

U.S. House of Representatives
Committee on Oversight and Government Reform
Darrell Issa (CA-49), Chairman



**Broken Government: How the Administrative State has
Broken President Obama's Promise of Regulatory Reform**

STAFF REPORT
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A. Grain Inspection, Packers, and Stockyards Administration Proposed Rule

i. Rule and Purpose

On June 22, 2010, the U.S. Department of Agriculture (USDA) Grain Inspection, Packers, and Stockyards Administration (GIPSA) proposed a rule pursuant to the Food, Conservation, and Energy Act of 2008 (Farm Bill) intended to “increase fairness in the marketing of livestock and poultry”⁴² and “clarify conditions for industry compliance with the [Packers and Stockyards Act of 1921].”⁴³ More simply, the proposed rule is an attempt to regulate livestock marketing practices. This change has caused a significant amount of alarm in the agricultural sector because it could “dismantle the business models used by livestock producers, meat packers, and poultry processors” by making commonly used marketing agreements legally risky and subject to challenge by those who are not a party to the agreements.⁴⁴ As a result, these agreements would be less attractive to industry and lead to higher prices and fewer options for consumers.⁴⁵

ii. Broken Process

Ranchers, livestock packers and producers, meat companies, as well as others in this community have expressed serious concerns with the development of this rule. These stakeholders argue that GIPSA has deliberately avoided conducting a meaningful cost-benefit analysis. Moreover, they argue GIPSA has not complied with the mandates of E.O. 12866 because the rule exceeds congressional authority and will encourage litigation.

In the first instance, GIPSA failed to conduct a proper economic analysis of the proposed rule in violation of E.O. 12866. Under E.O. 12866, agencies are to conduct a cost-benefit analysis in cases where the rule is determined to be “significant.”⁴⁶ While GIPSA determined the rule to be “significant,” it did not attempt to estimate the total of the costs or benefits of the rule.⁴⁷ Instead, GIPSA conducted a very minimal cost estimate of portions of the rule and provided generalized statements that it “believes potential benefits are expected to exceed costs.”⁴⁸ However, this bare bones analysis “never references potential costs to consumers” as well as other factors that will increase its implementation cost.⁴⁹ In contrast to the Administration’s lack of economic analysis, the private sector conducted three in-depth studies to understand the economic impact of the rule. The studies use various methodologies and

⁴² USDA News Release No. 0326.10, USDA Announces Proposed Rule to Increase Fairness in the Marketing of Livestock and Poultry (June 18, 2010).

⁴³ Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act Proposed Rule, 75 Fed. Reg. 35338 (June 22, 2010).

⁴⁴ J. Patrick Boyle, *Addressing USDA Regulations*, POLITICO, Feb. 18, 2011.

⁴⁵ *Id.*

⁴⁶ Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

⁴⁷ *See* Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act Proposed Rule, 75 Fed. Reg. 35338 (June 22, 2010).

⁴⁸ *Id.* at 35346.

⁴⁹ Letter from U.S. Senator Pat Roberts to The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs (July 26, 2010).

project different final costs; however, the conclusion is the same—the rule is not only significant, it is “economically significant,” meaning it will cost more than \$100 million annually.⁵⁰

In reaction to these studies and over 60,000 public comments, GIPSA finally agreed to conduct a more “rigorous” cost-benefit analysis.⁵¹ Further, USDA’s Chief Economist, Joe Glauber, recently testified at a Congressional hearing that the rule is being reclassified as “economically significant.”⁵² This designation is extremely important because it heightens the required analysis; the fact that the rule was improperly classified at its inception likely impacted the scrutiny originally applied to it. Accordingly, those in the agricultural sector have requested GIPSA reopen the rule for public comment after the new economic analysis is complete. In addition, Senator Pat Roberts has asked OIRA Administrator Sunstein to ensure that GIPSA complies with E.O. 12866, as well as requirements under the Regulatory Flexibility Act.⁵³ Unfortunately, Secretary of Agriculture Tom Vilsack indicated that GIPSA does not plan to reopen the comment period once the new cost-benefit analysis is complete.⁵⁴ To date, Administrator Sunstein has not replied to Senator Roberts’ request.⁵⁵

