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STATE OF NEBRASKA
OFFICIAL
DEC 3 1999
DEPT. OF JUSTICE

DATE: November 30, 1999

SUBJECT: Federal Pre-emption of Competitive Livestock Markets Act, Neb. Rev. Stat. § 54-2601 *et. seq.*, and Effects Upon the Department of Agriculture's Duties and Responsibilities.

REQUESTED BY: Merlyn Carlson, Director of Agriculture State of Nebraska

WRITTEN BY: Don Stenberg, Attorney General
William R. Barger, Assistant Attorney General

This office has received your request for an opinion on the interaction of recent federal livestock price reporting laws with our own state livestock price reporting statute, 1999 Neb. Laws LB 835, recently codified as Neb. Rev. Stat. §§ 54-2601 to 54-2631, and known as the "Nebraska Competitive Livestock Markets Act." The United States Congress recently passed, and the President signed, a federal livestock price reporting law. Title IX of H.R. 1906 is titled the "Livestock Mandatory Reporting Act of 1999," and contains similar requirements to the Nebraska statutes.

You ask whether the duties and responsibilities of the Nebraska Department of Agriculture in regard to the "Nebraska Competitive Livestock Markets Act," remain in place in light of the preemption clause of Title IX of H.R. 1906. In particular, does § 259 of H.R. 1906 preempt the Department's duty to promulgate regulations for the Nebraska Competitive Livestock Markets Act, and the Department's further duties to collect data, report data and enforce the Competitive Livestock Markets Act? From our analysis, it appears that virtually all of the duties and requirements that the Department had in regard to regulations and operation of a reporting system under the "Nebraska Competitive Livestock Markets Act" have been preempted.

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As background, the Nebraska Competitive Livestock Markets Act (hereinafter "the Nebraska Reporting Act"), was signed into law on May 26, 1999. Under Section 32 of that Act, the law went into effect immediately. 1999 Neb. Laws LB 835, § 32. In a prior opinion issued by our office, the Nebraska Department of Agriculture (hereinafter "the Department") inquired as to the enforcement date of certain provisions relating to price discrimination and contract terms. We essentially stated that the price reporting requirements do not begin until February 15, 2000, under the Nebraska Reporting Act, so it was impossible to enforce related price discrimination and contract term provisions until that date. Op. Att'y Gen. No. 99028 (July 16, 1999). Several other states have passed livestock price reporting laws very similar to the Nebraska law (South Dakota, Minnesota and Missouri). The United States Congress followed suit with a federal law mandating reporting of livestock prices, which the President signed on October 22, 1999, as Title IX of the Agricultural Appropriations bill, H.R. 1906. This section is cited as the "Livestock Mandatory Reporting Act of 1999" (hereinafter "the Federal Reporting Act").

I. FEDERAL AND NEBRASKA PRICE REPORTING LAWS

Both the federal and Nebraska acts require that livestock packers provide price information for the animals they purchase from producers. The Federal Reporting Act includes swine, cattle and sheep, while the Nebraska Reporting Act includes only swine and cattle.

The Nebraska Reporting Act has specific requirements for packer ownership of livestock (Neb. Rev. Stat. §§ 54-2604 to 54-2606), swine price information (Neb. Rev. Stat. §§ 54-2607 to 54-2615), and cattle price information (Neb. Rev. Stat. §§ 54-2617 to 54-2625). Packers may not own, keep or feed livestock under Neb. Rev. Stat. § 54-2604. Packers are to avoid paying discriminatory prices for similar hogs, and are required to report the prices, carcass data and quantity of swine purchased. Neb. Rev. Stat. §§ 54-2607 and 54-2613. Cattle packers cannot have contracts without delivery dates set, nor can contracts be non-negotiated. Prices, carcass data and quantity of cattle purchased must also be reported. Neb. Rev. Stat. §§ 54-2617, 54-2619 and 54-2623.

