



October 13, 2015
RE: 80 FR 34097, June 15, 2015

Deputy Director Susan Keith
United States Department of Agriculture
Grain Inspection Packers and Stockyards Administration
STOP 3601, Rm. 2055-S
Independence Ave., SW
Washington, DC 20250

Deputy Director Keith:

I am writing on behalf of the Livestock Marketing Association (LMA) regarding the request for information concerning 9 CFR Part 201 (market agencies selling on commission; purchases from consignment) published in the Federal Register (80 FR 34097 (June 15, 2015)). As the national trade association that represents more than 800 livestock auction markets and related businesses, this is an issue of great interest to our members.

First, thank you for your attention to this matter. Over the years, markets have received varying interpretations of 9 CFR 201.56(c). In some instances, markets have been advised by GIPSA officials that it is permissible for their auctioneer to sit in the stands and buy livestock while not currently auctioneering. In other cases, this activity has been seen as a GIPSA violation.

We would appreciate clarity in this area and have a strong preference for narrowing any restriction on the purchasing activity of market employees. We welcome this opportunity to provide information on the topic and, hopefully, work together to create a revised rule or agency guidance that best serves the common goal of healthy, competitive livestock markets.

Overview

The primary job of a livestock market is to get the highest price for a consignors' livestock, which can best be done when there are as many bidders as possible. It does not matter who these bidders are as long as the bidding is done fairly and openly. We believe in today's market environment, competition and transparency can be achieved by narrowing the GIPSA regulation in the area of market employees buying. Because of this, most within our membership would prefer the 9 CFR 201.56(c) restrictions on employees buying be removed.

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However, if these restrictions continue to exist, they should only apply to auctioneers who are currently selling (actually calling from the block, selling that animal/lot). Additionally, an auctioneer should be able to buy for market support even while currently selling.

As market owners and operators, our main job is to promote competition by getting top dollar for the producers choosing to sell at our markets. The current ability for market owners and employees that are not key employees to buy at markets, both for their own accounts and for the accounts of others, is extremely important. Every market owner or employee that is eligible to bid is another buyer competing for a producer's livestock, helping to drive the price of the livestock higher and, in turn, benefitting the producer selling at market. GIPSA restrictions limiting buyer participation in our markets run the risk of reducing competition. Because of this, any limitation on the eligibility of certain employees, such as auctioneers or weighers, to buy should be as narrowly tailored as possible.

In past conversations, GIPSA officials have indicated that transparency when market owners and employees are buying is important. We agree and believe this issue is fully addressed in the operations of a live auction setting. First, in a live auction environment, participants are able to see who is bidding on and buying livestock. Not only is this the case for those actually present, but many auctions also broadcast their sales online where the internet audience may also hear who is buying. Furthermore, 9 CFR 201.56(b) requires owners, officers, agents, and employees to only buy livestock at the market if they are offered for sale in an open and competitive manner to other buyers and then only at a price higher than the highest available bidder. Finally, in cases where market owners and employees buy, they must disclose on the account of sale the name of the buyer and their relationship to the market as required by 9 CFR 201.56(d). These requirements make it abundantly clear to all involved when someone associated with the market is buying.

Today, more than ever before, there exists compelling inherent incentives for market owners and operators to maintain a competitive and transparent market place. The advent of information technology provides livestock producers many options when deciding where and how to market their livestock. Additionally, producers in many areas have options between multiple fixed-facility markets where they can sell their livestock. Market owners and managers are extremely conscientious that they must run their businesses in a way that advances livestock sellers' interests. If issues arise in a livestock market, information technology ensures that transgressions are quickly publicized, and sellers would choose to do business elsewhere. The sunlight provided by technology quickly reveals any moral hazards that can arise in an opaque market situation.

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On a related note, individual livestock markets have the ability to establish additional rules within their market in addition to those mandated by GIPSA. If an individual livestock market owner or manager wanted to limit if and when employees could buy at their market, they have the ability to do so. By allowing business owners to address specific concerns instead of creating a “one size fits all” regulation that would further reduce buyer participation the widest competition is ensured. In instances where an auctioneer buying benefits the sellers at that market, it could be allowed. In instances where this behavior harms competition and transparency, or creates a negative perception in this area, the market owner can have their own rule to address this.

