

United States Senate

November 15, 2016

The Honorable Shaun Donovan
Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

The Honorable Howard Shelanski
Administrator
Office of Information and Regulatory Affairs
725 17th Street, NW
Washington, DC 20503

Dear Director Donovan and Administrator Shelanski,

I write to express my concern regarding the U.S. Department of Agriculture's (USDA) Grain Inspection, Packers and Stockyards Administration's (GIPSA) recent decision to send three rules (commonly referred to as the GIPSA rule) to the Office of Management and Budget (OMB) for review. It appears that USDA intends to now finalize these six-year-old rules, having been first proposed in 2010, by issuing an interim final rule, which would not provide the public with a meaningful opportunity to provide updated information, data, or comments prior to the agency finalizing the rule.

The GIPSA rule has been the subject of a considerable amount of debate over the last six years. At the time in 2010, the proposed GIPSA rule received more than 61,000 public comments. Additionally, in response to concerns that the rule could have an adverse impact on the livestock, meat, and poultry industries, a bipartisan majority in Congress repeatedly voted to defund USDA's implementation of most of the GIPSA rule.¹

As you know, the Administrative Procedures Act (APA) is meant to provide the public with the ability to participate in the rulemaking process—mainly through the submission of comments.² In addition to the APA, Executive Order 12866 requires each agency to “provide the public with meaningful participation in the regulatory process” and “afford the public a meaningful opportunity to comment on any proposed regulation.”³ In 2011, the White House issued Executive Order 13563,

¹ See Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 721, 125 Stat. 552 (2011), Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, § 742, 127 Stat. 198 (2013), Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, § 744, 128 Stat. 5 (2014), Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 731, 128 Stat. 2130 (2014).

² 5 U.S.C. § 553 (b)-(c).

³ Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C § 601.

which “reaffirms the principles, structures, and definitions” established in Executive Order 12866.⁴ Consistent with the APA and the previous Executive Order, the 2011 Executive Order establishes that, “[r]egulations shall be adopted through a process that involves public participation.”⁵ It goes further and states that “regulations shall be based . . . on the open exchange of information and perspectives among . . . affected stakeholders in the private sector and the public as a whole.”⁶ It also directs every agency to use the “best available science” and “the best available techniques to quantify anticipated present and future benefits and costs *as accurately as possible*.”⁷

I am concerned that USDA, by issuing an interim final rule six years after the public first provided formal comments, is effectively sidestepping the public notice and comment requirement by only allowing comments after it finalizes the rule. Although the APA does provide a “good cause” exception to the requirement for notice and comment prior to finalizing a rule, that exception should not apply in this case.⁸

The good cause exception applies when the pre-promulgation notice and comment procedure is “impracticable, unnecessary, or contrary to the public interest.” However, in this case, not only is providing notice and comment easily achievable since there is no exigent circumstance, such as a statutory or judicial deadline, it is also necessary and in the public’s interest. In a recent letter responding to a request to reopen the comment period, USDA Secretary Thomas Vilsack indicated the USDA is “considering excluding” several provisions from the 2010 proposed rule. Based on these comments it appears that the 2010 proposed rule has changed in a way that amounts to more than mere technical corrections, and, as a result, it is necessary that the public has an opportunity to review and provide comment on this new and updated version of the rule.

Additionally, the livestock, meat, and poultry industry has experienced significant change since the 2010 rulemaking. I am concerned that failure to open the comment period to allow for updated information about the industry prior to USDA finalizing the rule would effectively lead to a rule that would not incorporate meaningful participation by the public in accounting for changes that have occurred in the industry over the last six years, and therefore fail to meet Executive Order 13563’s directive to quantify the cost and benefits of any rule “as accurately as possible.”

The issuance of this interim final rule comes at a time when farm income is down and many agricultural operations across the country are suffering from low commodity prices. It is therefore especially important that USDA now follow the notice and public comment requirement under the

⁴ Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* (emphasis added).

⁸ 5 U.S.C. § 553(b)(B) (“Except when notice or hearing is required by statute, this subsection does not apply . . . when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”).

APA and past Executive Orders, and allow for updated stakeholder input prior to USDA finalizing the rule to ensure that it fully understands the economic impact of this rule.

Sincerely,



Ted Cruz
U.S. Senator

cc: The Honorable Thomas J. Vilsack, Secretary, U.S. Department of Agriculture