The Federal Reporting Act does not require some of the specific information the Nebraska Reporting Act requires. The Federal Reporting Act swine report requires reporting of the quantity and base price for swine purchased and scheduled to be slaughtered, along with the average hog price, highest and lowest average price per lot, average carcass weight, average sort loss, average backfat, average lean percentage, total daily kill and total packer commitments. HR 1906 Title IX § 232(c). The Federal Reporting Act cattle report similarly requires the average cash and contract prices plus quantities of live cattle and cattle carcasses be reported, along with premiums and discounts for each category. The quantity of live cattle and cattle carcasses purchased or committed must also be reported. HR 1906 Title IX § 222(c). Lastly, both swine and cattle have weekly reporting of certain items, especially cattle formula contract information. The Federal Reporting Act contains no restrictions on price discrimination or contract terms. The Federal Reporting Act also has similar price reporting requirements for sheep.

We understand that H.R. 1906 failed to provide an appropriation for the United States Department of Agriculture to operate the price reporting program in Title IX. This may create a situation where the federal law has not begun to operate although it's effective.

II. THE DEPARTMENT'S DUTIES AND RESPONSIBILITIES

The Nebraska Reporting Act requires that the Department promulgate regulations to carry out the act's pricing and contracting provisions. Neb. Rev. Stat. § 54-2629. The Nebraska Reporting Act price reporting, price discrimination and contract requirements all become operative on February 15, 2000. Neb. Rev. Stat. § 54-2613, 54-2623, and Op. Att'y Gen. No. 99028 (July 16, 1999). Without federal preemption or judicial injunction, those statutes will begin operating in February.

The U.S. Constitution mandates that federal law supercedes conflicting state law as provided by the Supremacy Clause. U.S. Const., art. VI, cl. 2. "Federal preemption of state law may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" ***Gade v. National Solid Wastes Management Ass'n***, 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992). The Federal Reporting Act contains a preemption clause, wherein it spells out its relationship to state laws. That clause states:

> In order to achieve the goals, purposes and objectives of this title on a nationwide basis and to avoid potentially conflicting State laws that could impede the goals, purposes and objectives of this title, no State or political subdivision of a State may impose a requirement that is in addition to, or inconsistent with, any requirement of this subtitle with respect to the submission or reporting of information, or the publication of such information, on the prices and quantities of livestock or livestock products.

HR 1906, Title IX, § 259.

As a result, the Nebraska Reporting Act provisions must be sufficiently different from the areas preempted by the Federal Reporting Act for the Nebraska statutes to survive. Those areas that are preempted are unenforceable and the Department should refrain from acting upon those preempted sections. An analysis of each section of the Nebraska Reporting Act is necessary to determine which parts have been preempted. If a portion of the Nebraska Reporting Act is preempted, that does not imply the entire statutory scheme is preempted. "In a preemption case such this, state law is displaced only 'to the extent that it actually conflicts with federal law.'" ***Dalton v. Little Rock Family Planning Services***, 516 U.S. 474, 478, 116 S. Ct. 1063, 134 L. Ed. 2d 115 (1996).

A. Packer Ownership of Livestock

The initial provisions of the Nebraska Reporting Act relate to packer ownership of swine or cattle. Neb. Rev. Stat. §§ 54-2604 to 54-2606. In particular, "it is unlawful for a packer to directly or indirectly be engaged in the ownership, keeping or feeding of livestock for the production of livestock or livestock products, other than temporary ownership, keeping, and feeding, not to exceed five days, necessary and incidental to the process of slaughter." Neb. Rev. Stat. § 54-2604. The packer ownership prohibitions in Neb. Rev. Stat. § 54-2604 are not new as the language mirrors the general prohibition against corporations or syndicates controlling livestock in Neb. Const. art XII, § 8(1). Commonly known as "Initiative 300," this article of the Nebraska Constitution requires that no corporation or syndicate engage in farming or ranching. Ranching is defined as "the ownership, keeping or feeding of animals for the production of livestock or livestock

products." Neb. Const. art XII, § 8(1). The Legislature is granted specific authority to extend this prohibition by enacting" . . . further restrictions prohibiting certain agricultural operations that the legislature deems contrary to the intent of this section." ***Id.***