The pattern of excluding public comments goes back to the earliest days of the proposal. In March 2010, prior to proposing the rule, the USDA initiated a series of five workshops to explore competition and regulation in the agriculture industry.⁵⁶ One of the workshops, in May 2010, specifically addressed the poultry industry; another, in August 2010, addressed the livestock industry.⁵⁷ Despite the close proximity of these workshops to the rule’s proposal, on July 8, 2010, GIPSA Administrator Dudley Butler wrote to members of the livestock industry to inform them that these workshops were “separate and distinct from the GIPSA rulemaking process,” the comments made at the workshops “fall outside the comment period,” and would not be considered despite the fact they were related to the proposed rule.⁵⁸ Yet, in direct contrast to Administrator Butler’s letter, GIPSA used anecdotes from the May 2010 poultry workshop in an “Examples of Market Behavior” document released in conjunction with the proposed rule.⁵⁹ After inquiries from numerous Senators about the objectivity of GIPSA’s rulemaking process, Secretary Vilsack reversed the decision of Administrator Butler and decided that the comments

⁵⁰ American Meat Institute Fact Sheet, What Three Comprehensive Studies Have Said About the Cost of Proposed GIPSA Rule, *available at* <http://meatami.com/ht/a/GetDocumentAction/i/64920> (last visited Aug. 28, 2011).

⁵¹ California Poultry Federation, NCC Welcomes Vilsack’s Call for Cost-Benefit Analysis of GIPSA Rule, *available at* http://www.cpfif.org/index.php?option=com_content&task=view&id=719&Itemid=89 (last visited Aug. 28, 2011).

⁵² *Nutrition and Forestry, The State of Livestock in America: Hearing Before the S. Comm. on Agriculture*, 112th Cong. (2011) (question and answer by Joe Glauber, Chief Economist, U.S. Department of Agriculture).

⁵³ Letter from Senator Pat Roberts to The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs (July 26, 2011).

⁵⁴ Tim Hearden, *Factions trade barbs on GIPSA effort*, CAPITAL PRESS, Mar. 24, 2011.

⁵⁵ Email from Senate Agriculture Committee staff to House Oversight Committee staff (Sept. 8, 2011).

⁵⁶ USDA News Release No. 0081.10, USDA and Department of Justice Workshops to Explore Competition and Regulatory Issues in the Agriculture Industry to Begin March 12th in Iowa (Feb. 23, 2010).

⁵⁷ U.S. Dept. of Justice, Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy Workshop Information, *available at* <http://www.justice.gov/atr/public/workshops/ag2010/> (last visited Aug. 28, 2011).

⁵⁸ Letter from J. Dudley Bulter, GIPSA Administrator, to Sam Carney, President, National Pork Producers Council (July 8, 2010).

⁵⁹ Letter from U.S. Senator Pat Roberts, et al. to The Honorable Tom Vilsack, Secretary, U.S. Dept. of Agriculture (Aug. 26, 2010).

at the workshops would be considered in the rulemaking process.⁶⁰ Absent this concession, Administrator Butler's refusal to include such comments runs contrary to the requirement in E.O. 12866 that agencies seek the involvement of those expected to be burdened by a regulation *before* issuing a notice of proposed rulemaking.⁶¹

During the public comment period GIPSA also took the unusual step of publishing an advocacy document entitled, "Misconceptions and Explanations," related to the proposed rule.⁶² Some argue that the document was an attempt to combat against a very contentious House Agriculture Subcommittee hearing in June 2010 where broad, bipartisan concerns were raised about the proposed rule.⁶³ On its face, the document appears to attempt to persuade Congress, the press, stakeholders, and the public that the rule is needed. It has been argued such advocacy by a federal agency is "contrary to the spirit and intent of the Administrative Procedures Act."⁶⁴

