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## DEPARTMENT OF AGRICULTURE

### Grain Inspection, Packers and Stockyards Administration

#### 9 CFR Part 201

RIN 0580-AB10

#### Required Scale Tests

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

**ACTION:** Final rule.

**SUMMARY:** The Department of Agriculture's (USDA) Grain Inspection, Packers and Stockyards Administration (GIPSA) is amending one section of the regulations under the Packers and Stockyards Act of 1921, as amended and supplemented (P&S Act), regarding the requirement that stockyard owners, market agencies, dealers, packers, and live poultry dealers that weigh livestock, live poultry, or feed, have their scales tested at least twice each calendar year at intervals of approximately 6 months. This final rule requires that regulated entities complete the first of the two scale tests between January 1 and June 30 of the calendar year. The remaining scale test must be completed between July 1 and December 31 of the calendar year. In addition, a minimum period of 120 days will now be required between these two tests. GIPSA is also including in this final rule an exception for the testing of scales with limited seasonal use. More frequent testing, however, will still be required in cases where a scale does not maintain accuracy between tests. Finally, we are amending that same section of the regulations to add "swine contractors" to the list of regulated entities to which the section applies. GIPSA believes that this final rule will facilitate GIPSA's ability to regulate the business operations of stockyard owners, swine contractors, market agencies, dealers, packers, and live

poultry dealers through the effective enforcement of the P&S Act.

**DATES:** This final rule becomes effective on February 22, 2011.

**FOR FURTHER INFORMATION CONTACT:**

S. 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](mailto:s.brett.offutt@usda.gov).

**SUPPLEMENTARY INFORMATION:**

#### Background

The Grain Inspection, Packers and Stockyards Administration (GIPSA) administers and enforces the P&S Act (7 U.S.C. 181 *et seq.*). Under authority delegated to GIPSA by the Secretary of Agriculture in section 407(a) of the P&S Act (7 U.S.C. 228), we are authorized to issue regulations necessary to carry out the provisions of the P&S Act.

Section 201.72 of the current regulations under the P&S Act (9 CFR 201.72) requires that each stockyard owner, market agency, dealer, packer, or live poultry dealer who weighs livestock, live poultry, or feed for purposes of purchase, sale, acquisition, payment, or settlement, or who weighs livestock carcasses for the purpose of purchase on a carcass weight basis, or who furnishes scales for such purposes, have such scales tested at least twice during each calendar year at intervals of approximately 6 months. Regulated entities must then report the results of the scale tests to the GIPSA Packers and Stockyards Program (P&SP) regional office for the geographical region where the scale is located. Section 201.71 of the regulations (9 CFR 201.71) requires that scales must meet all applicable requirements of the 2009 edition of the National Institute of Standards and Technology Handbook 44, "Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices."

Under current procedures, the P&SP regional office, which has enforcement responsibility for the geographic location where a specific scale is located, notifies the regulated entity that its scale is due for testing in the event that the regulated entity has not filed a scale test report within the required 6-month timeframe. Thereafter, GIPSA sends the regulated entity a follow-up letter, or Notice of Default, if GIPSA does not receive the scale test report within 30 days from the date that the

scale test report was due. Finally, if the regulated entity fails to provide GIPSA with the required test report, GIPSA issues to the regulated entity a Notice of Violation, used to inform the regulated entity that its scale test reports were not received within the required timeframe under P&S Act regulations. GIPSA also notifies the regulated entity that the scale may not be used further until the violation is corrected.

Because the regulations now state that scale tests must be performed at "approximately" 6-month intervals, GIPSA has found that it is difficult to determine when a regulated entity may be in violation of the P&S Act for failing to submit a timely scale test report. As a result, GIPSA is amending § 201.72(a) (9 CFR 201.72(a)) of the P&S Act regulations to delete the term "approximately" in order to clearly state that regulated entities must submit a scale test report to GIPSA every 6 months in a calendar year between the periods January 1 and June 30, and July 1 and December 31, respectively. GIPSA will continue to require more frequent testing of specific scales in cases where the scales do not maintain accuracy between tests.

The Farm Security and Rural Investment Act of 2002 (Pub. L. 107-171) (Act) amended the P&S Act to add "swine contractor" as a regulated entity. Section 10502 of the Act defined swine contractor as "\* \* \* any person engaged in the business of obtaining swine under a swine production contract for the purpose of slaughtering the swine or selling the swine for slaughter, if (a) the swine is obtained by the person in commerce; or (b) the swine (including products from the swine) obtained by the person is sold or shipped in commerce."

Adding "swine contractor" to specific sections of the regulations will dispel any confusion among swine contractors regarding which regulations under the P&S Act are applicable to them. It will also allow GIPSA to more easily identify and enforce violations of the P&S Act.

GIPSA published a Notice of Proposed Rulemaking in the **Federal Register** on August 24, 2009, (74 FR 162) seeking public comment on the proposed changes to the regulations. The comment period on the proposed rule closed October 23, 2009.

