



May 24, 2022

VIA ELECTRONIC SUBMISSION

The Honorable Tom Vilsack
Secretary
U.S. Department of Agriculture
1280 Maryland Ave SW
Washington, D.C. 20240

Re: Standards for Birds Not Bred for Use in Research Under the Animal Welfare Act (87 Fed. Reg. 9880; February 22, 2022).

Dear Secretary Vilsack,

On February 22, 2022, the U.S. Department of Agriculture's Animal, Plant and Health Inspection Service (APHIS) published a proposed rule to establish animal welfare standards in birds not bred for research. The proposed rule creates new recordkeeping, licensing, and operational requirements for bird breeders, dealers, and exhibitors. The Office of Advocacy of the U.S. Small Business Administration (Advocacy) respectfully submits the following comments on the proposed rule. Advocacy and small entities agree that care should be taken to ensure the safety and health of birds. Advocacy supports the use of performance-based standards in the rulemaking, as they create increased flexibility based on bird species while still achieving the goals of the rule. APHIS should, however, provide additional guidance on implementation and enforcement of the rule, as well as examine whether there are any alternatives that may minimize the burden to small entities while ensuring the welfare of the birds.

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility

Act (RFA),¹ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),² gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.³ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.⁴

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁵

I. Background

The Animal Welfare Act (AWA) authorizes the Secretary of Agriculture to establish standards that govern the humane handling, care, treatment, and transport of animals by dealers, exhibitors, operators of auction sales, and carriers and intermediate handlers.⁶ Originally the word "animals" only included dogs, cats, monkeys, guinea pigs, hamsters, rabbits, and other warm-blood animals the Secretary identified.⁷ On June 4, 2004, APHIS amended the regulations for animals, stating that only birds bred for research purposes should be excluded from AWA regulations.⁸ APHIS concurrently published an advance notice of proposed rulemaking stating that the agency intended to extend enforcement of the AWA to birds, and asked for comments on what standards would be appropriate.⁹

Since publication of the advance notice of proposed rulemaking, and after a series of lawsuits from animal welfare organizations, on February 22, 2022, APHIS published a court-mandated proposed rule to establish animal welfare standards in birds not bred for research.¹⁰ The

¹ 5 U.S.C. §601 et seq.

² Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

³ Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁴ *Id.*

⁵ *Id.*

⁶ Standards for Birds Not Bred for Use in Research Under the Animal Welfare Act, 87 Fed. Reg. 9880, (February 22, 2022) citing 7 U.S.C. § 2131 *et seq.*

⁷ *Id.* at 9880.

⁸ Animal Welfare: Definition of Animal, 69 Fed. Reg. 31513, (June 4, 2004).

⁹ Animal Welfare; Regulations for Birds, Rats and Mice, 69 Fed. Reg. 31537 (June 4, 2002).

¹⁰ On January 10, 2020, the U.S. Court of Appeals for the D.C. Circuit found that the AWA requires that APHIS issue standards for birds not bred for research. *See American Anti-Vivisection Society and Avian Welfare Coalition vs. USDA*, 946 F. 3d 615 (D.C. Cir. 2020) decided on January 10, 2020. APHIS was required to publish a proposed rule no more than 18 months after publication of a notice of listening sessions. APHIS published the notice on August 20, 2020, thus requiring that the agency publish a proposed rule by February 22, 2022.

proposed rule touches on several performance-based and mandatory standards for the humane treatment of birds, including requirements for licensing, identification of individual birds, record-keeping, structural enhancements, storage and cleaning requirements, feeding requirements, and veterinary care.¹¹ Specific provisions of the proposed rule that pertain to Advocacy's comments are discussed in greater detail below.

II. Advocacy's Comments

A. Advocacy supports the use of performance-based standards in this rulemaking. However, APHIS should ensure that there is ample flexibility to comply.

1. APHIS should clarify that so long as the welfare of the bird can be verified, the agency will not mandate any one performance-based standard over another.

On April 19, 2022, Advocacy held a small business roundtable to hear comments and feedback on the proposed rule.¹² Advocacy heard from small breeders and dealers, small zoos, non-profit bird sanctuaries, and small veterinarian practices. All attendees agreed that the welfare of the birds was of the utmost importance. They mentioned that they actively take steps to ensure that their animals are well cared for because birds are their passion. Many small entities shared concerns with specific provisions of the rule including identification requirements.