(1) Which of the following should be included as a key employee, and why: (a) Auctioneer (b) Clerk of Sale (c) Ringmen (d) Salesmen (e) Weighmaster/Weigher (f) Manager or Owner

We assume that the terminology “key employees” is being considered in the context of a prohibition of key employees buying out of consignment. For livestock market owners, all of our employees are important. The term “key” could be confusing, as it does not indicate the context of why the employees are “key.” Employees who manage the auction market’s office and those who provide care for animals are key to conducting business in a livestock auction but have traditionally not been considered key for GIPSA purposes. If changes to this regulation are made, our preference would be to specifically list job titles in the requirements as the regulation does currently. This will make the requirements easier to understand and avoid using a term not commonly used in the marketing industry.

Turning to what employees, if any, should be restricted to buying out of consignment for their own account or the account of another, we believe that restrictions in this space should be kept to a minimum. Currently 9 CFR 201.56(c) specifically includes auctioneers, weighmasters, and salesmen. LMA notes that the GIPSA Request for Information expands upon the list specifically included in 201.56(c) to further include clerk of sale, ringmaster, and manager/owner. As explained below, LMA does not support broadening the list of employees restricted from buying out of consignment.

(a) Auctioneer – Generally, the reason for limiting employee buying is the need to avoid the ability of that employee to influence the price of an animal to the detriment of the seller (and implicitly to their benefit). In today’s livestock market, only the auctioneer has that capability.



Within LMA's membership, opinions vary on whether an auctioneer should be permitted to buy on their own account or on the account of another while currently selling. Some market owners expressed a concern that there could be a real or perceived advantage of an auctioneer buying with their ability to miss a competitor's bid. However, this was the minority position.

On behalf of the majority of our membership, LMA is advocating for the ability of auctioneers to buy while currently selling, for their own account or the account of another. Many market owners expressed the need for auctioneers to buy in order to have the most competitive market possible. This comment was particularly heard from smaller livestock markets and markets in regions where the number of buyers on the seats is lower. In these cases, the auctioneer's bid, whether for themselves or filling an order, is critical to getting the best price for seller's livestock. Some of our members also expressed concerns that it would be difficult for a young auctioneer to get started in the business without also being able to draw a commission as a buyer of livestock. Opportunities for new auctioneers to sell are limited, so the ability to also have a buying business when working to gain microphone time would be a real leg up for these young people.

To be clear, most within our association would prefer that GIPSA remove the 9 CFR 201.56(c) restrictions on auctioneers purchasing livestock out of consignment and allow auctioneers to buy on their own account and on the account of others. Livestock markets could then determine for themselves when and if their auctioneers may buy rather than GIPSA having a regulation on the topic.

Additionally, even if GIPSA continues to have a restriction on auctioneers buying while actually selling, there is strong consensus amongst LMA members that any buying restrictions for auctioneers should not be extended to when the auctioneer is not calling the sale. Finally, auctioneers need to be able to buy for market support even while calling the sale.

(b) Clerk of Sale – The clerk should be able to buy without restriction. Their role in recording weights and prices is not a price setting role. Commonly weight and price figures are shown on an electronic board during the sale. There is no need or reason to limit their participation as buyers.

(c) Ringmen – Ringmen should be able to buy without restriction. Their bid catching role is backed up by the auctioneer, who is also catching bids. Potential buyers attempting to bid have the ability to make their intent well known if they feel overlooked. Also, ringmen are situated where people can clearly see them purchasing, making their role in the marketplace extremely transparent and their reputation in the business dependent on their fair treatment of buyers.

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Many ringmen and others working in livestock markets chose the profession because they are passionate about and engaged in the livestock industry. Many are livestock herdsmen themselves. Ringmen are present throughout the sale and their connections with the livestock industry make them a logical choice to send an order for someone who cannot attend a sale. Their eligibility to purchase livestock on their own account or for the account of another increases competition resulting in higher prices.

(d) Salesmen – This term is antiquated as it refers to the individuals who would take buyers to pens of the salesman’s company in a terminal stockyard and receive individual bids from buyers prior to the widespread adoption of the open auction method of selling. The role of a salesman has changed over the years and in today’s open, competitive bidding environment there is no similar job.

LMA’s recommendation is that the term no longer be used. Today’s market employees who solicit producers to sell at market or encourage buyers to come participate, sometimes called salesmen, should not be barred from also buying in an open, competitive manner.