Since packer ownership deals with ownership and control of livestock, it is slightly related to livestock pricing and livestock purchase contracts. If Congress meant to legislate in the area of ownership of livestock, then that intent should be apparent from H.R. 1209, Title IX. In a case where the federal statute contains no express preemption provision, the US Supreme Court stated " . . . we should not find MWRA's [local] bid specification preempted 'unless it conflicts with federal law or would frustrate a federal scheme, or unless we discern from the totality of circumstances that Congress sought to occupy the field to exclusion of the states.'" ***Building and Const. Trades Council of Metropolitan Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.***, 507 U.S. 218, 224, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993).

In this case, Congress was quite specific in defining what area was regulated and preempted. No mention of ownership or control of livestock by packers exists throughout H.R. 1209, Title IX. Neb. Rev. Stat. § 54-2604 does not appear to hinder or substantially effect the reporting of prices paid for livestock sales or the reporting of quantity and quality of those animals. Congress limited the preemptive effect to "the submission or reporting of information, or the publication of such information, on the prices and quantities of livestock." HR 1906, Title IX § 259. For those reasons, we believe that the preemption clause of H.R. 1906 is inapplicable to the field of livestock ownership. ***Id.***

Further, the field of livestock pricing and purchasing is not directly related to livestock ownership. We do not believe that courts would hold that any limitation on ownership or control of livestock is a part of the field of livestock sales prices, sale quantities or quality characteristics. Courts are specific in considering the extent to which Congress intended to "occupy a field." For instance, in recent cases examining the broad "relate to" language contained in ERISA, courts preempted state laws with a clear connection to ERISA plans, but have refused to preempt state laws which had only an incidental effect upon the federal ERISA scheme. ***Plumbing Indus. Bd., Plumbing Local Union No. 1 v. E.W. Howell Co.***, 126 F.3d 61, 67 (2d Cir. 1997), citing ***De Buono v. NYSA-ILA Med. & Clinical Servs. Fund***, 520 U.S. 806, 816 n. 16, 117 S. Ct. 1747, 138 L. Ed. 2d 21 (1997). It would be difficult to imagine a situation where ownership of livestock would conflict with the reporting of the sales prices for those animals, whether owned by packers or producers. H.R. 1906, Title IX generally requires the reporting of price and quality information of packer owned livestock just like all other livestock. Ownership would not conflict with the reporting scheme Congress intended, and any effect upon it would be at most incidental. More compelling proof Congress did not intend to regulate livestock ownership in H.R. 1906, Title IX is the fact Congress is considering a separate bill that would restrict ownership of livestock. Senate Bill 1738, proposed on October 15, 1999, by Senator Tim Johnson (S.D.), would prevent a packer from owning, keeping or controlling livestock intended for slaughter. S. 1738, 106th Congress. Congress would not consider such a bill if Congress had already intended to regulate packer ownership through HR 1906, Title IX.

B. Hog Information Reporting

Unlike packer ownership, this section of the Nebraska Reporting Act restricts packers' purchases or procurement of swine and the reporting of the information surrounding those transactions. The price discrimination provisions in Neb. Rev. Stat. §§ 54-2607 to 54-2612 and purchase reporting provisions in Neb. Rev. Stat. §§ 54-2613 to 54-2615 are similar and inter-related.

The purchase reporting provisions require that prices paid, quality characteristics, and quantity of swine purchased be reported for cash market sales or contract sales. Neb. Rev. Stat. § 54-2613. The Federal Reporting Act requires that very similar types of items be reported. HR 1906 Title IX § 232(c). For instance, both the Nebraska Reporting Act and the Federal Reporting Act require reporting of the quantity and base price for swine purchased under contract and formula purchases. However, the Federal Reporting Act requirements diverge from the state requirements in many respects. Whereas the Nebraska Reporting Act requires information regarding the actual prices paid for formula premium and discount factors, the Federal Reporting Act doesn't require these numbers, but instead requires a daily average. This same reporting of averages on a daily basis is the rule throughout the Federal Reporting Act, while the Nebraska Reporting Act requires reports of the actual amounts paid.

