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Submitted to Regulations.gov, Docket AMS-FTPP-21-0045

Re: Inclusive Competition and Market Integrity Under the Packers and Stockyards Act

The undersigned organizations (collectively, "Commenters") respectfully submit these comments in response to the U.S. Department of Agriculture, Agricultural Marketing Service's ("AMS") Inclusive Competition and Market Integrity Under the Packers and Stockyards Act proposed rule, AMS-FTPP-21-0045 ("Proposed Rule").[1] Packers, swine contractors, and live poultry dealers ("regulated entities") have long taken advantage of lax enforcement and insufficiently proscriptive rules under the Packers and Stockyards Act ("PSA") to manipulate business relationships and markets to the detriment of producers. We are encouraged that AMS is looking to strengthen the protections Congress enshrined in the PSA to account for present day conditions and challenges faced by producers in the livestock and poultry industries. This proposed rule further clarifying prohibited discriminatory, prejudicial, and deceptive conduct is an important step in that direction.

Commenters submit the following arguments and recommendations for improvement in support of the Proposed Rule. First, Commenters strongly support expansive anti-discrimination protections for market vulnerable individuals, but ask AMS to further consider and alleviate a producer's burden of proving market vulnerable status and discriminatory treatment. Second, Commenters support the anti-retaliation provisions of the Proposed Rule as a starting point, but request further additions to address known retaliatory conduct not covered by the Proposed Rule. Third, Commenters support the broad prohibitions against deceptive conduct, but urge AMS to further strengthen the rule by clarifying prohibited deception in the refusal to deal context, and enumerating a non-exclusive list of prohibited conduct that AMS is already aware occurs in livestock and poultry markets. Fourth, Commenters request that AMS expand the Proposed Rule's recordkeeping requirements by including a standalone recordkeeping and reporting section that mandates the creation and retention of specified compliance records. Finally,

[1] 87 Fed. Reg. 60010 (Oct. 3, 2022) (hereinafter "Proposed Rule").

Commenters urge AMS to adopt a standalone provision codifying the Agency's longstanding position that market-wide competitive harm need not occur to establish a violation of the PSA.[2]

I. Interests of Commenters

Commenters are a broad group of non-profit organizations representing farmer, sustainable agriculture, environmental, animal welfare, public health, and consumer interests. Commenters represent millions of members and supporters across the country.

Food & Water Watch ("FWW") is a national, nonprofit membership organization that mobilizes regular people to build political power to move bold and uncompromised solutions to the most pressing food, water, and climate problems of our time. FWW uses grassroots organizing, media outreach, public education, research, policy analysis, and litigation to protect people's health, communities, and democracy from the growing destructive power of the most powerful economic interests. FWW has long advocated for better controls over integrators and packers to protect farmers, consumers, and the environment.

The **American Society for the Prevention of Cruelty to Animals** ("ASPCA") was founded in 1866 as the first animal welfare organization established in North America, and today serves as the nation's leading voice for vulnerable and victimized animals. As a 501(c)(3) not-for-profit corporation with more than two million supporters nationwide, the ASPCA is committed to preventing cruelty to dogs, cats, equines, and farm animals throughout the United States.

The **Campaign for Family Farms and the Environment** ("CFFE") is a coalition of state and national organizations, including Dakota Rural Action (SD), Iowa Citizens for Community Improvement, Land Stewardship Project (MN), Missouri Rural Crisis Center, Food & Water Watch and Institute for Agriculture and Trade Policy. Our organizations work together as CFFE to change policies that promote consolidation in animal agriculture at the expense of independent family farms, rural and urban economies, workers and an open, fair and competitive food system.

Center for Food Safety ("CFS") is a national, non-profit 501(c)(3) organization with nearly one million members and supporters. CFS' mission is to empower people, support farmers, and protect the environment from industrial agriculture. CFS promotes truly sustainable and regenerative agriculture, like organic and ecological farming. For 25 years, CFS has furthered this mission through legal actions, groundbreaking scientific and policy reports, books and other educational materials, and market pressure and grassroots campaigns through our True Food Network. One of CFS's flagship programs seeks to end the harms of industrial meat production on farmers, animals, and the environment.

[2] Food & Water Watch and others submitted comments regarding AMS's poultry transparency proposed rule and advanced notice of proposed rulemaking regarding fairness and related concerns in poultry grower tournament systems, and we incorporate those by reference here as this Proposed Rule will equally apply to poultry growers currently operating within the tournament system. *See* Exhibits A and B attached hereto. In those comments, we called on AMS to prohibit specific practices common to the tournament system when a practice is known to harm producers. If AMS does not include each of our tournament system-related prohibitions in a separate rule, it should enumerate them here as prohibited deceptive practices in contracting.

Dakota Rural Action ("DRA") organizes people and builds leadership while developing strong allied relationships. DRA protects environmental resources, advocates for resilient agriculture systems, and empowers people to create policy change that strengthens their communities and cultures.

The **Farm and Ranch Freedom Alliance (**"FARFA") is a nonprofit organization that supports independent family farmers and protects a healthy and productive food supply for American consumers. FARFA promotes common sense policies for local, diversified agricultural systems. Many of FARFA's members raise poultry and livestock. While FARFA's farmer members typically sell direct-to-consumer or to independent outlets (rather than integrators), the conditions and laws that govern the industry as a whole have both direct and indirect impacts on both our farmer and consumer members.

Food Animal Concerns Trust ("FACT") believes that all food-producing animals should be raised in a humane and healthy manner, and everyone should have access to safe and humanely-produced food. We accomplish this vision by supporting humane farmers, promoting policies that make foods from animals safe and healthy to eat, and helping consumers make informed food choices.

Institute for Agriculture and Trade Policy ("IATP") is a 35 year old non-profit organization based in Minnesota. IATP works locally and globally at the intersection of policy and practice to ensure fair and sustainable food, farm and trade systems. Since its founding, IATP has advocated for fair and transparent markets for farmers and consumers within the food system. IATP has advocated for more than a decade specifically on strengthening the Packers and Stockyards Act rules to better protect farmers rights in the marketplace.

Institute for Local Self-Reliance ("ILSR") is a national research and advocacy organization that partners with allies across the country to build an American economy driven by local priorities and accountable to people and the planet. ILSR has a vision of thriving, diverse, and equitable communities, and to reach that vision, builds local power to fight corporate control.

Iowa Citizens for Community Improvement ("Iowa CCI") is a statewide, grassroots people's action group that uses community organizing to win public policy that puts communities before corporations and people before profits, politics and polluters. CCI is 3,000-members strong, has an active communication base of 15,000 Iowans, and has been fighting to put people first for over 45 years.

The **Johns Hopkins Center for a Livable Future** ("CLF") operates out of the Johns Hopkins Bloomberg School of Public Health from the Department of Environmental Health and Engineering and works with students, educators, researchers, policymakers, advocacy organizations and communities to build a healthier, more equitable and resilient food system.

Montana Cattlemen's Association is a producer-driven grassroots organization committed to increasing profitability for the Montana cattle industry. We are dedicated to increasing profit opportunities for family agriculture and future generations. The Montana

Cattlemen's Association addresses the market interests of Montana cattle producers. It serves to support the environmental, cultural and historical interests of Montana cattle producers and ensures prosperity to rural Montana by advancing the interests of agriculture.

The **Natural Resources Defense Council** ("NRDC") is a national, nonprofit organization. On behalf of more than three million members and advocates, NRDC works to safeguard the Earth – its people, its plants, and its animals, and the natural systems on which life depends. NRDC advances policy and legal solutions that support a transition from agricultural systems that threaten our environment and health to systems that protect our climate, enhance biodiversity, and build healthier communities.

Ohio Ecological Food and Farm Association ("OEFFA") cultivates a future where sustainable and organic farmers thrive, local food nourishes our communities, and agricultural practices protect and enhance the environment. To realize that vision, changes in state and federal policy are needed so family farmers can thrive in fair and transparent markets and can access the land they need to grow products that sustain community resilience. OEFFA's policy program empowers our members to enact that change.

Open Markets Institute is a nonprofit organization made up of researchers, lawyers, and economists dedicated to exposing the dangers of monopolization and identifying changes in policy and law to address them. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, journalists, and other members of the public.

Public Justice is a national public interest advocacy organization that specializes in connecting high-impact litigation with strategic communications and the strength of our partnerships to fight these abusive and discriminatory systems and win social and economic justice. The Public Justice Food Project employs those techniques to take on industrial animal agriculture and its ills. Among its work, it is presently advocating alongside poultry growers and ranchers to stop anticompetitive practices facilitated by industry and USDA.

The **Ranchers Cattlemen Action Legal Fund United Stockgrowers of America** ("R-CALF USA") is the largest trade association exclusively representing United States cattle farmers and ranchers within the multi-segmented beef supply chain. It is also the largest all-voluntary membership-based cattle trade association with nearly 5,000 voluntary dues paying members in over 40 states. Its membership includes cow-calf operators, cattle backgrounders and stockers, cattle feedlot owners, and sheep producers. Numerous main street businesses are non-voting members of R-CALF USA.

Socially Responsible Agriculture Project ("SRAP") has served as a mobilizing force for more than 20 years to help communities protect themselves from the damages caused by industrial livestock operations and to advocate for a food system built on regenerative practices, justice, democracy, and resilience. Our team includes technical experts, independent family farmers, and rural residents who have faced the threats of factory farms in their communities. When asked for help, SRAP offers free support, providing communities with the knowledge and skills to protect their right to clean water, air, and soil and to a healthy, just, and vibrant future.

The **Western Organization of Resource Councils** ("WORC") is a network of nine grassroots organizations in seven Western states with 15,000 members, many of them ranchers and farmers committed to common-sense reform in agriculture, oil and gas development, coal mine reclamation, and rural economic development. Headquartered in Billings, Mont., WORC also has offices in Colorado and Washington, D.C.

II. Commenters Support Expansive and Adaptable Anti-Discrimination Protections That Do Not Impose an Insurmountable Burden of Proof on Covered Producers

Commenters strongly support inclusion of Section 201.304(a) and its flexible "Market Vulnerable Individual" approach to combatting discriminatory conduct, but caution AMS against imposing a heavy burden on covered producers by failing to provide a workable standard for proving market vulnerable status or requiring proof of discriminatory intent. AMS has proposed a rule under which regulated entities are prohibited from discriminating against producers based on the producer's status as a "Market Vulnerable Individual,"[3] defined as "a person who is a member, or who a regulated entity perceives to be a member, of a group whose members have been subjected to, or are at heightened risk of, adverse treatment because of their identity as a member or perceived member of the group without regard to their individual qualities."[4] The Agency seeks comment on whether the final rule should maintain this market vulnerable individual approach or instead ban discrimination against specific protected classes, such as race, national origin, or sex, to more closely follow current civil rights laws.[5]

AMS should keep its market vulnerable approach rather than limit the PSA's discrimination protections to a specific list of protected classes. A more expansive approach comports with the broad purpose and reach of the statute. It will more effectively ensure inclusive market access for covered producers by permitting an evolving and market-specific application of the regulation that can address barriers to inclusion as they arise. However, because the Proposed Rule provides little clarity on how a producer can demonstrate their market vulnerable status, and seemingly requires producers to demonstrate intentional discrimination in order to prove a violation—a heavy burden as shown by precedents set in the civil rights law context—the final rule should clarify and lessen a producer's burden of proof so as not to impede enforcement of these protections.