For example, the proposed rule calls for dealers to identify animals held in primary enclosures by one of three methods: labels, leg or wing bands, or a microchip.¹³ Small businesses raised concerns about being required to use a wing band or microchip on small birds, stating that these animals are too fragile to be identified using these methods. They described how wing or leg bands do not expand as the bird grows and can end up becoming too tight and injuring the bird. These businesses also described how it is impossible to microchip a very small bird because the process may injure them. Small birds have bodies too small to accept a microchip without complications or death. APHIS should therefore ensure that its inspectors are considering the feasibility of the various methods being suggested, and that the agency does not attempt to prescribe methods that may end up injuring the birds, or that are overly burdensome to small businesses when other less burdensome methods exist.

Several other provisions of the proposed rule also have performance-based rather than prescriptive requirements.¹⁴ Advocacy suggests that in the final rule, APHIS add additional language making it clear that so long as the welfare of the bird can be verified, APHIS will not mandate any one method over another. The approach and method used to satisfy a particular requirement of the rule is dependent on the species of the bird in question, how and where the

¹¹ 87 Fed. Reg. 9880 at 9891-9903.

¹² See SBA Office of Advocacy Small Entity Agriculture Roundtable (April 19, 2022), <https://advocacy.sba.gov/2022/04/13/agriculture-roundtable-april-19-2022/>.

¹³ 87 Fed. Reg. 9880 at 9892.

¹⁴ See, e.g., *Id.* at 9893 discussing options for facilities construction pertaining to safety doors, and enclosures including the use of double-doored entry and exits, or other systems to prevent escape of the birds.

animal lives, and in some instances the particular use of the animal (birds for sale vs. those in zoos, sanctuaries, or rescues). APHIS should therefore focus on “best practices” to achieve the goals of the rule without prescribing unworkable requirements. APHIS should explain in plain language the performance standards being used so that small entities can be confident they are achieving the standards without incurring unnecessary costs.

2. APHIS should discuss how it will enforce various standards including what metrics or definitions it will use to determine the welfare of the birds.

Within the proposed rulemaking, APHIS suggests different methods to achieve its various requirements. Given that the rulemaking allows for these different methods, APHIS should include a discussion of how it will enforce these requirements and how it will determine whether a particular method adequately provides for the welfare of the birds. Advocacy suggests that APHIS update its Animal Welfare Inspection Guide to include a chapter specifically for birds and publish it for public comment prior to the finalization of the rule.¹⁵ This will ensure that regulated entities have clarity about what criteria the agency is using, and how its inspectors will evaluate each facility during the inspection.

B. APHIS should consider reasonable alternatives to the rule to minimize the burden on small entities while still ensuring the welfare of birds.

1. APHIS should reassess the feasibility of regular programs of veterinary care.

Within the proposed rule, newly licensed dealers are required to have a program of veterinary care including sign-off on space requirements, environmental enhancement opportunities, social grouping, and others.¹⁶ The proposed rule also mentions regularly scheduled visits by a veterinarian.¹⁷ During Advocacy’s small business roundtable, participants spoke about challenges resulting from this provision of the rule. In speaking with their local veterinarians, many small breeders were told that the veterinary providers do not have the necessary training to handle birds. In addition, veterinarians either do not have capacity to do onsite visual inspections of facilities, or that they would have to charge for the time it would take to close the practice and travel to the facility. Small businesses in rural areas were especially concerned because the nearest provider was more than an hour away.

One small breeder was quoted \$1200 on top of normal vet fees to have his veterinarian come to inspect the facility. Although the per bird fee varies, small businesses stated the average cost was anywhere from \$80 to above the \$350 estimated by APHIS in the rulemaking.¹⁸ Some small breeders estimate they may have upwards of 500-1,000 or more small birds. A veterinarian would have to make multiple visits and close their practice for multiple days in order to inspect

¹⁵ See APHIS Animal Welfare Inspection Guide, USDA, (November 2021), [Animal Welfare Inspection Guide \(usda.gov\)](#).

¹⁶ *Id.* at 9891-9896.

¹⁷ *Id.* at 9896.