### Discussion of Comments and Final Action

GIPSA received 42 comments from livestock auction markets, livestock producers, livestock ranchers, related industry associations, State and county agencies, feed operations, a poultry grower, and the University of California's Cooperative Extension. The 42 comments received referenced our proposal to require that regulated entities have scales tested twice within each calendar year. Because no comments were received regarding our proposal to add swine contractors to the list of regulated entities, swine contractors will be added to the list of regulated entities in the final rule as proposed.

Of the 42 comments received, two commenters supported the rule. One commenter recommended that we implement the rule as written; the other suggested that scales be tested more frequently. Six commenters submitted general statements that did not specifically address the timing of scale tests presented in our proposal, but instead objected to increased government regulations. Thirty-four commenters (including 14 from State and local government entities) questioned the need for more than one scale test per year, especially for scales that are used seasonally or only when livestock is being shipped during a certain time period of the year. Many commenters objected to our proposal stating that it would double their costs of compliance with the P&S Act, would place an unjust regulatory burden on small businesses, be costly to State and local governments charged with certifying the scales, and would make it difficult for regulated entities to obtain the services of a limited number of accredited scale testers. For example, one commenter from the Oregon Department of Agriculture stated that there are nearly 54,000 scales within the State's jurisdiction, and the State lacks the money to double the workload of its nine scale testers without a sharp increase in funding. Another commenter added that States would have difficulty scheduling additional inspectors even if the cost of the inspections was paid for by the regulated entities.

Currently, the regulations require that scale tests be completed at least twice per calendar year. This is unchanged in the proposed regulations. Because we did not propose to increase the number of scale tests from the two tests required in the current regulations, GIPSA believes that there would be no increased burden on individuals or

agencies responsible for scale testing as a result of this final rule.

Twenty of the 40 commenters objecting to our proposed rule, however, suggested that GIPSA consider adding an exception to the current regulations that would allow scales used seasonally to be tested once per year. While GIPSA maintains that its initial proposal to delete the term "approximately" in order to clearly state that regulated entities must be required to complete a scale test twice in a calendar year was appropriate in order to clarify the regulations, we agree with the commenters' suggestion and will include in the final rule an exception for the testing of scales with limited seasonal use. A scale used from either January 1 through June 30, or July 1 through December 31, but not during both periods, will be considered by GIPSA to be a seasonal scale. GIPSA will require that these scales be tested once during each calendar year, within 6 months prior to use.

Finally, GIPSA believes that many comments may have resulted from commenters believing that GIPSA was proposing regulations affecting everyone who owns scales, which is not the case. GIPSA's intent is that only regulated entities be affected by the proposed rule. Accordingly, GIPSA is replacing in the final rule all references to "scale owners," with references to "regulated entities" to dispel any confusion that may have arisen from our proposal.

Based on the foregoing discussion, we will therefore modify the proposed 201.72(a) (9 CFR 201.72(a)) in the final rule to (1) provide an exception to the testing requirements for limited seasonal scales if they are used only once per calendar year and tested within 6 months prior to use, and (2) delete from the second sentence the phrase "As a scale owner, \* \* \*" since the phrase, GIPSA believes, led many of the commenters to mistakenly believe that the regulation applies to non-regulated entities.

### Executive Order 12866 and Regulatory Flexibility Act

This final rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget (OMB).

Also, pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), GIPSA has considered the economic impact of this final rule 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.<sup>1</sup> The affected entities and size thresholds under this final rule are defined by the SBA as small businesses as follows: NAICS code 12111, cattle producers; NAICS code 112210, hog producers and swine contractors; and NAICS codes 112320 and 112330, broiler and turkey producers if their sales are less than \$750,000 per year, respectively. Live poultry dealers, NAICS code 31165; and hog and cattle slaughterers, NAICS code 311611, respectively, are considered as small businesses if they have fewer than 500 employees. Stockyards are found under NAICS code 424520, "Livestock Merchant Wholesalers," and are considered to be small businesses if they have fewer than 100 employees.

According to the 2008 Annual Report, Packers and Stockyards Program,<sup>2</sup> published on March 1, 2009, there were 339 bonded livestock slaughter firms, 126 live poultry dealers, 4,685 bonded dealers, 1,326 bonded market agencies, and 1,392 posted stockyards operating subject to the P&S Act. While many of these entities are considered as small businesses by the SBA, we believe that this final rule will not affect those entities significantly since all of the entities, as regulated entities, are already required to report scale tests results to GIPSA twice in a calendar year at 6-month intervals. Again, we are amending the regulations to clarify the time interval between required scale tests in order to enhance GIPSA's ability to enforce the P&S Act. Furthermore, this final rule reduces the number of tests required for scales operated on a seasonal basis by regulated entities. And while this final rule also affects swine contractors, most such entities do not meet the definition for small entities under the SBA. Accordingly, we have considered the effects of this final rule under the RFA and believe that it will not have a significant impact on a substantial number of small entities.

### 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. This rule would not pre-empt state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures that must be

<sup>1</sup> See: [http://www.sba.gov/idc/groups/public/documents/sba\\_homepage/serv\\_sstd\\_tablepdf.pdf](http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf).