A. AMS's Proposed "Market Vulnerable Individual" Approach Is Preferable to Limiting the PSA's Discrimination Protections to Expressly Enumerated Classes

1. The PSA Clearly Authorizes the Proposed Rule's Expansive Protections Against Discrimination

The PSA authorizes the Secretary of Agriculture to make rules "as may be necessary to carry out the provisions" of the PSA,[6] one of the cornerstones of which is ensuring that

[3] Proposed § 201.304(a)(1).
[4] Proposed § 201.302.
[5] Proposed Rule, at 60017.
[6] 7 U.S.C. § 228(a).

producers are not subject to unjust discrimination or undue prejudice or disadvantage.[7] Differential, adverse treatment such as less favorable contract terms, differential contract performance, and undue contract terminations or refusals to deal for producers who are members of particularly market vulnerable groups is exactly what the PSA's text must protect against. Therefore, the Proposed Rule's discrimination protections are necessary and clearly fall within AMS's rulemaking authority.

Congress intended the PSA to go beyond earlier anti-trust laws[8] and exercise "the fullest control of the packers and stockyards which the Constitution permits."[9] The problem that motivated this especially expansive approach in 1921 is our problem again today: livestock and poultry move through bottlenecks on the way to the ultimate consumer and those in control of the bottleneck are in a position to misuse their tremendous market power.[10] As such, the law broadly prohibits "any" unjust discrimination, and "any" undue prejudice or disadvantage "in any respect whatsoever."[11] These prohibitions are not limited to particular discriminatory conduct, nor particular, protected characteristic bases.[12] They are at least as broad as the discrimination and prejudice protections under the Interstate Commerce Act, which Congress clearly intended to address "the evil of discrimination" by prohibiting "any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach."[13]

Indeed, courts have found conduct to be discriminatory and prejudicial in violation of the PSA even when such discrimination has nothing to do with a protected class or characteristic in a classic civil rights sense. For example, in *Swift & Co. v. United States*, the Seventh Circuit affirmed that a packer offering discounted prices to large corporate buyers not available to smaller independent competitors unlawfully discriminated against and disadvantaged those smaller entities.[14] There was no indication of or requirement for the small entities to be members of protected classes. The fact that they suffered disparate and unjustified adverse treatment sufficed.

For this reason, AMS's proposed "market vulnerable" approach, which extends broad anti-discrimination protections to any producer belonging to a group at heightened risk of adverse treatment, better aligns with the statutory mandate than an approach that only protects a closed set of enumerated classes. Had Congress wished to limit the PSA in such a manner it could have easily done so, just as it has in other anti-discrimination legislation.[15] Instead, Congress banned "any" discrimination and "any" prejudice and disadvantage "in any respect

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[7] 7 U.S.C. § 192(a)–(b).
[8] *See Crosse & Blackwell Co. v. F.T.C.*, 262 F.2d 600, 604 (4th Cir. 1959) (The PSA "would never have been adopted by the Congress if the marketing of livestock and the distribution of meat products did not present problems [that] were insufficiently met by the [then existing] antitrust laws[.]").
[9] House Report No. 67-324, at 3 (1921).
[10] *Crosse & Blackwell Co.*, 262 F.2d at 604.
[11] 7 U.S.C. § 192(a)–(b).
[12] *Cf.* Section 3 of the Clayton Act, 15 U.S.C. § 13 (banning price discrimination only).
[13] *Mitchell v. United States*, 313 U.S. 80, 94–95 (1941) (finding race-based discrimination easily fell within the Interstate Commerce Act's broad prohibition against discrimination).
[14] 317 F.3d 53, 55–56 (7th Cir. 1963).
[15] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.* (prohibiting employers from discriminating against applicants and employees specifically on the basis of race, color, religion, sex, and national origin).

whatsoever."[16] A rule that undercuts this expansive language by limiting its application only to particular classes of producers facing discrimination would not effectuate the intent of the Act to "stop[] unlawful practices in their incipiency,"[17] nor would it provide "the fullest control of [regulated entities] which the Constitution permits" to protect producers.[18]

2. The Market Vulnerable Approach Prohibits Discriminatory Conduct That AMS Is Aware Occurs in Poultry and Cattle Markets, and That a List of Protected Classes Would Not

As AMS acknowledges, discrimination against producers can take many forms, and has and will continue to evolve in the face of changing, market-specific conditions.[19] Commenters agree with AMS that a flexible approach to resolving marketplace vulnerabilities that will be responsive to the particular facts of a given case and particular market realities is therefore needed. A dynamic definition of "market vulnerable individual" achieves this goal, because it not only covers instances of discrimination based on protected characteristics like race, national origin, sex, religion, gender identity, and disability, it can—and should—also apply to other forms of invidious discrimination that are unique to livestock and poultry markets.

For instance, producers that operate in monopsony[20] or oligopsony[21] regions are at heightened risk of adverse treatment, and should therefore fall within the definition of market vulnerable individual. As AMS is well aware, when poultry integrators have little to no regional or local competition, they wield unequal bargaining power that can result in more exploitative and onerous contract terms for growers. Compared to their counterparts in non-monopsony regions, growers operating within monopsonies have "little to no influence" over frequency of flock placements, time between flocks, grower payments, contract duration, or required capital investments.[22] In other words, it is *because of* their status as growers within a monopsony region that poultry integrators offer less favorable contract terms; this differential treatment compared with more competitive markets constitutes an unreasonable disadvantage and unjust discrimination.[23] By AMS's own estimate, one quarter of growers have just one live poultry dealer in their area, and another quarter have only two dealers in their area.[24] These monopsony

[16] 7 U.S.C. § 192(a)–(b).
[17] *Bowman v. United States Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966).
[18] *See* House Report No. 67-324, at 3 (1921).
[19] Proposed Rule, at 60017.
[20] "A monopsonist is one who is a single buyer for a product or service of many sellers." Merriam-Webster online dictionary, https://www.merriam-webster.com/dictionary/monopsonist.
[21] "An oligopsonist is a member of an oligopsonistic industry or market," which is a "market situation in which each of a few buyers exerts a disproportionate influence on the market." Merriam-Webster online dictionary, https://www.merriam-webster.com/dictionary/oligopsonist
[22] *See* Transparency in Poultry Grower Contracting and Tournaments, 87 Fed. Reg 34980, 34986 (June 8, 2022) ("Owing to their greater negotiating power than that of the poultry growers with whom they contract, live poultry dealer [monopsonists] set the terms of the contract. Consequently, they have little to no influence over" flock placements, time between flocks, grower payments, contract duration, or capital investment requirements). *See also* Poultry Growing Tournament Systems: Fairness and Related Concerns, 87 Fed. Reg. 34814, 34815 (June 8, 2022) (discussing adverse treatment that can occur in monopsony regions).
[23] Michael Kades, Protecting Livestock Producers and Chicken Growers 67, (Washington Center for Equitable Growth, May 2022) ("Contract terms that an integrator obtains by virtue of its monopsony power unreasonably harm the growers" and "could be declared an unreasonable disadvantage or unjust discrimination.").
[24] 87 Fed. Reg. at 34986.

forces are especially potent against poultry growers who are typically required to invest in single purpose, buyer-specific facilities unfit for other uses.[25] This large group of vulnerable market participants would not have a remedy for such discriminatory treatment if the final rule limits the PSA's protections as AMS alternatively proposes.

The same is true for independent cattle producers operating in cash-negotiated spot markets, who are at heightened risk of "prejudicial exclusion and retaliation" by virtue of their independent status.[26] With the rise in Alternative Marketing Arrangements ("AMAs"), where a feedlot commits cattle to dedicated buyers before knowing the price, packers have increasingly subjected independent producers who refuse this potentially exploitative arrangement to disparate and adverse treatment, including impeding access to markets, refusing to deal, and offering less favorable price terms.[27] An expansive and flexible "market vulnerable individual" approach is needed to fully address market-specific discrimination against these at-risk producers who fall outside of traditional protected classes.

B. AMS Should Clarify and Lessen a Producer's Burden of Proof to Obviate the Difficulty of Proving Intentional Discrimination and Market Vulnerable Status

While Commenters are generally supportive of AMS's market vulnerable producer approach to discrimination, we are concerned that, as proposed, the rule could place a heavy burden on producers to establish a claim of intentional discrimination based on market vulnerable status. As decades of anti-discrimination law enforcement have demonstrated, succeeding on claims that hinge on a showing of discriminatory intent can be incredibly challenging. "Finding direct evidence [of discrimination] is rare; most recipients are circumspect enough to avoid making overtly discriminatory statements."[28] Indeed, discriminatory animus in livestock markets is "often unspoken or even hidden by near pretextual justifications," [29] making it nearly impossible to show that an entity took action "'because of' and not merely 'in spite of' its adverse effects upon an identifiable group."[30] Because producers often only have evidence of a packer or integrator's actions, and not the underlying discriminatory intent animating the differential treatment, requiring producers to show they were subject to adverse treatment *because of* a protected trait or membership in an at-risk group would be prohibitively difficult and would fail to give effect to Congressional intent.[31]

For this reason, AMS should promulgate a final rule that requires regulated entities instead to rebut a presumption of discriminatory intent once a producer demonstrates differential

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[25] *See* Exhibit B at 9–10 (explaining that poultry growers are put in deeply vulnerable positions via required investments in single purpose facilities, resulting in functional monopsonies even where another buyer hypothetically exists).
[26] Proposed Rule, at 60013.
[27] *Id.*
[28] U.S. Dep't of Justice, Civil Rights Division, *Title VI Legal Manual*, 5. *See also Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) ("[D]irect evidence of intentional discrimination is hard to come by.").
[29] Kades, *supra* note 23, at 69.
[30] *Pers. Adm'r of Mass v. Feeney*, 442 U.S. 256, 279 (1979).
[31] *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 443 (2016) (finding plaintiffs need not produce records demonstrating wage and hour theft where evidentiary gap existed due to defendant's unlawful failure to maintain such records).

treatment. Commenters therefore recommend the final rule clarify that to prove an unlawful violation of section 201.304(a), a producer need only demonstrate that (1) they meet the definition of a "market vulnerable individual," and (2) were personally subject to disparate and adverse treatment. Upon such a showing, the burden would then shift onto the regulated entity to show that (1) the producer's status as market vulnerable was not a motivating factor of its presumptively discriminatory conduct, and (2) the same decision would have been made notwithstanding the producer's market vulnerable status.

This burden-shifting approach tracks other antitrust and civil rights evidentiary frameworks developed by courts to alleviate the hardship of proving discriminatory intent.[32] For decades, where plaintiffs can make an initial showing of disparate treatment, courts have softened the discriminatory intent requirement in Title VII employment discrimination cases by shifting the evidentiary burden onto the defendant to prove why its conduct was *not* discriminatory.[33] So too should be the case for discrimination violating the PSA.