(e) Weighmaster/Weigher – The weigher should be permitted to buy livestock without restriction. As described below, with electronic scales, weights are displayed for all to see and the weigher doesn’t have an ability to influence these numbers.

(f) Manager/ Owner – The owner or manager of the sale should have the ability to buy without restriction. This is a logical person for potential buyers to contact if they would like to purchase livestock and cannot attend the sale. Additionally, they may have a need for personal livestock and it would be unreasonable to require a market owner to source their own livestock outside of the market environment.

(2) If weighers are otherwise considered key employees, should a weigher be allowed to bid on livestock when:(a) The market scale is equipped with a digital indicator; (b) Livestock are not sold by weight?

Yes to both questions. In fact, the wide adoption of digital scales makes any restriction on a weigher buying irrelevant. The restriction on weighers buying should be removed from the regulation completely rather than creating an exception to the rule that encompasses almost all of the markets in the country.



(a) In the past, there was concern that the weigher's use of a beam scale would allow them to alter an animal's weight and thereby influence the price of the animal. Today, the overwhelming majority of livestock markets use digital scales. This eliminates an employee's discretion because the numbers appear digitally for all to see. When digital scales are used, the weigher should have the ability to buy for their own account or the account of another.

(b) Additionally, when livestock are not sold by weight, the ability of the weigher to affect price is removed. Therefore, the weigher should be able to buy.

(3) If livestock scale operators remain on the list of key employees would you object to GIPSA referring to the livestock scale operator as the "weigher" rather than the "weighmaster" in 201.56(c)?

LMA would not object to GIPSA replacing the term "weighmaster" with the term "weigher."

GIPSA is also interested to hear comments on whether key employees may purchase livestock during a sale under specific circumstances, or for specific purposes, such as:

(4) If a key employee would step down from the auctioneer's booth or scale during a sale:

(a) Could the key employee then bid on livestock for their own account from the bleachers with the other buyers as long as the employee provided no key services while doing so:

The LMA believes that an auctioneer should be permitted to buy for their own account or the account of another when he or she is not engaged in calling the sale. The same logic holds true for weighers and other employees that may sometimes be limited in their ability to buy at the market. As long as they are not simultaneously performing their employment function they should be permitted to buy.

Allowing an auctioneer to buy when he or she is not calling the sale does not create an unfair, unjustly discriminatory, or deceptive situation. This practice is transparent because everyone can see the auctioneer bidding and buying from the stands. When the auctioneer is no longer selling, they have no ability to affect the price for an animal beyond bidding and agreeing to pay more for the livestock than previous bidders.

Allowing auctioneers to purchase livestock when they are not calling the sale increases competition for the consignors' livestock.

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(i) Should this be limited to a specific species;

No. If a distinction is made, it should be based solely on whether an employee is engaged in their key employment function. A limit based on species is arbitrary.

In some markets, an auctioneer will work one sale and another auctioneer will take over to call a subsequent sale on the same day. Sometimes, this first auctioneer will stay at the market and participate as a buyer in the following sale.

Often this shift is made between different species. In other instances the shift may occur between different classes of livestock, such as one auctioneer selling the feeder cattle sale and a different auctioneer selling the mature cattle. And in some instances, the shift in auctioneers could be made based on time rather than classes of animal. In all these situations, the original auctioneer sitting in the stands buying is transparent. It is another bidder increasing competition for livestock selling at markets and should be welcome activity.

(ii) Should their time spent bidding or serving in a key capacity be documented, and if so, how;

LMA is extremely concerned about creating additional paperwork burdens on livestock markets and would object to the imposition of additional duties. The amount of time a key employee spends bidding is irrelevant to market operation. The only relevant time would be the period an employee is serving in a key capacity which may be documented by existing systems such as video recordings of a sale or employee time cards. No additional documentation is necessary.

(iii) Should a key employee be allowed to return to the auctioneer's booth or scale, to perform key employee duties, after bidding on livestock from the bleachers?

Yes. The order in which an auctioneer sells and buys (or buys and sells) does not influence competition or transparency. In some markets, two auctioneers may take turns selling for set periods of time. Allowing the auctioneer not currently selling to buy will increase competition and allow them to make productive use of time not spent selling, both for themselves and the producers whose livestock they purchase.

In addition, if buyers or sellers in a particular market do not want an auctioneer to be able to return to the block after buying, the market could have an individual market rule to this effect.