Not only did GIPSA fail to conduct a meaningful cost-benefit analysis of the rule and sought to exclude public participation, GIPSA also violated E.O. 12866 because the rule exceeds the agency's delegated authority and will likely spur litigation. E.O. 12866 mandates that federal agencies promulgate regulations required by law and do so in a way that minimizes the potential for litigation.⁶⁵ When Congress debated and passed the Farm Bill, it directed USDA to issue rules that address specific topics. However, GIPSA's proposed rule includes provisions that were explicitly rejected during the Farm Bill debate. For example, the proposed rule includes a provision that requires certain livestock packers and dealers to "maintain written records that provide justification for differential pricing or any deviation from standard price or contract terms offered to certain livestock producers and growers."⁶⁶ A similar provision addressing business justification was included in a Senate floor amendment to the Farm Bill that did not pass.⁶⁷ The requirement is problematic because it neglects the realities of livestock procurement. Thousands of transactions between packers and producers take place "in the field" and varying prices may be merely the result of better negotiation.⁶⁸

Also, the proposed rule would no longer require a plaintiff to show "competitive injury" to the marketplace, meaning actions that "adversely affect or [are] likely to adversely affect

⁶⁰ U.S. Dept. of Justice & U.S. Dept. of Agriculture, Public Workshops Exploring Competition Issues in Agriculture: A Dialogue on Competition Issues Facing Farmers in Today's Agricultural Marketplaces (Aug. 27, 2010) (transcript of Sec. Vilsack's remarks).

⁶¹ Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

⁶² Grain Inspection, Packers and Stockyards Administration, Misconceptions and Explanations, *available at* <http://archive.gipsa.usda.gov/psp/rulefacts.pdf> (last visited Aug. 28, 2011).

⁶³ Letter from Rep. Jack Kingston, Ranking Member, Committee on Appropriations Agriculture Subcommittee, to The Honorable Tom Vilsack, Secretary, U.S. Dept. of Agriculture (Aug. 26, 2010).

⁶⁴ *Id.*

⁶⁵ *See* Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

⁶⁶ Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act Proposed Rule, 75 Fed. Reg. 35338, 35351 (June 22, 2010).

⁶⁷ *See* Tester S. Amdt. No. 3666 to H.R. 2419, Roll Call Vote, 110th Cong. (2007).

⁶⁸ American Meat Institute, Comments Filed, Re: Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act; Proposed Rule; 75 Fed. Reg. 35338 (June 22, 2010).

competition” in a lawsuit brought under the Packers and Stockyards Act of 1921.⁶⁹ This language was included in a discussion draft at a Senate committee mark-up of the Farm Bill, but was subsequently deleted.⁷⁰ In addition to being contrary to congressional intent, it is also inconsistent with the law as interpreted by eight federal circuit courts.⁷¹ These courts, prior to and after enactment of the Farm Bill, have held that “only those practices that will likely affect competition *adversely* violate the Act.”⁷² (emphasis added). This provision will undoubtedly increase litigation because it lowers the standard of proof necessary to demonstrate a violation of the Act. Arguably, plaintiffs will no longer need to show actual injury to the marketplace in order to prevail in court. Adding to the controversy, the author of the rule, Administrator Butler, is a former plaintiffs’ lawyer who lost a multitude of cases under the current law.⁷³ Demonstrating clear bias, shortly after Administrator Butler was appointed to his position, he previewed the GIPSA regulations at a speech before the Organization for Competitive Markets. He indicated terms in the rule would be “a plaintiff lawyer’s dream” and continued, “we can get in front of a jury on [these terms].”⁷⁴ (emphasis added). Administrator Butler’s clear conflict-of-interest and bias is even more troubling in light of the many ways his agency sought to avoid vetting the rule through the scrutiny of the administrative process.

iii. Impact

The impact of the proposed rule would be extremely costly to the economy and those regulated by the rule. For instance, John Dunham and Associates, a bipartisan firm that conducts economic impact studies on various pieces of legislation, estimated the proposed rule would reduce national GDP by \$14 billion, come with a price tag of \$1.36 billion in lost revenues to the federal, state, and local governments, and jeopardize 104,000 American jobs in the meat and poultry industry.⁷⁵ The study also predicts livestock producers would be especially impacted by the rule, costing up to 21,274 jobs, primarily in rural America.⁷⁶ The study also evaluated the impact of the rule on consumers. It concluded that the cost of meat and poultry products would increase by approximately 3.33 percent, meaning consumers would pay an additional \$2.7 billion to maintain their current meat consumption.⁷⁷

These findings are bolstered by two additional studies. Informa Economics, Inc., a world leader in domestic and international agricultural market research, estimated the rule would result

⁶⁹ Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act Proposed Rule, 75 Fed. Reg. 35338, 35351 (June 22, 2010).