In addition to establishing this rebuttable presumption framework, AMS should also provide producers with further guidance on how to demonstrate their market vulnerable status. By failing to provide clear examples of who qualifies as a market vulnerable individual, or factors that should be considered in the market vulnerable analysis, the Proposed Rule places the burden on producers—and courts—to come up with a workable standard of proof. Producers that clearly meet the intended definition of market vulnerable by virtue of their membership in a protected class would be forced to repeatedly litigate the historical adversity their group has faced. And market vulnerable individuals that do not fall within traditional civil rights classes would have little regulatory guidance for how to demonstrate they have been subject to or are at heightened risk of adverse treatment.

To overcome these issues, Commenters recommend that AMS expand Section 201.304 to specify a non-exclusive list of factors covered producers can rely on to demonstrate their market vulnerable status. Such factors should be based on the history of demonstrable, adverse outcomes experienced by producers based on their position in their respective markets as outlined by AMS throughout the Proposed Rule,[34] and at minimum include: (1) a producer's membership in a protected class (e.g. race, national origin, sex, gender identity, religion, disability) that is currently or has historically been underrepresented in livestock and poultry markets,[35] (2) a producer's locality and the regional market power or monopsony power existing within that locality, (3) a producer's status as an independent participant on open markets versus under an

[32] *See Impax Labs., Inc. v. Fed. Trade Comm'n*, 994 F.3d 484, 497–500 (5th Cir. 2021) (explaining defendant's antitrust burden of proving its presumptively anticompetitive conduct is reasonably necessary to achieve a legitimate competitive benefit); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (shifting responsibility to defendant to articulate a legitimate, nondiscriminatory reason for the challenged action).

[33] *See, e.g.*, *McDonnell Douglas Corp.*, 411 U.S. at 802–803 (shifting burden to employer to articulate some legitimate, nondiscriminatory reason for adverse employment action); *Price Waterhouse*, 490 U.S. at 244–245 (upon plaintiff's showing that a protected trait played a motivating part in an employment decision, "the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed [the protected trait] to play such a role.").

[34] Proposed Rule, at 60011–14, 60023–24.

[35] *See* Proposed Rule, at 60020 (connecting underrepresentation in livestock markets with historical and present-day prejudice). *Thompson v. Sawyer*, 678 F.3d 257, 284 (D.C. Cir. 1982) (finding "evidence of underrepresentation of a protected class can raise a presumption that an individual [] has suffered discriminatory treatment").

AMA, and (4) the relative size of the producer as compared with competitors, regardless of their status as a contractor or independent producer.

III. Commenters Support the Proposed Rule as a Starting Point to Address Retaliation, but Request Additional Provisions to Protect Covered Producers

Commenters strongly support inclusion of § 201.304(b), which would prohibit regulated entities from taking adverse action against covered producers in retaliation against certain lawful communications, assertion of contract or other legal rights, and associational participation. However, Commenters request that AMS strengthen the rule to better protect producers from regulated entities' abuses. We agree that "[r]etaliation remains a prevalent concern in today's concentrated and highly integrated markets."[36] Ample evidence supports this conclusion.[37] Regulated entities have embedded this culture of retaliation in the market so thoroughly that the specter of retaliation, and the potentially devastating impacts that it can have on a producer, has scared producers into silence. As one contract poultry grower put it, "[f]armers all around are complaining about how we're being treated, but are too scared to speak publicly. We farmers can't set the record straight and speak the truth because we don't have any protections from retaliation."[38]

Regulated entities retaliate against producers that dare to step out of line in numerous ways, yet USDA thus far has failed to step in, resulting in the culture of fear and anxiety among producers beholden to buyers' excessive market power. The Proposed Rule lays out important first steps to prohibit this unfair, unjustly discriminatory, and unreasonably prejudicial conduct, but does not go far enough. AMS must not underestimate regulated entities' ingenuity in crafting new and creative ways to retaliate against producers. Future retaliatory schemes may fall outside the Proposed Rule's enumerated conduct, leaving producers vulnerable for engaging in supposedly protected activities. Likewise, as these retaliatory measures evolve, it may be necessary to contemplate a broader scope of protected activities. Therefore, Commenters recommend the following additions to strengthen this section and ensure the intended protections are durable and capable of responding to all present as well as future retaliatory schemes.

- AMS should expand the list of activities protected by subsection (b)(2) to include situations in which a producer refuses to enter into forward contracts or other contractual agreements that set future price or performance at the request of the regulated entity, and instead

[36] Proposed Rule, at 60013.
[37] *E.g.*, U.S. Dep't of Justice, Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy and Thoughts on the Way Forward (May 2012) at 10, https://www.justice.gov/sites/default/files/atr/legacy/2012/05/16/283291.pdf; Press Release, Senator Deb Fischer, RECAP: Senate Ag Committee Hearing on Fischer's Cattle Price Discovery and Transparency Act (Apr. 26, 2022), https://www.fischer.senate.gov/public/index.cfm/2022/4/recap-senate-ag-committee-hearing-on-fischer-s-cattle-price-discovery-and-transparency-act (quoting the Nebraska Cattlemen letter stating that "none of our producer members we encouraged to testify were willing to put themselves out front for fear of possible retribution by other market participants – an unfortunate reality of today's cattle industry").
[38] Press Release, Rural Advancement Foundation International-USA, USDA Must Write Rules Protecting Farmers from Retaliation This June (May 22, 2019), https://www.rafiusa.org/blog/usda-retaliation-rule/. RAFI-USA's Executive Director stated: "We've heard story after story of processors retaliating against farmers who speak out against exploitation and abuse. Farmers should be able to speak their mind. They should not be subject to reprisal or retaliation when they push back on unfair treatment by processors." *Id.*

maintains their status as independent participants on open markets. AMS recognizes that producers who resist entering into forward contracts and AMAs are often targets of retaliation.[39] Yet, as currently written, the proposed rule fails to protect these producers from retaliatory conduct. Commenters therefore request that AMS include another subsection as follows:

> (vii) A covered producer refuses to sell livestock or poultry through forward contracts, alternative marketing agreements, or similar contractual arrangements, opting instead to engage in open market sales.

- AMS should remove and disavow this position contained in the Proposed Rule: "Adverse actions not tied to the activities proposed would not be regulated under this proposal."[40] Retaliation of any kind in response to producers exercising their lawful rights as members of a free society is unjust discrimination and/or an unreasonable prejudice under the plain meaning of the Act. AMS should expand the scope of protected activities listed in subsection (b)(2) to include a catchall provision capable of protecting covered producers from retaliation against other lawful conduct in service of livestock production and marketing more generally. Commenters request that AMS include a subsection as follows:

  > (viii) A covered producer engages in any lawful conduct for the purpose of improving production or marketing of livestock or poultry.

- Given the profound lack of transparency and information asymmetries in livestock and poultry production markets, and the importance of allowing a free flow of information into the "marketplace of ideas" for a matter of great public concern,[41] AMS should expand the types of protected communications in response to which a regulated entity may not retaliate, as defined in subsection (b)(3). For example, if a covered producer posted on social media about unfair or otherwise abusive treatment they experience at the hands of a packer or live poultry dealer, they have exercised a lawful and critical right to participate in the marketplace of ideas, a core value in our society.[42] Such communications would also advance the goal of remedying the profound information asymmetry between producers and regulated entities that AMS has prioritized in this and related rulemakings. Yet this would fall outside of AMS's enumerated (and admittedly narrow) protected activities. AMS should not allow a regulated entity to retaliate against such a producer to silence dissent.[43] The PSA was enacted to "comprehensive[ly]" protect producers; a narrow

[39] Proposed Rule, at 60013.
[40] Proposed Rule, at 60024–25.
[41] *E.g.*, *Animal Legal Def. Fund v*. Otter, 118 F. Supp. 3d 1195, 1202 (D. Idaho 2015) ("Food and worker safety are matters of public concern."); Animal Welfare Institute, *Consumer Perceptions of Farm Animal Welfare*, https://awionline.org/sites/default/files/uploads/documents/fa-consumer_perceptionsoffarmwelfare_-112511.pdf (surveying research finding that consumers are concerned about how animals are raised for food).
[42] "Our representative democracy only works if we protect the 'marketplace of ideas.'" *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021).
[43] Of course, a broader approach would not affect or limit regulated entities' ordinary remedies to address defamation, disparagement, or other unlawful speech.

approach to curtailing retaliation falls short of that congressional mandate.[44] Commenters request that AMS include another subsection as follows, and renumber subsections (2)(ii) through (vi) accordingly:

> (ii) A covered producer communicates with a reporter, private investigator, public interest organization, or the general public through traditional media or social media with respect to any matters related to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry; so long as such communication does not expose a trade secret a regulated entity has reasonably and clearly identified in writing as a sensitive and confidential trade secret. A regulated entity's claim that any communicated information is a sensitive and confidential trade secret is not reasonable if the information is publicly available, shared by the regulated entity to any third party that is authorized to disseminate the information, or exposes standard industry practices common among more than one regulated entity in the relevant market.

- Commenters request that AMS broaden proposed subsection (b)(2)(v) to include communications and negotiations with *any* entity for the purpose of exploring a business relationship or alternative business models. As proposed, the protected activity only includes communications and negotiations with another regulated entity, which is unnecessarily and unreasonably narrow. Covered producers may wish to explore business opportunities outside continued livestock or poultry production, and AMS should not allow a regulated entity to retaliate against covered producers for exploring all options. Commenters recognize that if a covered producer were to transition out of livestock or poultry production altogether, they would no longer be a "covered producer" and would no longer be subject to many of the potential retaliatory actions by a regulated entity, but this protection is to ensure covered producers may *explore* all their business opportunities. That exploration may or may not result in a producer deciding to terminate their contract with a regulated entity. Thus, broader protection is necessary to allow producers to explore all options without fear that, if they decide to retain their current business relationship, they will be punished. There is an emerging movement of producers shifting to alternative uses for their industrial livestock or poultry raising infrastructure, and communications and negotiations with non-regulated entities are critical to a covered producer giving informed consideration to this and all other options.[45] Commenters request the following modification to the proposed subsection (b)(2)(v):

  > (v) A covered producer communicates or negotiates with a regulated entity, *other commercial entity, or relevant consultant* for the purpose of exploring a business relationship *or alternative use or application of their property*.

[44] Upon its enactment, legislators described the PSA as "a most comprehensive measure [that] extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act." H.R. Rep. No. 67-77, at 2 (1921).

[45] For example, the Transfarmation Project is helping producers transition to more sustainable and profitable uses of their industrial livestock or poultry raising infrastructure: https://thetransfarmationproject.org/. If AMS wishes to empower rational and efficient allocation of resources and enable producers to decide their role in the market, such choices are just as important as which regulated entity to work with.

- In response to Question 29, Commenters support a catchall provision but request that it be broader than suggested. Without a doubt, offering unfavorable contract terms or offering contract terms less favorable than ordinarily offered can be tools of retaliation. If AMS does not include these actions, they could become a loophole allowing regulated entities to avoid the Proposed Rule's prohibition on retaliatory termination or non-renewal of contracts and refusals to deal (proposed § 201.304(b)(3)(i) & (iii)), but with similar retaliatory results. We also support inclusion of the non-exclusive list of contract terms included in Question 29 to provide clarity on the purpose and scope of the prohibition.