(5) Should GIPSA allow a key employee to buy livestock for market support or to fill orders held by their employer, the market agency?

Yes to both questions.

Market support is a critical tool livestock markets use to foster a fair and competitive marketplace. At times, a market must purchase animals in order to ensure they are not falling below their true market value. This tool is used in a variety of situations. For example, when active buyers are unable to make it on sale day, whether it be for inclement weather or other reasons, the market may have to purchase animals in order to ensure the producers selling at their sale get the true value of their animals. Additionally, market support is a tool markets can use to ensure buyers do not work in concert with one another to keep prices low.

At times, LMA member markets have encountered varying GIPSA interpretations regarding what qualifies for market support. The term is currently not defined. LMA would support GIPSA making the description of market support used in this notice of inquiry the official definition of the activity. That description reads:

“Market support purchases are purchases made in the name of the market agency when the market agency believes that the highest bid does not reflect the true market value of the livestock being offered for sale. Key employees may also purchase livestock in the market agency’s name for the market agency’s livestock dealer account.”

This definition helps remove confusion and avoids unnecessary inquiries, such as how long the market keeps animals purchased for market support, what is done with those animals, and whether a profit is realized. The key question is clearly defined in this definition. That is whether the market agency believes the highest bid does not reflect the true market value of the livestock being offered for sale.

In addition to the market owner, any employee of the livestock market should be permitted to purchase for the purpose of market support. This includes auctioneers or others that are restricted in their ability to purchase animals, and certainly must include market owners who are also auctioneers. Market support is a critical tool to protect producers from selling at below-market prices that markets must be able to utilize as needed. One key component of market support is the ability to determine when an animal or group of animals are selling for below market value and quickly act on this knowledge. Because of the skill necessary to make this assessment only certain employees have this acumen. Markets need the flexibility to allow the most qualified employee or employees in their operation to fill this role. For some markets,

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the auctioneer may be the only individual who is both present at the ring during the entire sale and capable of determining when market support is needed.

In addition, employees that are otherwise restricted in their ability to buy on their own account should have the ability to fill an order held by the livestock market. In many cases, it may not be feasible for a small buyer to attend a sale. Instead, they call the market owner or manager and place an order for animals they would like to purchase. Not only is this an essential service provided to that buyer, this order also provides additional competition for sellers of livestock. The buyer expects that the person filling the order will be present at the sale and have the ability to analyze livestock and determine if they are the right fit for the order. In some cases, the auctioneer is the best fit to fill these orders.

Finally, as discussed earlier, the nature of a live auction environment and existing GIPSA disclosure requirements ensure transparency when markets are buying for market support or on order. The name or number of the individual purchasing the livestock will be announced for all.

(6) What is perceived to be the greatest impediment or barrier to effective competition at a market agency selling livestock on a commission basis?

Livestock markets face a variety of challenges, and these challenges vary between regions and individual markets. For some, getting buyers in the seats is their biggest impediment to effective competition. In other cases, the biggest challenge to competition is simply keeping numerous livestock markets open so producers have choices and can benefit from a competitive bidding environment. Anything that creates inefficiencies and increases the burden on markets, including unnecessary regulation, can hinder this. Many markets also identify managing accounts receivable to help ensure that the market, and therefore producers selling livestock, receives payment as their biggest challenge. The greatest challenge for some markets may be completely unrelated to these things.

However, LMA understands that many of these challenges to competition are not items that can be addressed through regulation. LMA is strongly concerned about the effect any additional regulations may impose. Inefficiencies in the market increase costs and lower the amount that a producer ultimately receives for his livestock. LMA notes that many of the current inefficiencies that do exist are the result of outdated regulatory requirements based on a very old statute. LMA is currently in the process of examining and developing modernization proposals. We encourage GIPSA to regulate only where necessary and allow flexibility for markets to increase competition with tools such as employees purchasing.

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Conclusion

Thank you for the opportunity to provide feedback on this matter. We appreciate the agency's interest in this key area. The LMA would appreciate clarity on the topic and the ability for employees to participate in sales to provide the maximum competition possible for consignors' livestock.

If you have questions or would like to discuss this in more depth, please contact me or LMA Vice President of Government and Industry Affairs Chelsea Good. She can be reached at 816-305-9540 or cgood@lmaweb.com.

Sincerely,
Dan Harris
Livestock Marketing Association President