¹⁸ *Id.* at 9902.

and document each individual bird's health. This requirement creates an extraordinary amount of work and requires a significant amount of time for the veterinarian. It is also a significant cost increase to the breeder. These vet fees are likely to disproportionately impact small entities, as the per-bird cost for a site visit is higher for small entities. These businesses explained that depending on the bird's species, their revenue may as little as \$25 per bird for some of the smallest species. This revenue would not cover the veterinarian costs on top of the normal supply and feed costs needed for care of the bird. APHIS should discuss these additional costs in its RFA analysis.

Breeders of small-sized birds were further concerned because in some instances these types of birds would experience undue stress and anxiety in being caught and handled for examination. APHIS should consider whether an on-site veterinarian is necessary and feasible in all instances, and whether there may be other mechanisms for ensuring the welfare of the animals such as through self-certifications, ensuring compliance with existing state licensing requirements, and more.

2. APHIS should consider additional exemptions for entities who are already heavily monitored including non-profits, bird sanctuaries, and zoos.

Non-profits, bird sanctuaries, and small zoos must comply with several state licensing requirements and federal requirements, including under the Migratory Bird Treaty Act¹⁹ and the Endangered Species Act,²⁰ to maintain their active status. For organizations already employing best practices for animal welfare, additional administrative requirements are unlikely to improve conditions for the animals in their care and may result in reducing their capacity.

Most non-profits have just enough staff to properly care for the animals and to comply with all administrative requirements currently imposed on them. Over 6,000 conservation and wildlife organizations and over 500 nature parks are small businesses.²¹ This accounts for 98 and 97 percent of all businesses in both industries, respectively.²² In 2017, there were approximately 579 small zoos and botanical gardens in the U.S., accounting for 93 percent of all businesses in this category.²³ While Advocacy does not know how many entities care for birds at their establishments, many of the organizations that Advocacy spoke with in its outreach efforts stated that it is common to care for several different types of animals within the same establishment, including birds.

Many businesses stated that they may be forced to close if required to administer additional licensing, record-keeping, and paperwork requirements. These small entities cannot afford to hire additional staff and cannot pull their current staff from caring for the animals to do

¹⁹ 16 U.S.C. § 703.

²⁰ 16 U.S.C. § 1538-1540.

²¹ U.S. Census Bureau Statistics of U.S. Businesses: 2017 Annual Data Tables by Establishment Industry, 2017 SUSB Annual Data Tables by Establishment Industry, (<https://www.census.gov/programs-surveys/susb.html>).

²² *Id.*

²³ U.S. Census Bureau Statistics of U.S. Businesses: 2017 Annual Data Tables by Establishment Industry, 2017 SUSB Annual Data Tables by Establishment Industry, (<https://www.census.gov/programs-surveys/susb.html>).

administrative work. The mission of these organizations is to rescue, rehabilitate, and release the birds back into the wild if it is safe to do so. The mission of most zoos is to provide safe mechanisms to study and appreciate animals. One non-profit mentioned that they receive abandoned and rescued birds from their county police department because other area animal shelters do not accept birds. Several non-profits mentioned that they operate on very tight, donation-based budgets that are not likely to increase substantially to compensate for additional costs. These sanctuaries mentioned that were they to have to shut down due to a lack of adequate funding, rescue birds will likely perish because there will be nowhere to send them so they can be rehabilitated for release.

Given that nearly all these establishments are small, APHIS should accurately account for the impacts of the proposed rule on these entities in its RFA analysis and discuss whether there are any alternatives to the proposed rule that may minimize this regulatory burden while still ensuring the welfare of the birds. APHIS should determine whether requiring these entities to comply with additional requirements will be duplicative with existing state and federal requirements. Where such entities are required to undergo state inspections, and receive certifications from the states, perhaps APHIS could accept submission of those inspection reports and certificates in place of another inspection or required form.

3. APHIS should consider alternatives to the shelter requirements that allow for structures that mimic the bird's natural environment.