  However, AMS should broaden the catchall provision to ensure that regulated entities are not free to devise new means to retaliate against covered producers for engaging in the listed protected activities, and thereby maintain the culture of retaliation that keeps producers from exercising their rights. Therefore, Commenters request that AMS add the following provisions:

  > (v) Offering unfavorable contract terms in contract formation, contract modification, or contract renewal that affect reprisal. Such terms include, but are not limited to: price terms, including any base or formula price; formulas used for premiums or discounts related to grade, yield, quality, or specific characteristics of the animals or meat; the duration of the commitment to purchase or to contract for the production of animals; transportation requirements; delivery location requirements; delivery date and time requirements; terms related to who determines date of delivery; the required number of animals to be delivered; layout periods in production contracts; financing, risk-sharing, and profit-sharing; or terms related to the companies' provision of inputs or services, grower compensation, or capital investment requirements under production contracts.
  >
  > (vi) Any other action that adversely impacts a covered producer's financial or reputational interests, or may result in diminished contract performance with the regulated entity.

IV. Commenters Support a Prohibition on Deceptive Practices in Contracting and Refusing to Deal, but AMS Should Further Clarify Prohibited Conduct

Commenters support AMS's proposal to prohibit regulated entities from engaging in deception when contracting or refusing to deal, and we suggest strengthening and clarifying the prohibition. First, AMS should expand the prohibition on deceptive conduct when refusing to deal. Second, in addition to the Proposed Rule's broad prohibitions against using pretext, false or misleading statements, and material omissions in various stages of contracting, AMS should also clarify what the rule prohibits by enumerating a non-exclusive list of prohibited conduct known to harm producers. This will provide clear guardrails and end abusive practices against producers more quickly.

AMS is well within its "comprehensive" authority to prohibit deceptive conduct by regulated entities under the PSA to protect producers. When enacted, the PSA "extend[ed] farther than any previous law in the regulation of private business, in time of peace, except

possible the interstate commerce act," with the intent "to halt unfair trade practices in their incipiency, before harm has been suffered."[46] This broad delegation of authority in the PSA is not an outlier. Congress has empowered federal agencies in several areas to protect market participants faced with structurally inequitable bargaining power. For example, the Federal Trade Commission prohibits predatory or deceptive conduct by credit card companies to protect consumers from unfair terms and conditions in credit contracts.[47] The asymmetry between regulated entities and producers could hardly be more extreme, and that requires clear guardrails to protect producers as Congress intended under the PSA.

Therefore, Commenters request that AMS strengthen and clarify the Proposed Rule in two ways. First, AMS should expand and clarify the rule's prohibition on deceptive conduct during contract refusal. Contract refusal can be used by regulated entities to manipulate and abuse producers just as well as contract termination. Take the cattle producer who sells on a negotiated cash market and who is confronted with a dominant buyer unwilling to bid on their cattle; the buyer simply says "I don't need your cattle." In reality, this buyer wishes to only purchase from producers locked into AMAs, under which it can pay a lower price than fair market value. By refusing to contract on the open cash market, regulated buyers are able to reduce their contracted prices *and* punish the producer for not entering an AMA. Such a buyer's "don't need your cattle" statement may not be false or misleading, but it would be a pretextual justification for the refusal to deal. To protect against this and other potential abuses, Commenters request the following addition:

(e) *Contract refusal*. A regulated entity may not *rely on a pretext or* provide false or misleading information to a covered producer or association of covered producers concerning a refusal to contract.

Second, AMS should include a new subsection (f) that enumerates a non-exclusive list of prohibited conduct. As noted above, this will provide clarity that the PSA flatly prohibits certain conduct known to harm producers and market integrity. AMS should include all known abusive and harmful conduct that may be deceptive to encourage better behavior and streamline necessary enforcement efforts. The requested additions are as follows, but Commenters offer this as a minimum set of prohibitions; AMS should add any other harmful conduct that producers currently face and make clear that any other conduct known to harm producers or market integrity is prohibited even if not specifically listed.

[46] The PSA is "a most comprehensive measure [that] extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act," H.R. Rep. No. 67-77, at 2 (1921), and must be construed liberally "in accord with its purpose to prevent economic harm to producers and consumers." *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Farrow*, 760 F.2d at 214; *Been v. OK Industries Inc.*, 398 Fed. Appx. 382, 392 (10th Cir. 2010). The PSA was enacted to "halt unfair trade practices in their incipiency, before harm has been suffered." *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999) (quoting *Farrow v. U.S. Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985)); *De Jong Packing Co. v. USDA*, 618 F.2d 1329, 1336–37 (9th Cir. 1980).

[47] *See* 16 C.F.R. Pt. 444.

(f) *Specific deceptive practices prohibited*.[48] In addition to any other conduct prohibited by subsections (b) through (e), a regulated entity may not engage in the following conduct during contract formation, performance, or termination or when refusing to contract:

(1) Demanding capital investments as a condition of contract renewal if such capital investment demands were not previously agreed to in writing between the covered producer and regulated entity.
(2) Demanding capital investments by a covered producer without commensurate and enforceable obligations on the part of the regulated entity that will reasonably allow the covered producer to recover the demanded capital costs plus a reasonable return.
(3) Refusing to deal because the livestock producer is selling livestock on the cash market rather than through a contract arrangement and the livestock is otherwise marketable.
(4) Failing to provide a guaranteed base pay in Alternative Marketing Agreements, production contracts, or other similar arrangements.
(5) Inequitably distributing inputs such as animal placements, feed, veterinary care, or other inputs controlled by a regulated entity that can impact a covered producers' performance or compensation.
(6) Shifting environmental compliance costs or responsibilities exclusively to a covered producer when the regulated entity exercises substantial operational control, through contract or otherwise, over the producer through an ownership interest in the livestock or poultry, land or other capital, or control of a covered producers' activities, inputs, management and waste management practices, or capital investments.

V. Commenters Urge More Comprehensive Recordkeeping and Reporting Requirements to Ensure Compliance and Address Information Asymmetry

Commenters request that AMS expand the Proposed Rule's recordkeeping requirements by including a standalone recordkeeping and reporting section that mandates the creation and retention of specified compliance records and reporting through an Annual Compliance Report. Merely relying on regulated entities to "retain" records they voluntarily create is insufficient. And reliance on "policies and procedures, staff training materials, materials informing covered producers regarding reporting mechanisms and protections, compliance testing, board of directors' oversight materials, and the number and nature of complaints received relevant to this section," if any such records exist, is a good start but insufficient.[49]

The PSA requires that regulated entities "shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business."[50] Furthermore, if AMS determines that "the accounts, records, and memoranda of [a regulated

[48] If AMS adopts this addition, it must also revise § 201.306(a) to include subsection (f): "A regulated entity may not engage in the specific deceptive practices prohibited in paragraphs (b) through *(f)* of this section … ."
[49] *See* Proposed § 201.304(c).
[50] 7 U.S.C. § 221.

entity] do not fully and correctly disclose all transactions involved in his business, [AMS] may prescribe the manner and form in which such accounts, records, and memoranda shall be kept."[51] By using the phrases "fully and correctly disclose" and "all transactions" in the statutory text, Congress granted broad and clear authority for AMS to require the recordkeeping and reporting suggested below by Commenters.[52]

Accurate and thorough recordkeeping are essential to accomplish "the broad purposes of the statute."[53] "One of the important and essential means in the accomplishment of the purposes of the Packers and Stockyards Act is to require market agencies to keep such accounts, records and memoranda as will fully and correctly disclose all transactions involved in their handling of livestock." If AMS "is to perform successfully its duties in respect to reasonable rates, undue discriminations and favoritism, it must be informed as to the business of those subject to regulation, and their records must fully and correctly disclose the transactions in which they engage."[54]

The rule must ensure that regulated entities produce and maintain adequate records to comply with this broad statutory mandate. Without more rigorous recordkeeping and reporting requirements, much of the Proposed Rule's protections will fail to adequately protect market vulnerable individuals or other covered producers. For example, without recordkeeping and reporting that allow AMS or producers to compare a regulated entity's conduct across producers, identifying and remedying discrimination or retaliation may be a very difficult task and may shift a large evidentiary burden onto producers. In other words, "fully and correctly disclos[ing] all transactions" includes recordkeeping that can show whether those business dealings, individually or collectively, effect undue discrimination, retaliation, deception or other violations of the Act. AMS should require regulated entities to create and retain these records so that AMS or producers can ascertain whether a regulated entity is complying with the rules, and if not, to enable them to bring enforcement actions compelling compliance.

Therefore, in response to AMS's request for comment on whether more robust recordkeeping requirements are needed,[55] Commenters recommend the final rule include stronger recordkeeping requirements for the following reasons.

A. Necessary Recordkeeping to Ensure Compliance with § 201.304(a)

Recordkeeping requirements for regulated entities are essential for allowing covered producers to meet the initial burden of showing disparate treatment in the burden-shifting framework recommended by Commenters, or any other enforcement framework requiring proof of discrimination or prejudice. Specifically, AMS should require regulated entities to generate detailed records of all market transactions that are sufficient to expose whether a regulated entity's adverse conduct is directed at producers with certain protected traits or market

[51] *Id.*
[52] Black's Law Dictionary, ed. 10, "*transaction*: 1. The act or instance of conducting business or other dealings; esp., the formation, performance, or discharge of a contract."
[53] *Hyatt v. United States*, 276 F.2d 308, 312 (10th Cir. 1960).
[54] *Id.*
[55] Question 32 with respect to § 201.304 and Question 9 with respect to § 201.306.

vulnerabilities and not otherwise similarly situated individuals. Without such a requirement, producers will have limited means to demonstrate the disparate nature of treatment they experienced or shift the burden onto regulated entities to prove a nondiscriminatory reason for the conduct.

B. Necessary Recordkeeping to Ensure Compliance with § 201.304(b)

AMS needs to mandate recordkeeping by regulated entities to ensure that they comply with the Proposed Rule's prohibitions on certain retaliatory conduct. Commenters do not believe AMS should require regulated entities to track and record covered producers' participation in the protected activities listed in proposed § 201.304(b)(2); indeed, requiring such recordkeeping would incentivize retaliatory conduct by encouraging regulated entities to closely scrutinize producers' activities. Instead, requiring regulated entities to maintain comprehensive records regarding all of their transactions should illuminate whether disparate treatment has occurred, which can then be traced to a retaliatory purpose. For example, a record of all prices paid across producers could assist in showing that a regulated entity engaged in differential treatment, alleviating a retaliated against producer's potential burden of having to establish this fact without the necessary data. Similarly, a record showing how various inputs were distributed across covered producers could show differential contract performance. A covered producer knows whether they have engaged in a protected activity, and comprehensive transaction recordkeeping would allow that producer to compare their experience with the regulated entity to that of others who may not have engaged in a protected activity.