⁷⁰ American Meat Institute, Comments Filed, Re: Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act; Proposed Rule; 75 Fed. Reg. 35338 (June 22, 2010).

⁷¹ *Id.*

⁷² *Terry v. Tyson Farms, Inc.*, 604 F.3d 272 (6th Cir. 2010).

⁷³ See, e.g., Bob Barr, *Federal beef boss proposes self-serving changes to rules*, THE HILL, Oct. 26, 2010; Billy Gribbin, *New GIPSA Administrator is the Fox in America’s Henhouse*, AMERICANS FOR TAX REFORM, Nov. 18, 2010.

⁷⁴ Billy Gribbin, *New GIPSA Administrator is the Fox in America’s Henhouse*, AMERICANS FOR TAX REFORM, Nov. 18, 2010.

⁷⁵ John Dunham and Associates, Inc., *The American Meat Institute Meat Demand Study: The Impact of Proposed Grain Inspection, Packers and Stockyards Administration Proposed Rule 2* (Aug. 2010).

⁷⁶ *Id.* at app.1.

⁷⁷ *Id.* at 2.

in ongoing and indirect costs to the livestock and poultry industries of more than \$1.64 billion.⁷⁸ More specifically, it would result in losses near \$880 million for the beef industry, more than \$401 million for the pork industry, and close to \$362 million for the poultry industry.⁷⁹ Similarly, FarmEcon LLC, an agricultural consulting firm, estimated the impact of the rule solely on the broiler chicken industry. It concluded the rule would cost more than \$1 billion over five years in reduced efficiency, higher costs for feed and housing, and increased administrative expenses.⁸⁰ The study also warned the rule would “likely slow the pace of innovation, increase the costs of raising live chickens and result in costly litigation.”⁸¹ Equally concerning, the study found the rule could negatively impact U.S. competitiveness abroad. According to the study,

the Proposed Rul[e] place[s] cost burdens and regulatory restrictions on U.S. broiler companies that do not apply to foreign competitors. To the extent that U.S. chicken company competitiveness in global markets is reduced, U.S. chicken net exports would likely decline in a manner similar to the recent decline in EU chicken net exports. Export competitor countries such as Brazil could reap significant benefits from the Proposed Rul[e].⁸²

One job creator, Robbie LeValley, and her family, who co-own Homestead Meats, a small direct-beef marketing business, believes the proposed rule “will destroy our small business model, force us to lay off our employees, cripple our ability to market our cattle the way we want to, and limit consumer choice.”⁸³ She believes alternative marketing agreements are “the heart of [their] small business,” and the agreements do not warrant further government intervention or being subject to potential litigation.⁸⁴

B. Fish and Wildlife Service Injurious Species Proposed Rule

i. Rule and Purpose

On March 12, 2010, the United States Department of the Interior, Fish and Wildlife Service (FWS) proposed a rule to designate nine snake species as “injurious” under the Lacey Act.⁸⁵ The species include four variations of pythons, four variations of anaconda, and the boa constrictor.⁸⁶ The Lacey Act, enacted in 1900 and amended in 1981, allows the FWS to list certain species as “injurious” to humans, agriculture, horticulture, forestry, and fish and

⁷⁸ Informa Economics, Inc., *An Estimate of the Economic Impact of GIPSA’s Proposed Rules 53* (Nov. 2010).

⁷⁹ *Id.* at 51-53.

⁸⁰ FarmEcon LLC, *Proposed GIPSA Rules Relating to the Chicken Industry: Economic Impact 27* (Nov. 2010).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Regulatory Incompetency: How USDA’s Proposed GIPSA Rule Hurts America’s Small Businesses: Hearing before the H. Comm. on Small Business, Subcomm. on Agriculture, Energy, and Trade, 112th Cong.* (2011) (testimony of Robbie LeValley, Homestead Meats).

⁸⁴ *Id.*

⁸⁵ *Injurious Wildlife Species; Listing the Boa Constrictor, Four Python Species, and Four Anaconda Species as Injurious Reptiles*, 75 Fed Reg. 11808 (Mar. 12, 2010).

⁸⁶ *Id.*