

January 24, 2017

Randall Jones, Acting Administrator
Grain Inspection, Packers and Stockyards Administration
Stop 3601- Room 2055 South Building
1400 Independence Ave., SW
Washington, D.C. 20250-3601

S. Brett Offutt, Acting Deputy Administrator
Grain Inspection, Packers and Stockyards Administration
Stop 3601- Room 2055 South Building
1400 Independence Ave. SW.
Washington, DC 20250

Re: Scope of Sections 202(a) and (b) of the Packers and Stockyards Act; Interim Final Rule; RIN 0580-AB25; 81 *Fed. Reg.* 92566 (Dec. 20, 2016); Poultry Grower Ranking Systems; Proposed Rule; RIN 0580-AB26; 81 *Fed. Reg.* 92723 (Dec. 20, 2016); Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act; Proposed Rule; RIN 0580-AB27; 81 *Fed. Reg.* 92703 (Dec. 20, 2016).

Dear Mr. Offutt:

The undersigned organizations submit this letter asking when the Grain Inspection, Packers and Stockyards Administration (GIPSA or the agency) intends to announce the delay of the effective date of the above-referenced interim final rule (IFR) and requesting an extension of the comment period for the two above-referenced proposed rules.

On January 20, 2017, White House Chief of Staff and Assistant to the President Reince Priebus issued a memorandum, Regulatory Freeze Pending Review (Priebus Memo), asking the heads of executive departments and federal agencies to take certain steps immediately regarding “regulations,” as that term is defined in the memorandum.¹ The Priebus Memo provides that the effective date of regulations that have been published in the Office of the Federal Register but not taken effect should be postponed for 60 days from the memorandum’s January 20, 2017 date, to allow the President’s appointees or designees to review the regulations regarding the “questions of fact, law, and policy they raise.”² Consistent with the

¹ Memorandum for the Heads of Executive Departments and Agencies, Regulatory Freeze Pending Review, Reince Priebus, Assistant to the President and Chief of Staff, January 20, 2017, (Priebus Memo).

² *Id.*

Priebus Memo the IFR's effective date should be no earlier than March 21, 2017, and for reasons discussed below, should be extended to June 21, 2017, in order to provide for an adequate review of the comments filed opposing the IFR.

As highlighted in the Priebus Memo, the IFR raises serious and contentious issues of law and policy.³ The December 20 *Federal Register* IFR publication ignores or misrepresents important legal and policy questions. As GIPSA is well aware, eight separate federal appellate courts have rendered decisions that conflict with the IFR. The IFR's conflict with settled law is best highlighted in a passage from a case decided just weeks before GIPSA published the proposed rule in 2010. In *Terry v. Tyson Farms, Inc.* the United States Court of Appeals for the Sixth Circuit said the following.

The tide has now become a tidal wave, with the recent issuance of the Fifth Circuit Court of Appeals' *en banc* decision in *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (*en banc*), in which that court joined the ranks of all other federal appellate courts that have addressed this precise issue when it held that "the purpose of the Packers and Stockyards Act of 1921 is to protect competition and, therefore, only those practices that will likely affect competition adversely violate the Act." *Wheeler*, 591 F.3d at 357. All told, seven circuits – the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits – have now weighed in on this issue, with unanimous results."⁴

The Sixth Circuit also addressed GIPSA's position, which the agency adopted in the IFR.

In this appeal, Terry, joined by *amicus curiae* United States Department of Agriculture ("USDA"), seeks to persuade us to adopt the decidedly minority view embraced by some district courts and vigorously articulated by Judge Garza, along with six of his colleagues, in his dissenting opinion in *Wheeler*. See *Wheeler*, 591 F.3d at 371 (Garza, J., dissenting). ...Ultimately, Terry and the USDA would have this court deviate from the course taken by the seven other circuits that have spoken on this issue, thus creating a conflict. We decline to do so.⁵

Suffice it say, the appellate courts have pointedly repudiated the agency's position about the state of the law regarding the proper application of sections 202(a) and (b) of the Packers and Stockyards Act (the Act). In the face of this repudiation, GIPSA nevertheless promulgated the IFR. This conflict demonstrably shows there are substantial questions of law inherent in the IFR.

³ *Id.*, Paragraph 3(b)

⁴ *Terry v. Tyson Farms, Inc.* 604 F.3rd 272, 277 (6th Cir. 2010).

⁵ *Id.* at 277-278.

Not only is section 201.3(c) legally infirm, it is poor policy. The agency received countless comments advising it that the IFR will adversely affect the very livestock producers and poultry growers the Act is intended to protect. From the comments received and its own study the agency is well aware that producers will be most adversely affected if the use of alternative marketing arrangements and other grower production contracts is diminished and the agency also knows regulated entities will decrease or abandon using those agreements with the looming threat of litigation.⁶ Notwithstanding that advice the agency published the IFR expecting, indeed hoping, it will spur numerous lawsuits intended to change the behavior of entities subject to the Act's jurisdiction. Executive Order 12866 required GIPSA to conduct a cost-benefit analysis of the IFR. It is telling that the agency's analysis consists almost entirely of a review of how much litigation will ensue and its costs, depending on how regulated entities react or change behavior.⁷ A regulation that conflicts with long settled case law harms the constituents it is intended to protect, and is intended to change behavior by encouraging numerous lawsuits is not good public policy.

Because the IFR does not involve an emergency or other urgent circumstances its effective date should be delayed to give the incoming Administration the opportunity to consider these problems.⁸ In addition, because the IFR raises "substantial questions" of law and policy the agency should, consistent with Mr. Priebus's memorandum, "notify the OMB Director and take further appropriate action in consultation with the OMB Director."⁹

To provide time for adequate reconsideration of these significant problems, GIPSA should extend the IFR's effective date by more than the 60 days requested in the Priebus Memo. The undersigned organizations recommend a 150 day extension to June 21, 2017. If the IFR becomes effective before the new Administration has an opportunity to review the IFR, the comments, and the policy underlying the IFR, the regulatory review contemplated by Mr. Priebus' memorandum will be compromised.

In addition to delaying the effective date of the IFR the agency should also extend the comment period for the two proposed rules published on December 20. The term "regulation" in the Priebus Memo includes "notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking,..."¹⁰ The concepts included in the proposed rules are sufficiently different from the agency's

⁶ See United States Dept. of Agriculture. Grain Inspection, Packers and Stockyard Administration. *GIPSA Livestock and Meat Marketing Study*. Vol. 1. Research Triangle Park: RTI International, 2007.

⁷ See 81 *Fed. Reg.* 92577-92594.

⁸ Nor is the IFR subject to any statutory or judicial deadlines. See Priebus Memo, Paragraphs 1 and 4.

⁹ Priebus Memo, Paragraph 5.

¹⁰ *Id.*, Paragraph 6.

2010 publication and they warrant careful and considered scrutiny. These differences, along with the applicability of the Priebus Memo and the fact the agency published the proposed rules just days before the Christmas and New Year holiday period, justify extending the comment period for the proposed rules by at least 30 days with a 60 day extension even more justifiable.

If you have any questions regarding this letter or other issues attendant to these issues, please contact us.

Respectfully submitted,

National Cattlemen's Beef Association
National Chicken Council
National Pork Producers Council
National Turkey Federation
North American Meat Institute