C. Necessary Recordkeeping to Ensure Compliance with § 201.306

AMS needs to mandate recordkeeping by regulated entities to ensure that they comply with the Proposed Rule's prohibitions on certain deceptive practices. As above, Commenters do not believe specific deception-related recordkeeping is necessary, as comprehensive transaction recordkeeping should capture the necessary data to assist in policing unlawful deception. Requiring regulated entities to maintain comprehensive records regarding all of their transactions should illuminate whether deception may have occurred in contract formation, performance, termination, or refusal as prohibited by § 201.304(b). For example, a record of contract formation between a regulated entity and a covered producer for the production of poultry showing the regulated entity used a simple average pay to induce the producer, while not disclosing that actual guaranteed pay is lower than said average, would establish deception in violation of § 201.306(b).

D. Reporting Through an Annual Compliance Report

Commenters suggest that AMS require regulated entities to submit an Annual Compliance Report that includes disclosure of all contracting conduct by regulated entities so that AMS, covered producers, potential producers, and the public have ready access to this information and need not review any other documents to identify disparate treatment, violative pretexts, false or misleading statements, or omissions of material fact necessary to make a

statement not false or misleading.[56] Such an Annual Compliance Report will restrain regulated entities from engaging in this conduct and will streamline enforcement efforts where needed. Commenters suggest a nonexclusive list of required elements in an Annual Compliance Reports.

E. Recommended Regulatory Text

Commenters suggest the following regulatory text in a standalone section § 201.307. Current § 201.304(c) should be moved into this new § 201.307.

§ 201.307 Recordkeeping and Reporting

(a) *Recordkeeping* A regulated entity shall maintain records relevant to its compliance with this Subpart (201.300 – 201.390). This includes but is not limited to all records used to develop the annual report required under section (b). A regulated entity shall retain all such records for no less than 5 years from the date of creation.

(b) *Reporting* A regulated entity shall produce an Annual Compliance Report showing all relevant details of the entity's regulated transactions during the reporting calendar year. The Annual Compliance Report shall be submitted to the Secretary no later than April 1 of the following year. The Annual Compliance Report shall include, at a minimum:

(1) An anonymized list of producers with which the regulated entity did business. The anonymized identifier shall be used in all other Annual Compliance Report disclosures, and the regulated entity shall maintain a reference list allowing the Secretary to identify individual covered producers upon request. A covered producer's identity shall remain confidential unless the covered producer or association of covered producers waives such confidentiality in writing;
(2) Terms offered to a covered producer during contract negotiation;
(3) Terms entered into with a covered producer and whether said terms differ from similarly situated covered producers;
(4) Each price paid to each producer and the manner in which such price was calculated;
(5) Whether any alternative marketing arrangements were used and if so the terms of such arrangements; and
(6) Records reflecting all instances of the regulated entity's refusal to deal with a covered producer and the justification for such refusal.

[56] AMS has conducted limited reporting through the Swine Contract Library and the Cattle Contracts Library Pilot Program, but this suggestion is for more robust, PSA-specific reporting tailored to bring regulated entities into compliance with the Act. To the extent that those other programs overlap with this reporting suggestion, AMS could combine obligations to reduce burden on regulated entities.

VI. Commenters Strongly Recommend AMS Expressly Codify Its Long-Standing Position That Prohibited Conduct Need Not Result in Market-Wide Harm

Lastly, Commenters request that AMS amend the Proposed Rule to include a standalone section codifying the Agency's long-standing position that the discriminatory, prejudicial, and deceptive conduct prohibited by Sections 201.304 and 201.306 need not result in market-wide competitive injury to constitute a violation of the PSA. The Executive Order On Promoting Competition in the American Economy stressed the need for a rule that confirmed that an individual should not have to show market-wide harm to secure relief under the Act, "and that the 'unfair, unjustly discriminatory, or deceptive' treatment of one farmer, the giving to one farmer of an 'undue or unreasonable preference or advantage,' or the subjection of one farmer to an 'undue or unreasonable prejudice or disadvantage in any respect' violates the Act."[57] While AMS claims to have "considered that direction in undertaking this rulemaking,"[58] and crafted a rule that "would protect producers at both individual and market-wide levels,"[59] nowhere in the Proposed Rule does it actually implement the Executive Order's direction by clarifying that there is no requirement to show market-wide harm to demonstrate a violation of the PSA.

AMS must rectify this oversight in the final rule. Not only does the plain language of the PSA support the reading of the statute directed by the Executive Order, but an express statement on market-wide harm codified by rule is necessary to prevent further confusion and misapplication of the law in courts. Because the Proposed Rule is replete with both references to USDA's long-standing position on market-wide harm and the Executive Order's explicit direction to include a market-wide harm provision in a final PSA rule, such an amendment would be a logical outgrowth of the rule as proposed.

A. The PSA's Plain Language Confirms That Market-Wide Harm Need Not Result for Regulated Entities to Violate the Act

Section 202 of the PSA bans seven categories of conduct:[60]

- **(a)** any unfair, unjustly discriminatory, or deceptive practice or device;
- **(b)** any undue or unreasonable preference or advantage, or any undue or unreasonable prejudice or disadvantage;
- **(c)** the sale, transfer, purchase or receipt of goods to apportion supply, which has the "tendency or effect of restraining commerce or creating a monopoly";
- **(d)** the sale, transfer, purchase or receipt of goods to "manipulat[e] or control[] prices," "creat[e] a monopoly," or "restrain[] commerce";
- **(e)** Any course of conduct to "manipulat[e] or control[] prices," "creat[e] a monopoly," or "restrain[] commerce";
- **(f)** Conspiracy to engage in price control or manipulation;

[57] E.O. 14036 *On Promoting Competition in the American Economy*, Section 5(i)(i)(B), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.
[58] Proposed Rule, at 60014.
[59] *Id.* at 60017.
[60] 7 U.S.C. 192(a)–(g).

(g) Conspiracy to engage in any of the above unlawful conduct.

Sections 202(c)–(f), all of which expressly apply to conduct that restrains commerce, creates a monopoly, and/or controls prices, mirror and expand upon the operative language of the Sherman Act, which bans agreements that restrain trade and monopolization.[61] In other words, similar to the reach of other antitrust laws, these provisions specifically ban conduct causing market-wide harm to competition. In contrast, neither Section 202(a) nor (b) require "restraining competition," "creating a monopoly," or "controlling or manipulating prices" to establish a violation.

"Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[62] Therefore, Congress' decision to include the conventional antitrust language in some sections but not all of them means violations of Sections (a) and (b) do not require proof that the challenged conduct results in market-wide harm.[63] Viewed another way, the PSA therefore "addresses public policy notions of fairness from two perspectives: (1) in equitable (micro) terms concerning unjustifiable harm to individual farmers or ranchers; and (2) in antitrust (macro) terms concerning harms to the overall competitive environment."[64]

If unfair, discriminatory, prejudicial, or deceptive conduct always required proof of market-wide competitive injury, then Section 202(a) and (b) become superfluous. Any act that would violate Sections (a) or (b) would also violate Section (e), which broadly prohibits "any course of business" or "any act" for the purpose or with the effect of causing competitive injury.[65] It is a cardinal principle of statutory construction to give effect to every clause and word of a statute, and not construe the statute in a way that renders words or clauses superfluous.[66] Grafting an adverse effect on competition requirement onto subsections (a) and (b) does just that. AMS has correctly understood the statute for decades, and should finally codify its interpretation now.[67]

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[61] *See* 15 U.S.C. §§ 1–2 (prohibiting contract, combinations and conspiracies in restraint of commerce, in addition to monopolization, attempted monopolization, or conspiracy to monopolize).
[62] *Rusello v. United States*, 461 U.S. 16, 23 (1983).
[63] Kade, *supra* note 20, at 51.
[64] Michael C. Stumo & Douglas J. O'Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships*, 8 Drake J. Agric. L. 92 (2003), https://aglawjournal.wp.drake.edu/wp-content/uploads/sites/66/2016/09/agVol08No1-Stumo.pdf.
[65] *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 375 (5th Cir. 2009) (Garza J., dissenting) ("This language, creating an unqualified prohibition of listed practices, is inconsistent with, and would be rendered superfluous by, a qualification that only those listed practices that adversely affect competition are prohibited.").
[66] *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).
[67] Scope of Sections 202(a) and (b) of the Packers and Stockyard Act, 81 Fed. Reg. 92566, 92566 (Dec. 20, 2016) (referencing "USDA's longstanding interpretation that not all violations of the P&S Act require a showing of harm or likely harm to competition.").

B. An Express Rule Statement on Market-Wide Harm Is Necessary to Prevent Further Confusion and Misapplication of the Law

Though the statutory text is clear, Circuit Courts are split on whether subsections (a) and (b) require a competitive harm showing. The Fifth, Sixth, Tenth, and Eleventh Circuits have all read a proof of competitive harm requirement into these provisions, relying on the primary purpose of the PSA to "assure fair competition and fair trade practice," analogies to narrower antitrust legislation, and a concern that an unqualified ban on unfair, discriminatory, prejudicial, and deceptive practices "would make a federal case out of every breach of contract."[68] By contrast, the Seventh and Ninth Circuits have held that proof of harm to competition is sufficient to show a violation when the plaintiff alleges it, but not that it is necessary in all cases.[69] The Eighth and Ninth Circuits, as well as district courts in the Fourth Circuit, have expressly held conduct to violate subsections (a) and (b) without any discussion of or requirement for anticompetitive harm.[70] In sum, the patchwork of precedent has muddled the plain meaning of the PSA, making a final rule that puts the issue to rest all the more critical.

Indeed, though the Agency's individual harm interpretation of the Act is well-established, courts have failed to credit it *expressly because* the interpretation has not been codified into regulation. For instance, the Tenth Circuit "afford[s] the USDA's position . . . little to no deference" because positions stated in amicus briefs "do not reflect the deliberate exercise of interpretive authority that regulations and guidelines demonstrate."[71] In light of the courts' hostility towards giving weight to uncodified agency interpretations, combined with the fact that several Circuits have already reached conflicting conclusions as to the competitive harm requirement in the Act, it defies logic for AMS to issue a rule that remains silent on the subject. References to its position throughout the rule preamble are not sufficient to entitle the agency's implicit interpretation to deference. As such, Commenters recommend AMS include the following language in the final rule:

§ 201.308 No Requirement to Cause Market-Wide Harm

(a) Where a regulated entity commits conduct prohibited by Subpart 201.302–201.306, such conduct violates Sections 202(a) and (b) of the Act whether or not market-wide harm to competition results. The unfair, unjustly discriminatory, or deceptive treatment of one covered producer, the giving to one covered producer of an undue or unreasonable preference or advantage, or the subjection of one covered producer to an undue or unreasonable prejudice or disadvantage in any respect violates the Act.

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[68] *See Wheeler v. Pilgrim's Price Corp.*, 591 F.3d 355, 362–3 (5th Cir. 2009); *Been v. O.K. Industries Inc.*, 495 F.3d 1217, 1229 (10th Cir. 2007); *Terry v. Tyson Farms Inc.*, 604 F.3d 272, 277 (6th Cir. 2009); *London v. Fieldale Farms Corp.* 410 F.3d 1295, 1304 (11th Cir. 2005); *Pickett v. Tyson*, 420 F.3d 1272, 1279-80 (11th Cir. 2005). *See also* Kade, *supra* note 20, at 33–37 for a detailed discussion of these cases, and their interpretation of the competitive harm requirement.