<sup>2</sup> See: [http://archive.gipsa.usda.gov/pubs/2008\\_psp\\_annual\\_report.pdf](http://archive.gipsa.usda.gov/pubs/2008_psp_annual_report.pdf).

exhausted prior to any judicial challenge to the provisions of this rule.

### Paperwork Reduction Act

In accordance with the Office of Management and Budget regulations (5 CFR part 1320) that implement the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the information collection and record keeping requirements that are covered by this final rule were approved under OMB number 0580-0015 on January 30, 2009, and expire on January 31, 2011.

### 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

Reporting and recordkeeping requirements, Measurement standards, Trade practices.

For the reasons set forth in the preamble, 9 CFR part 201 is amended as follows:

### PART 201—REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

■ 1. The authority citation for part 201 would continue to read as follows:

**Authority:** 7 U.S.C. 181–229c.

■ 2. Section 201.72 is revised to read as follows:

#### § 201.72 Scales; testing of.

(a) As a stockyard owner, swine contractor, market agency, dealer, packer, or live poultry dealer who weighs livestock, live poultry, or feed for purposes of purchase, sale, acquisition, payment, or settlement of livestock or live poultry, or who weighs livestock carcasses for the purpose of purchase on a carcass weight basis, or who furnishes scales for such purposes, you must have your scales tested by competent persons at least twice during each calendar year. You must complete the first of the two scale tests between January 1 and June 30 of the calendar year. The remaining scale test must be completed between July 1 and December 31 of the calendar year. You must have a minimum period of 120 days between these two tests. More frequent testing will be required in cases where the scale does not maintain accuracy between tests. *Except that* if scales are used on a limited seasonal basis (during either the 6-month period of January through June or July through

December, but not both) for purposes of purchase, sale, acquisition, payment or settlement, the stockyard owner, swine contractor, market agency, dealer, live poultry dealer, or packer making use of such scales, must complete one scale test within 6-months prior to use.

(b) As a stockyard owner, swine contractor, market agency, dealer, packer, or live poultry dealer who weighs livestock, livestock carcasses, live poultry, or feed for purposes of purchase, sale, acquisition, payment, or settlement of livestock, livestock carcasses or live poultry, you must furnish reports of tests and inspections on forms approved by the Administrator. You must retain one copy of the test and inspection report for yourself, and file a second copy with the P&SP regional office for the geographical region where the scale is located.

(c) When scales used for weighing livestock, livestock carcasses, live poultry, or feed are tested and inspected by a State agency, municipality, or other governmental subdivision, the forms used by such agency for reporting such scale tests and inspections may be accepted in lieu of the forms approved for this same purpose by the Administrator if the forms contain substantially the same information.

#### J. Dudley Butler,

*Administrator, Grain Inspection, Packers and Stockyards Administration.*

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### NATIONAL CREDIT UNION ADMINISTRATION

#### 12 CFR Part 707

RIN 3133-AD72

#### Truth in Savings

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Final rule.

**SUMMARY:** On July 22, 2009, NCUA published a final rule amending NCUA's Truth in Savings regulation and the accompanying official staff interpretations. The final rule addressed credit unions' disclosure practices related to overdraft services, including balances disclosed to members through automated systems. This final rule amends NCUA's Truth in Savings rule and official staff interpretations to address the application of the July 2009 final rule to retail sweep programs and the terminology for overdraft fee disclosures and to make amendments

that conform to the Federal Reserve Board's (Federal Reserve) final Regulation E amendments addressing overdraft services, adopted in November 2009. This rule also makes final the minor technical corrections to sample form B-12 that were part of the interim final rule.

**DATES:** The effective date of September 7, 2010 and October 1, 2010 for § 707.11(a)(1)(i) is confirmed as final without change.

**FOR FURTHER INFORMATION CONTACT:** Justin M. Anderson, Staff Attorney, Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428, or telephone: (703) 518-6540.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Truth in Savings Act (TISA) requires NCUA to promulgate regulations substantially similar to those promulgated by the Federal Reserve within 90 days of the effective date of the Federal Reserve's rules. 12 U.S.C. 4311(b). In doing so, NCUA is to take into account the unique nature of credit unions and the limitations under which they pay dividends on member accounts. *Id.*

On January 29, 2009, the Federal Reserve published a final rule amending Regulation DD, its TISA rule, and the official staff commentary to address depository institutions' disclosure practices related to overdraft services, including balances disclosed to consumers through automated systems. 74 FR 5584 (January 29, 2009). NCUA issued a similar final rule on July 22, 2009. 74 FR 36102 (July 22, 2009). Both rules had an effective date of January 1, 2010.

In November 2009, the Federal Reserve adopted a final rule amending Regulation E, which implements the Electronic Fund Transfer Act. This final rule limits a financial institution's ability to assess fees for paying ATM and one-time debit card transactions pursuant to the institution's discretionary overdraft service without the consumer's affirmative consent to such payment.

Since publication of the Federal Reserve's January 2009 final rule, institutions and others have requested clarification of particular aspects of the rule and further guidance regarding compliance with the rule. In addition, the Federal Reserve believed conforming amendments to Regulation DD were necessary in light of certain provisions subsequently adopted in the Regulation E final rule. Accordingly, in