Although the types of information the Federal Reporting Act requires are less detailed, it is clear that the federal Act regulates information on prices paid, quality characteristics and the quantity of swine procured or purchased. This is the same type of information that Neb. Rev. Stat. §§ 54-2613 to 54-2615 require be reported. "State law may not . . . impose a requirement that is in addition to, or inconsistent with any requirements of this subtitle . . . " HR 1906, Title IX § 259. The Federal Reporting Act's daily reports do not require some of the specific price information that is required by the Nebraska Reporting Act, in addition to the difference between prices and price averages mentioned above. "Preemption, which stems from the Supremacy clause of the United States Constitution, invalidates state edicts that interfere with or are contrary to federal law." ***National Bank of Commerce v. Dow Chemical Co.***, 165 F.3d 602, 607 (8th Cir. 1999), citing ***Wisconsin Public Intervenor v. Mortier***, 501 U.S. 597, 604, 111 S. Ct. 2476, 115 L. Ed. 2d 532 (1991). The federal requirements are clearly different than requirements under the Nebraska Reporting Act; hence the state requirements are preempted and unenforceable.

Second, the price discrimination requirements contained in Neb. Rev. Stat. §§54-2607 to 54-2612 require that packers pay the same price for substantially similar hogs, after subtracting transportation and acquisition costs. As part of the packer requirements under those sections, the packer may report information relating to the prices paid, and avoid violating the discrimination prohibition in Neb. Rev. Stat. § 54-2607. As discussed in our prior opinion, Op. Att'y Gen. No. 99028 (July 16, 1999), we believe that the price discrimination provisions contained in §§ 54-2607 to 54-2612 are not operative until February 15, 1999. The price discrimination prohibition is inoperative until price reporting begins because the price reporting options (§§ 54-2608 & 54-2609) of the discrimination provision (§ 54-2607) are associated with the regular price reporting system under §§ 54-2613 to 54-2615.

However, if the price reporting scheme under Neb. Rev. Stat. §§ 54-2613 to 54-2615 is federally preempted, then packers no longer have the option to report the prices paid in lieu of violating the discrimination prohibition in § 54-2607. As stated in our earlier opinion, price discrimination requirements without a price reporting scheme present an unworkable statutory framework. Similarly, potential violators of the discrimination rule would have their option of avoiding the penalties for discrimination eliminated by preemption of price reporting. Neb. Rev. Stat. § 54-2608(1) and (2) are connected by an "and," as are the similar contract purchase requirements of Neb. Rev. Stat. § 54-2609(1), (2) & 3. This conjunction requires that packers fulfill both the condition that price differences be only for transportation and acquisition costs, **and** the condition that prices and carcass quality be reported, for the packer to avoid the discrimination penalties. The practical effect is to intertwine the price discrimination requirements with the price reporting requirements in the Nebraska Reporting Act.

Since price reporting and price discrimination are so integrally related in the Nebraska Reporting Act, it would be difficult to avoid having the price discrimination portion preempted along with the price reporting requirements. "Congress may express an intent to preempt in the federal statute. An intent to preempt may also be implied for example, when federal and state laws directly conflict, when state law stands as an obstacle to accomplishing the purposes of federal law, or when federal law is so pervasive that it reflects an intent to occupy a regulatory field." ***Symens v. SmithKline Beecham Corp.***, 152 F.3d 1050, 1053 (8th Cir. 1998). Price discrimination rules, by their inclusion in the price reporting scheme of the Nebraska Reporting Act, are " . . . in addition to, or inconsistent with any requirements . . . " of HR 1906, Title IX § 259. The Nebraska price discrimination requirements must be separate and distinct from the preempted price reporting requirements to avoid preemption.