[69] *See Armour & Co. v. United States*, 402 F.2d 712, 723 (7th Cir. 1968); *De Jon Packing Co. v. USDA*, 618 F.2d 1329 (9th Cir. 1980); *Central Coast Meats, Inc. v. USDA*, 541 F.2d 1325, 1327-28 (9th Cir. 1976);

[70] *See Holiday Farms v. USDA*, 820 F.2d 1103 (9th Cir. 1987); *Bruhn's Freezer Meats v. USDA*, 438 F.2d 1332, 1341 (8th Cir. 1971); *M&M Poultry v. Pilgrim's Pride Corp.*, 2015 U.S. Dist. LEXIS 195184 (N.D. WV 2015).

[71] *Been*, 495 F.3d at 1227 (finding USDA's interpretation only had the "power to persuade," and even in that it failed).

C. A Market-Wide Harm Amendment Is a Logical Outgrowth of the Proposed Rule

Because the requested market-wide harm amendment better effectuates the Proposed Rule's stated purpose and intent, AMS has clear authority to include it in any final rule it issues. Where a proposed rule is modified in light of public comment, the modified rule may be promulgated as a final rule without additional notice or opportunity to comment so long as the final rule is a logical outgrowth of the proposed rule such that interested parties could have anticipated the change was possible.[72]

Here, such an amendment is easily foreseeable. Not only does Executive Order 14036 explicitly direct the Agency to promulgate a competitive harm rule, but the Proposed Rule expresses AMS's clear intent to "protect producers at both individual and market-wide levels,"[73] and "set[] forth specific prohibitions on prejudicial or discriminatory acts or practices against individuals that are sufficient to demonstrate violation of the P&S Act without the need to further establish broad-based, market-wide prejudicial or discriminatory outcomes or harms."[74]

VII. Conclusion

AMS must move decisively and issue a strong final rule that provides meaningful protection to producers and begins to remedy the abusive practices and market failures brought on by poor oversight and regulated entities' excessive market power. Discrimination, retaliation, and deception have become common features of livestock and poultry markets, leading to widespread fear and anxiety among producers. Commenters thank AMS for its efforts and respectfully request that it move quickly to a final rule that adopts the suggestions offered here to truly effectuate the PSA.

Sincerely,

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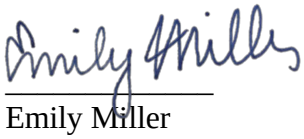

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[72] *Veterans Justice Group, LLC v. Sec'y of Veterans Affairs*, 818 F.3d 1336, 1344 (Fed. Cir. 2016).
[73] 87 Fed. Reg. at 60017.
[74] *Id.* at 60018.

The American Society for the Prevention of Cruelty to Animals
The Campaign for Family Farms and the Environment
Center for Food Safety
Dakota Rural Action
The Farm and Ranch Freedom Alliance
Food Animal Concerns Trust
Institute for Agriculture and Trade Policy
Institute for Local Self-Reliance
Iowa Citizens for Community Improvement
The Johns Hopkins Center for a Livable Future
Montana Cattlemen's Association
The Natural Resources Defense Council
Ohio Ecological Food and Farm Association
Open Markets Institute
Public Justice
The Ranchers Cattlemen Action Legal Fund United Stockgrowers of America
Socially Responsible Agriculture Project
Western Organization of Resource Councils

EXHIBIT A

August 23, 2022

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Submitted to Regulations.gov, Docket AMS-FTPP-21-0044

Re: Transparency in Poultry Grower Contracting and Tournaments Proposed Rule

The undersigned organizations (collectively, "Commenters") respectfully submit these comments in response to the U.S. Department of Agriculture, Agricultural Marketing Service's ("AMS") Transparency in Poultry Grower Contracting and Tournaments Proposed Rule, AMS-FTPP-21-0044 ("Proposed Rule"). We are encouraged that AMS is looking to strengthen the protections Congress enshrined in the Packers and Stockyards Act ("PSA" or "the Act") to account for present day conditions and challenges faced by producers in the poultry industry. This proposed transparency rule is an important first step in that direction. The extreme consolidation and vertical integration in the poultry industry places excessive market power in the hands of a very small number of live poultry dealers, which use that power to manipulate markets and take advantage of their contract growers.[1] Addressing the informational asymmetry between vertically integrated live poultry dealers ("integrators") and growers or potential growers as laid out in the Proposed Rule will help inform a grower or potential grower whether to enter or remain in this risky and often abusive system and could assist in identifying unlawful practices and initiating enforcement actions.

While the Proposed Rule is a welcomed *first* step, it alone does not go far enough. As AMS recognizes, the PSA "seeks to promote fairness, reasonableness, and transparency in the marketplace by *prohibiting practices* that are contrary to these goals." 87 Fed. Reg. 34980, 34980 (June 8, 2022) (emphasis added). The Proposed Rule has the potential to limit one type of abusive practice—using power asymmetries in flock placement frequency and stocking densities as a weapon against disfavored growers—but otherwise simply requires the integrator disclose its enormous control and discretion over a grower's ability to succeed, potentially illuminating certain ways in which a grower has been or could be abused by the integrator. However, the PSA

[1] *See, e.g.*, Michael Kades, Washington Center for Equitable Growth, Protecting Livestock Producers and Chicken Growers (May 2022), https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/.

was enacted to *stop* harmful conduct in its incipiency, not simply inform producers of the potential for that conduct. In effect, the Proposed Rule, standing alone, puts the burden of enforcing the Act on growers who are in dramatically asymmetrical relationships with integrators. It is inconsistent with the PSA for AMS to leave growers to fend for themselves against powerful integrators. The Agency therefore must not only finalize this rule, but also proceed with substantive prohibitions in response to the information received through the pending advanced notice of proposed rulemaking in order to make meaningful change in this presently unfair system. *See* Poultry Growing Tournament Systems: Fairness and Related Concerns, 87 Fed. Reg. 34814 (June 8, 2022) (hereinafter, "Tournament System Fairness ANPR").

I. Interests of Commenters

Commenters are a diverse group of non-profit organizations representing farmer, sustainable agriculture, environmental, animal welfare, and consumer interests. Collectively, Commenters represent millions of members and supporters across the country.

Food & Water Watch ("FWW") is a national, nonprofit membership organization that mobilizes regular people to build political power to move bold and uncompromised solutions to the most pressing food, water, and climate problems of our time. FWW uses grassroots organizing, media outreach, public education, research, policy analysis, and litigation to protect people's health, communities, and democracy from the growing destructive power of the most powerful economic interests. FWW has long advocated for better controls over integrators to protect farmers, consumers, and the environment.

Animal Legal Defense Fund ("ALDF") is a national, nonprofit membership organization based in California with over 300,000 members and supporters nationwide. ALDF's mission is to protect the lives and advance the interests of animals through the legal system. One way ALDF achieves this mission is by advocating and litigating for transparency and effective oversight of the industrial animal agriculture system across the United States—including as it relates to poultry integrators.

MountainTrue is an environmental non-profit working for Healthy Communities, Resilient Forests, and Clean Water in Western North Carolina. **Broad Riverkeeper** has been a program of MountainTrue for 7 years now. We believe that the corporate integrators of factory farms should be held accountable for an array of external costs associated with these factories, including: decreased property values in rural areas which are saturated by these operations, water and air pollution associated with the huge amount of waste generated, adverse health effects suffered by neighbors in close proximity, and displacement of truly sustainable meat producing farms. We also believe that the abusive Tournament System in which poultry growers must operate places them in opposition/competition with their neighboring growers, while undermining the real and historical farming values of helping and supporting each other and working together to build healthy communities.

The **Buffalo River Watershed Alliance** ("BRWA") is a non-profit, 501(c)(3) volunteer organization created in early 2013 in direct response to the first and largest hog CAFO of its kind in Arkansas. BRWA was organized by stakeholders living in the Buffalo River watershed, but its supporters span the state and region. Its mission is to help preserve and protect the scenic beauty and pristine water quality of the Buffalo National River by opposing and preventing the construction and proliferation of industrial concentrated animal feeding operations within the watershed. After the successful closing of the swine CAFO in 2019, BRWA continues to monitor developments that could threaten the watershed. This includes continued work on a permanent moratorium on hog CAFOs in the watershed as well as monitoring other threats such as the spread of agricultural waste beyond agronomic need and plans for extensive logging in the headwaters of the watershed.

The **Campaign for Family Farms and the Environment** ("CFFE") is a coalition of state and national organizations, including Dakota Rural Action (SD), Iowa Citizens for Community Improvement, Land Stewardship Project (MN), Missouri Rural Crisis Center, Food & Water Watch and Institute for Agriculture and Trade Policy. We work together to support family farmers, rural communities and a vibrant, sustainable food system. Through this work, we oppose national, state and local policies propping up corporate factory farms that are putting independent livestock producers out of business, extracting wealth from our rural communities, polluting our land, water and air, and threatening our national security.

The **Catawba Riverkeeper Foundation** ("CRF") is a member-funded environmental nonprofit that educates and advocates for the protection of the Catawba-Wateree River and all its tributaries. Our organization represents over 6,000 active members who rely on the watershed for drinking water, recreation, and electricity. There are over 750 poultry operations in the watershed, raising more than 50 million turkeys and broiler chickens annually.

Center for Food Safety ("CFS") is a national, non-profit 501(c)(3) organization with nearly one million members and supporters. CFS's mission is to empower people, support farmers, and protect the environment from industrial agriculture. CFS promotes truly sustainable and regenerative agriculture, like organic and ecological farming. For 25 years, CFS has furthered this mission through legal actions, groundbreaking scientific and policy reports, books and other educational materials, and market pressure and grassroots campaigns through our True Food Network. One of CFS's flagship programs seeks to end the harms of industrial meat production on farmers, animals, and the environment.

The **Center for a Livable Future** ("CLF") operates out of the Johns Hopkins Bloomberg School of Public Health from the Department of Environmental Health and Engineering and works with students, educators, researchers, policymakers, advocacy organizations and communities to build a healthier, more equitable and resilient food system.

Farm and Ranch Freedom Alliance ("FARFA") is a nonprofit organization that supports independent family farmers and protects a healthy and productive food supply for American consumers. FARFA promotes common sense policies for local, diversified agricultural systems. Many of FARFA's members raise poultry and livestock. While FARFA's farmer members typically sell direct-to-consumer or to independent outlets (rather than

integrators), the conditions and laws that govern the industry as a whole have both direct and indirect impacts on both our farmer and consumer members.

Friends of the Earth ("FOE"), founded by David Brower in 1969, fights to create a healthy and just world. Our Climate-Friendly Food Program aims to reduce the harmful impacts of industrial animal agriculture and build a more just and resilient food system through policy change and by reducing institutional purchases of industrial meat and dairy while driving increased demand for plant-based foods and organic, high welfare, and pasture-raised animal products.

Public Justice is a national public interest advocacy organization that specializes in connecting high-impact litigation with strategic communications and the strength of our partnerships to fight these abusive and discriminatory systems and win social and economic justice. The Public Justice Food Project employs those techniques to take on industrial animal agriculture and its ills. Among its work, it is presently advocating alongside poultry growers and ranchers to stop anticompetitive practices facilitated by industry and USDA.