In the proposed rule, APHIS states that for those birds held in outdoor enclosures, the agency requires shelter facilities to be constructed that can adequately hold all the birds at the facility.²⁴ According to one zookeeper, birds will not use shelters because it is unnatural and does not mimic their behavior in their natural habitat. Unlike domestic birds that are kept as pets, the zoo strives to maintain habitats that are close to what the birds would find in the wild. Large man-made shelters and climate-controlled bird houses are not found in nature, and thus may confuse and agitate the birds, rather than provide the intended protection. Furthermore, the zookeepers mentioned that many species of birds do not like being in enclosures because they feel trapped which may cause them unnecessary stress. Finally, certain water-fowl species continue to remain on the water in any type of weather or other circumstances, so such shelters would be unnatural. In addition to introducing unnatural features to the bird habitat, one small zoo estimated that it would cost nearly \$32,000 to build shelters in its various bird habitats.

Advocacy therefore asks that APHIS consider alternatives that better mimic the natural environment of the birds. In some instances, such structures may be unnatural, or other existing features of the habitat that are already provided may be adequate to provide necessary shelter to the birds. APHIS should also estimate the costs to comply with these provisions of the rule in its RFA analysis and determine whether any less costly regulatory alternatives exist.

²⁴ 87 Fed. Reg. 9880 at 9894.

4. APHIS should reevaluate the requirement to observe the birds frequently during shipping and transport, as this may cause distress to the bird, and hardship for the shipping company.

The proposed rule requires that carriers or handlers visually observe the birds as frequently as time may allow but not less than once every four hours for ground transportation.²⁵ For air transport, if the cabin is inaccessible, handlers would have to observe the bird while loading and unloading and whenever the cargo space is accessible.²⁶ While Advocacy and small businesses are in support of mechanisms to ensure the safety of birds in transit, visual inspections may not always be the safest method for doing so depending on the species of the bird. One small breeder mentioned that the small birds he ships, such as finches, can get very agitated if their container is opened multiple times during transit. He mentioned that they are calm and still when in a darkened cage. Opening the container creates undue stress and anxiety and raises the bird's blood pressure which could in turn cause them to suffer and/or die. Furthermore, a delivery driver or air cargo handler may not know how to detect warning signs to determine whether a particular bird is in distress or requires assistance.

Many ground shipping companies are themselves small businesses. 99 percent of all freight trucking companies are small.²⁷ These small companies may not be able to pay for specialized training in the handling and care of birds and may not want to incur the additional liability. If they stop shipping birds, bird breeders will have fewer options, which, in turn, will increase costs. APHIS should discuss what if any costs both the shipping companies and the breeders may face, and what if any alternatives exist that may minimize those costs. One such alternative may be offering exemptions from frequent inspections for certain species of birds that become agitated when their container is disturbed.

5. APHIS should consider the necessity and feasibility of certain record keeping requirements and whether time-saving alternatives exist.

The proposed rule requires that dealers and exhibitors maintain records of identification and disposition for each individual bird, including information about the bird's offspring and/or lineage.²⁸ Small breeders mentioned that in some instances they may have hundreds or even a thousand birds at any given time. The feasibility of determining a family lineage for offspring in that large a setting may be impossible. While Advocacy and small breeders understand the purpose of keeping records on each individual bird, time spent keeping up with administrative tasks may be at the expense of being able to adequately care for the birds and may not provide as much benefit to the birds as the agency anticipates. Advocacy encourages APHIS to explore other methods for accounting for and ensuring the welfare of each individual bird, such as keeping records on families of birds. APHIS may also consider starting records at the time the

²⁵ *Id.* at 9900.

²⁶ *Id.*

²⁷ U.S. Census Bureau Statistics of U.S. Businesses: 2017 Annual Data Tables by Establishment Industry, 2017 SUBS Annual Data Tables by Establishment Industry, (<https://www.census.gov/programs-surveys/susb.html>).

²⁸ 87 Fed Reg. 9880 at 9892.

offspring is hatched rather than having breeders backtrack and account for adult birds once this rule is finalized.

III. Conclusion

Advocacy supports the use of performance-based standards as they allow for needed flexibility. APHIS should clarify that where performance-based standards are used, the agency will not mandate any one specific method. APHIS should also publish draft guidance and/or inspection documents so the public can weigh in on the decision-making process. Finally, APHIS should consider reasonable alternatives to the mandatory requirements of the rule that still meet the stated objectives of increased protections for birds. If you have any questions or require additional information, please contact me or Assistant Chief Counsel Prianka Sharma at (202) 205-6938 or by email at prianka.sharma@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Prianka P. Sharma
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Copy to: Dominic Mancini, Deputy Administrator
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