability for their acts. They and errant court rulings ignore the Supreme Court's Chevron Decision regarding due deference to the administrator of the law. In a letter to USDA Secretary Vilsack, Iowa's Senator Harkin makes this point:

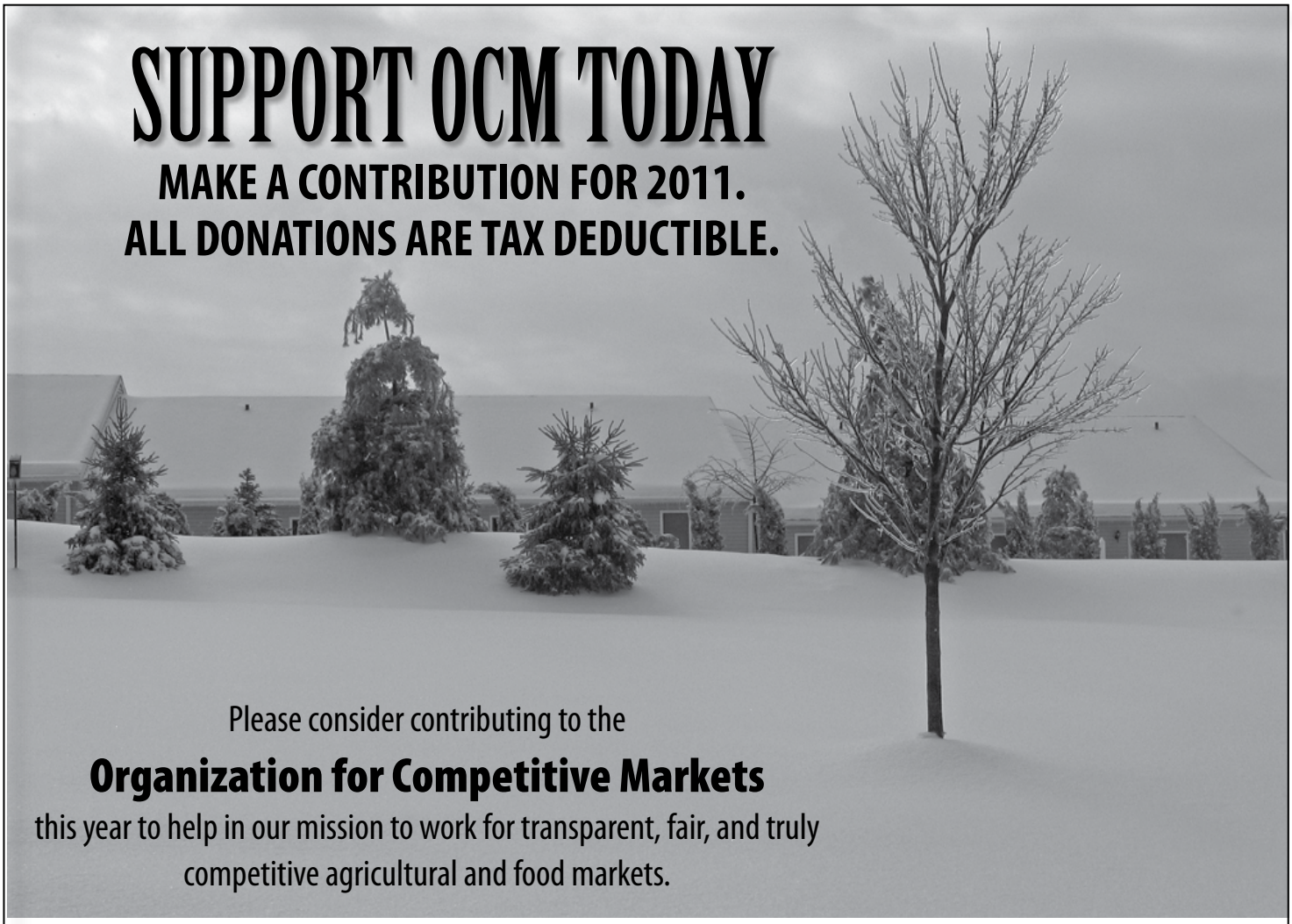
"A cardinal principle is that the courts are to give deference to the interpretation of laws by the federal agencies that are charged with implementing and administering them. Specifically, for instance, GIPSA is to be accorded deference in its interpretation, spelled out in the proposed rule, that the P&S Act protects individual producers against "unfair, unjustly discriminatory, or deceptive practices or devices" without a necessity of showing such conduct has an impact on the broader market."

It is important that the currently proposed GIPSA Rule be finalized with the provision pertaining to harm to competition intact and that the question regarding judicial deference be resolved.

Some respected folks in these issues take the view that proving harm to competition under PSA is possible, especially in a class action suit. However, in the history of the Act just one class action suit, Pickett v Tyson, produced a $1.3 billion jury verdict. But, the appellate courts also took away that award to the livestock industry; –- claiming inadequate proof of harm to competition.

The PSA's words do not require proof of harm to competition. No court has ever said so; they merely applied pro-business activism and read this requirement (borrowed from Sherman Act cases) into the law.

This is a perversion of PSA and a big and unnecessary impediment to justice for harmed producers. So long as judges can use this highly suspect interpretation of PSA to continue to reverse jury decisions favoring harmed livestock and poultry producers; taking away awarded damages and saddling them with court costs, Section 202 of the Packers and Stockyards Act of 1921 stands null and void. Producers will remain unprotected and alone.[FS]



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