The **Ranchers Cattlemen Action Legal Fund United Stockgrowers of America** ("R-CALF USA") is the largest trade association exclusively representing United States cattle farmers and ranchers within the multi-segmented beef supply chain. It is also the largest all-voluntary membership-based cattle trade association with nearly 5,000 voluntary dues paying members in over 40 states. Its membership includes cow-calf operators, cattle backgrounders and stockers, cattle feedlot owners, and sheep producers. Numerous main street businesses are non-voting members of R-CALF USA.

Socially Responsible Agriculture Project ("SRAP") has served as a mobilizing force for more than 20 years to help communities protect themselves from the damages caused by industrial livestock operations and to advocate for a food system built on regenerative practices, justice, democracy, and resilience. Our team includes technical experts, independent family farmers, and rural residents who have faced the threats of factory farms in their communities. When asked for help, SRAP offers free support, providing communities with the knowledge and skills to protect their right to clean water, air, and soil and to a healthy, just, and vibrant future.

Waterkeeper Alliance is the largest and fastest-growing nonprofit solely focused on clean water. The organization works to preserve and protect water by connecting and mobilizing more than 300 local Waterkeeper groups worldwide. Waterkeeper Alliance strengthens and grows this global network of grassroots leaders, and also engages in advocacy work to organize, educate, and litigate to ensure all habitable watersheds on earth are drinkable, fishable, and swimmable.

II. Discussion, Support, and Recommendations

Commenters submit the following arguments and recommendations in support of the Proposed Rule. First, not only does AMS have clear legal authority to strengthen transparency in poultry grower contracting under the PSA, but the Agency is also empowered—and indeed required—to go further and prohibit unfair, discriminatory, deceptive, retaliatory, or

unreasonably preferential practices inherent to the tournament system. Second, Commenters support AMS's proposal requiring integrators provide disclosure documents to growers at the time of contracting and suggest additional improvements that will enable growers to better understand and evaluate the potential risks involved in these business arrangements. Third, Commenters support the need for guaranteed minimum flock placements and stocking densities, and make further recommendations to ensure that growers not only understand how such disclosed minimum values will translate into actual income, but can also enforce such minimums through binding contract terms. Finally, Commenters support proposed disclosures showing how integrators distribute inputs to growers and raise several considerations for increasing transparency into and accountability for unlawful input distribution practices.

A. The Proposed Rule Is Well Within AMS's Statutory Authority, and the PSA Authorizes AMS to Go Further

The Proposed Rule's disclosure requirements are well within what the PSA authorizes and are a necessary first step to satisfying congressional intent and aligning the PSA with current conditions. Further, the PSA allows—and in fact requires—AMS to better protect growers from the unlawful conduct facilitated by and built into the tournament system.

1. The PSA Clearly Authorizes the Proposed Disclosure Requirements

The PSA authorizes the Secretary of Agriculture to make rules "as may be necessary to carry out the provisions" of the PSA, 7 U.S.C. § 228(a), one of the cornerstones of which is ensuring that business arrangements between integrators and growers are not unfair, unjustly discriminatory, deceptive, or facilitating undue preferences or prejudices, discrimination, or retaliation. 7 U.S.C. § 192(a)–(b). Because the Proposed Rule aims to improve the information asymmetry between integrators and growers within the tournament system, which enables violations of the PSA to persist unchecked, the proposed disclosure requirements clearly fall within AMS's rulemaking authority. Indeed, as the Proposed Rule points out, long-standing PSA rules already require certain disclosures to growers, and the additional requirements are tailored to address changes in the poultry industry that hamper growers' ability to make informed business decisions. Proposed Rule, at 34981 ("This proposed rule builds on existing disclosure concepts under the Packers and Stockyards Act"); *see* 7 U.S.C. § 192(a)–(c); 9 C.F.R. § 201.100.

2. The Proposed Rule Also Passes Constitutional Muster

Requiring disclosure of material information to protect parties to asymmetrical business relationships is a longstanding congressional and administrative agency tool for fostering healthier markets and does not violate the First Amendment rights of integrators, or any other cognizable right. Courts evaluate disclosure mandates like those contemplated in the Proposed Rule under a more lenient standard than other First Amendment inquiries, as set forth in *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985). *See Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) (holding that the more lenient standard set forth in *Zauderer* applies to disclosures designed to prevent deception as well as other governmental interests). That test, at most, requires AMS to show that the disclosure

requirements are "reasonably related" to a "substantial government interest." *Id.* at 34 (Kavanaugh, J., concurring).

The rationale of the Supreme Court's holding in *Zauderer* was that a commercial advertiser has no more than a "minimal interest" in withholding valuable commercial information in the course of consummating a commercial transaction. *See Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005). While many of the relevant cases focus on commercial speech in the context of seller-consumer relationships, integrators similarly have no more than a minimal interest in withholding material information from its own growers or potential growers with whom it wishes to contract. *See Am. Meat Inst.*, 760 F.3d at 22. In fact, federal law has long required the written disclosure of information relevant to private contractual relationships to advance government interests. *See, e.g.*, 29 U.S.C. § 1821(a) (imposing written disclosure requirements on farm labor recruiters when making an offer of employment to a migrant agricultural worker); *id.* § 1831(a) (same for seasonal agricultural workers); 49 U.S.C. § 32705 (requiring disclosures when privately transferring ownership of a vehicle).

Disclosure requirements like those in the Proposed Rule serve a clear function that is at least reasonably related to the substantial government interests set forth in the PSA. "The self-evident tendency of a disclosure mandate to assure that recipients get the mandated information may in part explain why, where that is the goal, many such mandates have persisted for decades without anyone questioning their constitutionality." *Am. Meat Inst.*, 760 F.3d at 26 (citing disclosure requirements regarding country-of-origin labeling, fiber content, care instructions, and ingredient lists); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (citing disclosure requirements that do not offend the First Amendment regarding securities, corporate proxy statements, price and production information among competitors, and employer retaliation for labor activities). "[T]he State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions." *44 Liquormart v. R.I.*, 517 U.S. 484, 499 (1996) (citing cases). "The government can require disclosure of factual and uncontroversial information in the realm of commercial speech as long as the disclosure 'reasonably relate[s]' to an adequate interest." *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 534 (D.C. Cir. 2015) (Srinivasan, J., dissenting) (citing *Zauderer*, 471 U.S. at 651). "Laws 'requiring a commercial speaker to make purely factual disclosures related to its business affairs … facilitate rather than impede the free flow of commercial information.'" *Id.* (quoting *Beeman v. Anthem Prescription Mgmt.*, 58 Cal. 4th 329 (Cal. 2013)). Therefore, so long as a disclosure requirement deals with the commercial aspect of speech, a reasonable relation to an adequate state interest is enough. *See Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 96 (1977). Furthermore, requiring the disclosure of material terms to commercial relationships is a "traditional or ordinary economic regulation" generally allowed under the First Amendment. *See AHA v. Azar*, 983 F.3d 528, 542 (D.C. Cir. 2020) ("Requiring hospitals to disclose prices before rendering services undoubtedly qualifies as 'traditional or ordinary economic regulation of commercial activity' that is acceptable under the First Amendment" (quoting *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335 (2020))).

First, the Proposed Rule would regulate commercial speech. The "core notion of commercial speech" is "speech which does 'no more than propose a commercial transaction.'" *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (quoting *Va. Pharmacy Bd. v. Va.*

Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976))); *see Pharm. Care Mgmt. Ass'n*, 429 F.3d at 309 (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience" (quoting *El Dia, Inc. v. P.R. Dep't of Consumer Affairs,* 413 F.3d 110, 115 (1st Cir. 2005))); *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1143 (D.C. Cir. 2009) ("expression related solely to the economic interests of the speaker and its audience" or "speech proposing a commercial transaction") (quoting *Cent. Hudson*, 447 U.S. at 561–62)). Clearly, the disclosure requirements in the Proposed Rule relate to speech that "proposes a commercial transaction" and is "expression related solely to the economic interests" of poultry integrators and current or potential growers in their execution of poultry growing agreements. *E.g.*, *Bolger*, 463 U.S. at 66; *Philip Morris USA, Inc.*, 566 F.3d at 1143.

Second, the Proposed Rule requires disclosure of purely factual and uncontroversial information, and the requirements are reasonably related to the government's substantial interest in ensuring fair and functional poultry production markets and addressing years of complaints and concerns expressed by growers subject to the tournament system. *See Nat'l Ass'n of Mfrs.*, 800 F.3d at 534; *Am. Meat Inst.*, 760 F.3d at 34 (Kavanaugh, J., concurring) (recognizing "Government's longstanding interest in supporting American farmers and ranchers"). The Proposed Rule only requires disclosure of factual information, such as past grower compensation at different quartiles of a tournament system spread. These facts are not controversial in the context of integrator-grower contracts because they are merely communicating missing but material terms to a commercial transaction. *See CTIA – The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 848 (9th Cir. 2019) (finding a health warning on cell phones uncontroversial). They would provide critical information to growers considering continuing or entering a grower arrangement with an integrator or would provide critical information about an integrator's fair performance under the agreement such as disclosing flock details to the recipient grower—requirements obviously related to the government's substantial interests in protecting growers and ensuring fairness in a market where drastically unequal bargaining power is the norm.

Finally, ensuring that parties to commercial transactions in the livestock and poultry industries have necessary information to protect the fairness and integrity of those commercial interactions is nothing new and is allowed under the First Amendment as "traditional or ordinary economic regulation." *See AHA v. Azar*, 983 F.3d 528, 542 (D.C. Cir. 2020). In sum, AMS can show that the Proposed Rule's disclosure requirements easily pass First Amendment scrutiny.

3. The "Major Questions Doctrine" Does Not Apply to This or Subsequent Rulemaking

The poultry industry is likely to raise the newly discovered "major questions doctrine" in the course of this Proposed Rule and subsequent PSA rulemaking.[2] *See West Virginia v. EPA*, 142 S. Ct. 2587, 2633–34 (2022) (Kagan, J., dissenting) (recognizing that the majority opinion "announces the arrival of the 'major questions doctrine,' which replaces normal text-in-context statutory interpretation with some tougher-to-satisfy set of rules"). But this new doctrine should have no bearing on AMS's efforts to effectuate exactly what Congress intended and clearly

[2] *See* Maeve Sheehey, *Climate Ruling Offers Opening to Challenge USDA Antitrust Role*, Bloomberg (Aug. 1, 2022), https://about.bgov.com/news/climate-ruling-offers-opening-to-challenge-usda-antitrust-role/ (reporting that a Senator from Arkansas, where Tyson Foods is headquartered, has already sent a letter to USDA claiming that the proposed rules could run afoul of the "major questions doctrine" as recently laid out by the Supreme Court).

expressed in the text of the PSA and should not chill AMS from taking strong but tailored action to give effect to the PSA.

The Supreme Court's newly formulated doctrine appears to require a two-step analysis. *Id.* at 2634. Step one calls for a threshold assessment to determine whether the doctrine applies. The doctrine only applies to "extraordinary cases" where an agency finds "[e]xtraordinary grants of regulatory authority" to "make a radical or fundamental change to a statutory scheme" in "modest words, vague terms, or subtle device[s]." *Id.* at 2609 (internal quotations and citations omitted). An underlying basis for this new doctrine is that courts should presume "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id.* (quoting *U.S. Telecom Ass'n v. FCC*, 855 F. 3d 381, 419 (D.C. Cir. 2017)). Where a court finds such extraordinary circumstances, a regulated industry may argue the major questions doctrine applies.

