

Congress of the United States
House of Representatives
Washington, DC 20515

March 30, 2021

The Honorable Tom Vilsack
Secretary of Agriculture
U.S. Department of Agriculture
1400 Independence Avenue, S.W.
Washington, D.C. 20250

Dear Secretary Vilsack:

It is our understanding that you have received (or will be receiving) a letter asking you to publish a Proposed Rule that the Animal and Plant Health Inspection Service (APHIS) promulgated in 2016. This Proposed Rule (Docket # APHIS-2011-0009 and 81 FR 49112) simply took most major provisions of H.R. 3268 (the PAST Act) and put them in rule form. After going through a comment period, the proposed rule was never published as a Final Rule. Because of the flaws outlined below, we request that the Department of Agriculture not act on the request for this Proposed Rule to be published as a Final Rule.

First and foremost, an agency of the Federal Government should not be legislating or creating law through the Rulemaking process. There was activity in the previous Congress that we believe will result in a consensus or compromise on these various issues, providing a much-needed modernization of the Horse Protection Act. We would hope the Department would respect the role of the Congress and let the legislative process continue.

Second, the fact that this Proposed Rule originated in 2016 should be cause enough for you and the Department to not move forward with its publication as a Final Rule. The information that was utilized by APHIS in developing this Proposed Rule can be considered “stale” now that it is March 30, 2021. The courts have said that an agency’s reliance on stale data and the agency’s failure to consider new data in adopting regulations can render them arbitrary and capricious, and thus unlawful under the Administrative Procedures Act (APA) (See, e.g., *Sierra Club v. EPA*, 671 F.3d 955, 968 (9th Cir 2012) (finding that “[t]he agency did not adequately address the staleness of its data and availability of more current data before reaching its conclusion” and “the [agency’s] failure to even consider the new data and to provide an explanation for its choice rooted in the data presented was arbitrary and capricious”).

This would certainly be the case were you to go forward with finalizing the 2017 Rule now. More than ten years have passed since the OIG issued its 2010 Audit. Between five and ten years have passed since the alleged violations occurred in 2010-15 that USDA relies upon to support the 2017 Rule. The USDA’s economic impact certification for the 2017 Rule was prepared in 2016 and rests in large part on an economic report that was prepared in 2012 and is thus stale. Economic impacts on small businesses are also stale as these items address the impacts the 2017 Proposed Rule would have – not today – but four years ago. To further prove

how outdated this rule is, the National Academies of Sciences published a report on Tennessee Walking horses and their inspections in January of 2021. We believe their findings are worth taking into consideration as we continue our work on a legislative solution.

Third, the Proposed Rule as presented in the Federal Register is unlawful due to its discriminatory nature. One of the changes outlined in the rule would institute a ban on the use of pads for Tennessee Walking Horse, Spotted Saddle Horse and Racking horse breeds in their shows. The Horse Protection Act applies to all breeds of horses, and while several other breeds also utilize pads, this ban is discriminatorily only applied to three breeds rather than all. Again, the courts have ruled that an agency action that treats two similarly situated groups dissimilarly is arbitrary and capricious. *See, e.g., Marco Sales v. FTC*, 453 F.2d 1, 6-8 (2d Cir. 1971) (“‘[the] law does not permit an agency the right to permit one person to do that which it denies to another similarly situated.’ These other breeds are similarly situated as to whether the use of pads causes soring. Indeed, if the use of pads, as currently permitted under the horse protection regulations, did in fact cause soring, it would make no rational sense for APHIS and the Department of Agriculture to allow pads to be used on any horse.

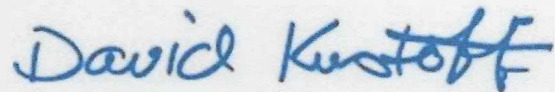
The issues surrounding the Horse Protection Act, its impacts to a number of equine breeds, as well as the need to modernize the HPA in order to both reflect new technologies and identify and utilize science-based methodologies are all questions that must be dealt with by Congress. Thus, we ask that you not move forward with a flawed and highly problematic regulatory action.

Thank you in advance for your time and attention to this letter and do not hesitate to contact us if you have any questions or need any additional information.

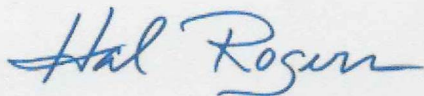
Sincerely,

A stylized blue ink signature of Scott DesJarlais, featuring a large, sweeping arch over a horizontal line.

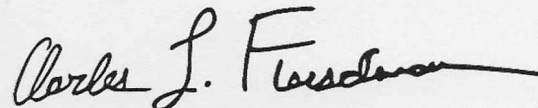
Scott DesJarlais
Member of Congress

A blue ink signature of David Kustoff, written in a cursive, flowing style.

David Kustoff
Member of Congress

A blue ink signature of Hal Rogers, written in a cursive, flowing style.

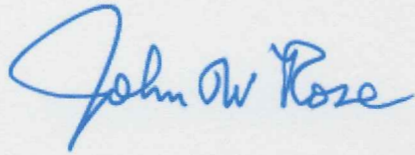
Hal Rogers
Member of Congress

A blue ink signature of Chuck Fleischmann, written in a cursive, flowing style.

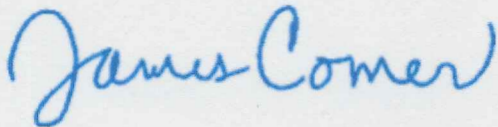
Chuck Fleischmann
Member of Congress



Brett Guthrie
Member of Congress



John Rose
Member of Congress



James Comer
Member of Congress