The Federal Reporting Act does not mention price discrimination requirements. Since Nebraska includes this additional restriction on packers, reporting under federal requirements would not satisfy state reporting requirements. The state law would have the effect of preventing complete price reporting by a packer to the United States Department of Agriculture, and would frustrate the federal objective of price reporting. "The Supremacy Clause of the federal Constitution dictates that a state law . . . cannot prevent the administration and execution of a federal statute." ***State of Mo. v. City of Glasgow***, 152 F.3d 802, 805 (8th Cir. 1998). The state price discrimination requirements, by being so tied to the state price reporting requirements, interfere with federal law and are, therefore, preempted. However, this should not be construed to mean that price discrimination can never be prevented. A state price discrimination law that used the data supplied from federal price reporting as a basis for determining damages to Nebraska producers, and providing a cause of action for them, would not interfere with the federal price reporting scheme. "Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law." ***English v. General Electric Co.***, 496 U.S. 72, 89, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990). Such a statute would not hinder the administration nor the purpose of the federal price reporting scheme, which is focused only on price reporting. "The Court has observed repeatedly that pre-emption is ordinarily not to be implied absent an 'actual conflict'." ***Id.*** *at 90.* A state law which does not conflict with the federal law's administration may avoid preemption. As

Neb. Rev. Stat. §§ 54-2607 to 54-2612 currently stand, they are in conflict with the federal purpose of price reporting by adding additional requirements to the federal scheme, which is expressly forbidden.

C. Cattle Information Reporting

The cattle price reporting requirements in Neb. Rev. Stat. §§ 54-2623 to 54-2625 are similar in administration to the hog price reporting requirements described above. These statutes require reporting of quantities purchased, carcass data, the basis for transportation and approximate purchase prices for cattle, much like the hog statutes. However, there is no discrimination section in the cattle statutes, unlike the prohibition on hog price discrimination described in Neb. Rev. Stat. § 54-2607. Instead, the cattle statutes have certain requirements relating to the contract terms of cattle procurement contracts. Neb. Rev. Stat. §§ 54-2617 to 54-2622.

Cattle price reporting requires that prices paid, quantity purchased, carcass quality, estimated live weight, premiums/discounts and basis contract terms be reported on a daily basis in much the same fashion as hog reports are made. Neb. Rev. Stat. § 54-2623. The Federal Reporting Act similarly requires reporting of prices paid by type of purchase, quantity of head delivered to packer and quantity of head committed to the packer. The federal requirements are different in that the time frame for reporting of prices and quantities are different than the state time frames for reporting. The state requires that cattle procured daily under a formula contract have their premiums, discounts and quantity reported simultaneously. Neb. Rev. Stat. § 54-2623(3). The Federal Reporting Act requires that prices, quantity delivered and quantity procured be reported categorically daily, and the actual quantity slaughtered for contracted cattle be reported weekly. Further, the Nebraska Reporting Act requires that monthly delivery dates be reported daily as part of a procurement contract report, while the Federal Reporting Act reports the quantity committed to the packer, then the quantity delivered and then the quantity actually slaughtered. Neb. Rev. Stat. § 54-2618(2), HR 1906 Title IX § 222(c). The state requirements are not more specific than the federal law, but require data in a different format and at different times in the transaction process than the federal requirements.

The Federal Reporting Act requires similar information, but in a different and essentially inconsistent pattern with that of the state requirements. Federal preemption clearly states " . . . no . . . State may impose a requirement that is in addition to, or inconsistent with, any requirement of this subtitle . . . " HR 1906, Title IX § 259. The inconsistencies in reporting between the federal and state schemes is explicitly to be preempted by " . . . avoiding potentially conflicting State laws . . . " ***Id.*** To allow the Nebraska reporting scheme to remain in place would likely frustrate the purpose of the Federal Reporting Act. "Conventional conflict preemption principles require preemption . . . where state law stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress." ***Boggs v. Boggs***, 117 S. Ct. 1754, 520 U.S. 833, 138 L. Ed. 2d 45, 57 (1997). Since the federal and state schemes report similar data at different times and in different formats, the federal preemption clause's requirement that conflicting state law be preempted must be followed. Neb. Rev. Stat. §§ 54-2623 to 54-2625 are preempted.

