

## **Organization for Competitive Markets Seeks Judicial Review of USDA's GIPSA Rule Withdrawal**

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On December 20, 2016, the United States Department of Agriculture ("USDA")'s Grain Inspection, Packers and Stockyards Administration ("GIPSA") issued two proposed regulations and an interim final rule ("IFR") amending GIPSA regulations. After a change in administration, on October 18, 2017 GIPSA issued a notification of no further action and a final rule that withdrew the 2016 IFR. Further, they indicated that the agency would no longer be pursuing action to amend the GIPSA regulations. Two months later, that decision was challenged.

The rules at issue involve the Packers and Stockyards Act of 1921 ("PSA"), responsibility for which lies with GIPSA. The PSA is intended to ensure effective competition, integrity, and fair trade practices in livestock, meat, and poultry markets. Jumping ahead to the 2008 Farm Bill, Congress mandated that USDA promulgate additional rules to better enforce the PSA in regards to contracting. Specifically, Congress required GIPSA establish 1) a definition of an "undue or unreasonable preference or advantage"; 2) the definition of "reasonable notice" for poultry growers whose delivery of birds has been suspended; 3) guidelines for requiring additional capital investments to facilities during a contract; and 4) the definition of a "reasonable period of time" to remedy a breach of a growing contract.

On June 22, 2010, GIPSA proposed a rule that would add several new sections to the regulations that enforce the P&S Act, based on the 2008 Farm Bill requirements. These proposals drew tens of thousands of comments, as well as the attention of Congress. A rider on the FY2012 appropriations law limited

GIPSA's authority to enforce the rules. The final rule, eventually released in December 2011, was significantly narrower in scope than the original proposal.

While several appropriations bills over the next few years contained the prohibitive language, the 2016 bill did not. As a result, in December 2016, GIPSA proposed an amendment to the Farmer Fair Practice Rules through an IFR. An IFR is used when an agency promulgates a final rule, without first publishing a proposed rule, because the agency finds it has good cause for the rule to become immediately effective. In the IFR, GIPSA added a paragraph to better define the scope of §§ 202(a) and (b) of the P&S Act. "This interim final rule clarifies that conduct or action may violate sections 202(a) and (b) of the P&S Act without adversely affecting, or having a likelihood of adversely affecting, competition." The IFR specifically provided that "the scope of section 202(a) and (b) encompasses conduct or action that, depending on their nature and the circumstances, can be found to violate the P&S Act without a finding of harm or likely harm to competition."

Two other proposed rules were submitted at the same time, through the normal rulemaking process. These rules defined "unfair practices and undue preferences" and discussed poultry grower ranking systems.

After a postponement earlier in the year, GIPSA withdrew the IFR and proposed rules on October 18, 2017. In the withdrawal, GIPSA stated that the agency had reviewed the IFR and related public comments, and was concerned with the legal and policy implications of the additional paragraph. GIPSA gave two reasons to withdraw the rule: (1) the IFR's interpretation of the scope of sections 202(a) and (b) of the P&S Act was inconsistent with U.S. Court of Appeals decisions interpreting the P&S Act, which would undermine the deference those courts give GIPSA, and; (2) The basis of good cause for promulgating the IFR was inadequate to withstand scrutiny under the Administrative Procedure Act.

In a petition for judicial review filed on December 14, 2017, the Organization for Competitive Markets claimed that the rule withdrawal was a violation of the agency's duties under the 2008 Farm Bill and was arbitrary and capricious. The USDA claimed the withdrawal was not arbitrary and capricious because the agency set forth reasonable rationale to withdraw the rule. In oral argument in the 8th Circuit Court of Appeals on September 26, 2018, the USDA contended that the rulemaking process for GIPSA is on the spring 2019 regulatory agenda. A ruling on the issue, as well as any supplementary rulemaking, has not been released.

## Sources

[USDA: Farmer Fair Practices Rules](#) (Last updated Mar. 6, 2017)

[USDA: Packers and Stockyards Division](#)

[Organization for Competitive Markets: GIPSA Lawsuit Documents and Updates](#)

[Oral Argument in the 8th Cir. on Sept. 26, 2018](#)

## Statutes

[Packers and Stockyards Act](#), 7 U.S.C. §§ 181–231

[2008 Farm Bill](#), Pub. L. 110-246, 122 Stat. 2120 § 11006

## Regulations

[Regulations under the Packers and Stockyards Act](#), 9 CFR Part 201

[Proposed Rule on June 22, 2010](#), 75 Fed. Reg. 35338

[Final Rule on December 9, 2011](#), 75 Fed. Reg. 76874

[Proposed Rule to Amend Regulations Under Packers and Stockyards Act](#), 81 Fed. Reg. 92703

[Interim Final Rule to Amend Regulations Under Packers and Stockyards Act](#), 81 Fed. Reg. 92566<sup>1</sup>

[Notification of No Further Action on Rule to Amend Regulations Under Packers and Stockyards Act](#), 82 Fed. Reg. 48603

[Final Rule Withdrawing 81 Fed. Reg. 92566](#), 82 Fed. Reg. 48594

## Additional Materials

[National Agriculture Law Center: Packers and Stockyards](#)

[Congressional Research Service: Joel L. Greene, \*USDA's "GIPSA Rule" on Livestock and Poultry Marketing Practices\*](#) (Jan. 7, 2016).

[USDA: About GIPSA](#) (Last updated Nov. 1, 2017)

[Hendrickson et al., \*Power, Food and Agriculture: Implications for Farmers, Consumers and Communities\*](#), (Nov. 1, 2017)

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<sup>1</sup> Minor correction for grammatical clarification to 81 Fed. Reg. 92566 made by [82 Fed. Reg. 2193](#)