As for the contract term requirements for cattle procurement contracts, they generally prohibit "gag" clauses in contracts, contracts without delivery dates, and procurement contracts without base prices set prior to commitment of fat calves. Neb. Rev. Stat. §§ 54-2617 to 54-2622. These sections have similar preemption problems to the hog price discrimination requirements. The packer may avoid the penalty for "gag" clauses in contracts, or contracts without delivery dates, by reporting certain contract terms as part of the daily price reporting requirements. Neb. Rev. Stat. §§ 54-2618(2). If the price reporting option is eliminated by preemption, then packers have no statutory alternative to avoid the penalty for contracts that would violate Neb. Rev. Stat. § 54-2617. (For example, a packer who fully reports under the federal price reporting system may be subject to violations of Nebraska statutes, even if he has no contractual "gag" rule, he sets the base price prior to scheduling cattle, and he allows the producer to select the week of delivery in the procurement contract, so as to satisfy both Neb. Rev. Stat. §§ 54-2618 and 54-2619.) The packer would still have to report under Neb. Rev. Stat. § 54-2618(2), which would be impossible since the reporting requirements are preempted. As we stated in our prior opinion, courts must construe statutes in a consistent and sensible scheme. Op. Att'y Gen. No. 99028 (July 16, 1999), citing ***FirsTier Bank, N.A. v. Department of Revenue***, 254 Neb. 918, 925, 580 N.W.2d 537, 541 (1998).

Enforcement of state statutes that have lost one of their two required provisions due to preemption would be nonsensical. This would be the situation arising under Neb. Rev. Stat. § 54-2618. Since contract term reporting is an integral part of the cattle price reporting scheme, it would be an "addition" to the federal price reporting scheme. This is specifically preempted by HR 1906, Title IX, § 259. Even more problematic is the state requirement that all contracts be proven to be "negotiated." Neb. Rev. Stat. § 54-2619. The Federal Reporting Act assumes that all cash sales, since they have a delivery date and base price, are a "negotiated" purchase. HR 1906, Title IX, § 212(8). However, "negotiated" appears to mean something more under Neb. Rev. Stat. § 54-2619, such as the base price being determined by a public market price. The fact "negotiated" may be defined differently in Nebraska is irrelevant, as the Federal Reporting Act has conclusively determined the definition of a negotiated purchase. From a practical standpoint, it would be difficult to determine if a purchase was "negotiated" from the information provided by the federal reporting scheme, making it virtually impossible to enforce Neb. Rev. Stat. § 54-2619 in conjunction with the Federal Reporting Act. For essentially the same reasons the hog discrimination requirements in Neb. Rev. Stat. §§ 54-2607 to 54-2612 were preempted, federal preemption of Neb. Rev. Stat. §§ 54-2617 to 54-2622 makes them unenforceable.

III. CONCLUSION

The Federal Reporting Act is the new law for livestock price reporting in the United States. It's preemption clause explicitly prevents any state laws from requiring additional or substitute requirements for the information the federal law requires. The Nebraska Reporting Act has three main portions of which only the packer ownership laws would survive a preemptive challenge. The federal preemption clause is sufficiently explicit to preempt not only hog and cattle price reporting in Nebraska, but to also preempt the

intertwined prohibitions on hog price discrimination, and the limitations on cattle procurement contracts. The Nebraska Reporting Act's price reporting requirements, price discrimination prohibitions and cattle procurement contract requirements are not enforceable by the Department.

Sincerely,

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Approved:

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