Step two of the major questions doctrine requires the agency to "convince" a court that the enabling statute authorizes the agency action. *Id.* The agency must do so with "more than a merely plausible textual basis for the agency action," and instead "must point to 'clear congressional authorization' for the power it claims." *Id.* (quoting *Utility Air*, 573 U.S. at 324).

The major questions doctrine clearly does not apply here because AMS has not proposed anything close to a "radical or fundamental change to a statutory scheme." *West Virginia*, 142 S. Ct. at 2609. Nor does AMS rely on "modest words, vague terms, or subtle devices" in the PSA. Comparing the Proposed Rule and possible rulemaking in response to the Tournament System ANPR with what the Court found in *West Virginia v. EPA* should settle the issue. In that case, the Supreme Court concluded that EPA's rule, had it ever been implemented, would "substantially restructure the American energy market." *Id.* at 2610. This broad authority was based on "vague language of an ancillary provision of [the enabling statute], one that was designed to function as a gap filler[3] and had rarely been used." *Id.* (internal quotation and citation omitted).

In sharp contrast to those supposed circumstances, here the Proposed Rule is based on clear congressional mandates found in one of the *central* provisions of the Act, 7 U.S.C. § 192, and does little more than incrementally improve upon the preexisting regulatory regime. No integrator could have any expectation of doing business without oversight and limitations imposed by the PSA. These rules do not "substantially restructure" the agriculture industry, they merely adapt an existing framework to present conditions and challenges faced by growers at the hands of exceptionally more powerful integrators.

Furthermore, section 192 is the opposite of a "backwater" of the statute and is well-trodden ground for USDA rulemaking and enforcement efforts. There is nothing "modest" or

[3] While the Court characterized Section 111(d) of the Clean Air Act as a "gap filler," this has no bearing on proper statutory interpretation. *Id.* at 2629 (Kagan, J., dissenting) ("That something is a backstop does not make it a backwater."). Therefore, we apply the standard as "backwater" provisions that have been rarely used, not "gap fillers," per the dissenting opinion's correct analysis. Although, Commenters note that no reasonable person could characterize AMS's authorization here as a "gap filler" either.

"subtle" about the text that enumerates the practices Congress has deemed unlawful—and which AMS has a responsibility to regulate. Section 192 clearly and forcefully states,

> It shall be unlawful for … any live poultry dealer with respect to live poultry to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.

Where, as here, market participants (*i.e.*, growers) have long complained of and provided evidence establishing pervasive violations of those prohibitions, and have further demonstrated that certain contracting practices facilitate this illegal conduct and harm to growers and competition, the PSA not only empowers AMS to act, but requires it. Simply stated, strengthening PSA enforcement and protections to address new challenges and market imbalances that place producers at the mercy of vastly more powerful integrators with a track record of harming growers and manipulating wholesale markets is *exactly* what Congress intended. Thus, even if the Proposed Rule was somehow "extraordinary" such that the major questions doctrine applies (which it is not), the Rule is based on a "clear congressional authorization." *West Virginia*, 142 S. Ct. at 2609. Congress made and reaffirmed the policy goals underlying the PSA—fairness for livestock and poultry producers and, separately, protection of competitive markets—and the Proposed Rule and contemplated future rulemaking do no more than effectuate those policies.

This reasoning applies to this Proposed Rule, but also to what Commenters expect from subsequent PSA rulemakings AMS has announced. The "major questions doctrine" does not prohibit AMS from doing exactly what Congress has called upon it to do in clear terms, and industry fearmongering should not dissuade the Agency.

4. The PSA Authorizes AMS to Do More to Prohibit Practices, Devices, or Conduct Related to the Tournament System

Not only does the Proposed Rule easily pass legal muster, but indeed the PSA calls on AMS to do more and actually protect growers from abusive integrator conduct, not just inform them of the abuse to come. The tournament system as used by integrators today inherently leads to violations of the PSA because it facilitates and obscures integrators' prohibited conduct. Allowing such a high degree of control and discretion over critical factors in the grower-integrator relationship allows integrators to, for example, provide substandard inputs to a disfavored grower that leads to substantially reduced compensation and possibly financial ruin. Integrators are essentially unrestrained in their exercise of that discretion to use "unfair, unjustly discriminatory, or deceptive practice[s] or device[s]," or to work an "undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any

particular person or locality to any undue or unreasonable prejudice of disadvantage in any respect." *See* 7 U.S.C. § 192(a)–(b).

Current poultry growing contracting also allows integrators to pressure growers or potential growers into assuming large capital expenditures and debt at the discretion of an integrator, which experience shows can lock growers into cycles of debt that financially strains them and makes them vulnerable to an integrator's demands or abusive treatment.[4] Again, the transparency requirements in the Proposed Rule would provide essential information for growers to assess these and other risks, but "given the economic power imbalances and competition concerns that exist in today's [poultry] markets," conduct prohibited by the PSA is likely to persist without clear and enforceable prohibitions in subsequent rulemaking. *See* Tournament System Fairness ANPR, at 34817.

These problems are only made worse by the enormous market power and monopsony or oligopsony control integrators exert. Integrators' response to *this very modest* transparency rulemaking exposes the way they think of and interact with their growers. Instead of allowing their growers to engage in this public process as free members of our society, to voice their own perspectives and better inform AMS's efforts, they are "coercing farmers to oppose the rule" with form letters written by the integrator.[5] AMS should take this as yet more evidence that integrators routinely engage in practices that offend the PSA to undermine growers' interests.

Congress intended the PSA to go beyond earlier antitrust laws that only redress competitive harms after the fact by "halt[ing] unfair trade practices in their incipiency, before harm has been suffered." *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999) (quoting *Farrow v. U.S. Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985)). Merely informing growers that integrators hold all the cards, that a contract's terms are likely to facilitate the integrator's ability to engage in practices that should be clearly prohibited by § 192, or that an integrator is distributing inputs amongst growers in an unfair, unjustly discriminatory, deceptive, and/or unduly preferential or prejudicial way during the life of the contract will not accomplish Congress's goal of stopping such conduct "before harm has been suffered." *IBP, Inc.*, 187 F.3d at 977.

To "halt unfair trade practices in their incipiency," the PSA prohibits *conduct*, not merely the withholding of material information regarding that conduct. *See* 7 U.S.C. § 192(a)–(b). Requiring disclosure of features to commercial transactions between growers and integrators that will lead to these prohibited outcomes is not prohibiting the unlawful conduct—it merely gives growers tools to identify such conduct and assist in the private enforcement of their rights under the Act. As recognized nearly 90 years ago: "It has been the policy of the law to prohibit violations of provisions against preferences and discrimination." *Trunz Pork Stores, Inc. v. Wallace*, 70 F.2d 688, 690 (2d. Cir. 1934). The legislative history is clear that integrators are "prohibited from engaging in any unfair, deceptive, or unjustly discriminatory practices or device

[4] *E.g.*, Joe Fassler, *A New Class-Action Lawsuit Claims Poultry Processors Conspire to Keep Farmers Trapped and Dependent*, Counter (Feb. 1, 2017), http://thecounterorg.wpengine.com/chicken-farmer-collusion-suit/.
[5] Leah Douglas, *Big U.S. Chicken Company, Mountaire, Asks Contractors to Oppose Transparency Rule*, Reuters (Aug. 5, 2022), https://www.reuters.com/world/us/big-us-chicken-company-mountaire-asks-contractors-oppose-transparency-rule-2022-08-05/.

in the conduct of their business." *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 379 (5th Cir. 2009) (Garza, J., dissenting) (quoting H.R. Rep. No. 85-1048 at 1–2) (emphasis omitted). The Proposed Rule is important and will provide valuable informational benefits to growers, but AMS must also clearly prohibit the conduct used by integrators to violate the Act in a subsequent rulemaking.

B. Commenters Support the Live Dealer Disclosure Document and Suggest Improvements

Commenters support the Proposed Rule's requirement that integrators provide growers with a Live Dealer Disclosure Document at critical junctures in the relationship. The Disclosure Document's component parts—such as informing growers or potential growers that their pay will vary and that the integrator solely controls most of the variables that will determine their level of pay and of the minimum number of placement and stocking densities the integrator will provide—are missing terms to these agreements that are of such material importance that they can make or break a grower's financial viability. Additionally, as the Proposed Rule notes, growers are enticed into growing arrangements based on integrators' misleading presentation of simple average pay projections, which obfuscates the significant spread of actual grower pay dependent on relative performance within a tournament group. Requiring integrators to disclose average pay in quintiles across the compensation spread is critical. Numerous complaints and reports from growers show that these features of the existing grower-integrator dynamic are often the tools of unfair, discriminatory, or otherwise abusive conduct. *E.g.*, Proposed Rule at 34987.[6]

Commenters respectfully request that AMS consider the following points and responses to AMS's specific questions:

- **Recordkeeping Requirements.** Regarding proposed section 201.100(d)(4) (requiring an integrator to provide a summary of "any information the dealer collects or maintains" regarding growers' variable costs), AMS should impose recordkeeping requirements to ensure that integrators cannot skirt the requirement to provide information about grower variable costs by simply failing to maintain said information. Because these variable costs are material to the agreement, and integrators intentionally place those risks upon growers, such recordkeeping should be mandated under 7 U.S.C. § 221.

- **Governance and Certification.** Regarding proposed § 201.100(f) (governance and certification), Commenters support the effort to ensure more legal accountability. But Commenters are concerned that AMS may give too much flexibility to integrators to design their own governance and certification framework. Commenters request that AMS ensure this requirement is robust and proscriptive enough to effectively root out "the potential for a conspiracy of

[6] *See also* Food Integrity Campaign, *Craig Watts: Whistleblower Profile*, https://foodwhistleblower.org/profile/craig-watts/ (profiling Craig Watts, a former contract poultry grower for Perdue Farms and outspoken whistleblower exposing how large poultry firms control and abuse growers through predatory contacts and other business practices).

deception" within a company considering this type of conduct is already happening across companies. Propose Rule at 34996 (recognizing that "[c]urrent civil and criminal actions related to price fixing in the poultry industry, including admissions of guilt, suggest the potential for a conspiracy of deception among live poultry dealers").

- **Non-English Disclosures.** AMS inquires whether there are circumstances in which integrators should be required to provide the Disclosure Document in a language other than English. Commenters respond that a grower or prospective grower should have the right to request the Document in their primary language and that all applicable time limits be tolled until the integrator-offeror provides an adequate translation. The burden on a non-native English speaker to navigate these complicated arrangements if only provided in English drastically exceeds the minimal burden on an integrator to provide this information in the offeree's preferred language.

- **Environmental Compliance Costs.** Commenters request that AMS add to the Disclosure Document information about costs related to compliance with environmental regulations and proper waste disposal. Integrators typically place all liability for environmental compliance and proper waste disposal on growers, despite the integrator dictating nearly every facet of the operation that might alleviate or exacerbate those compliance burdens. *See, e.g.*, Evan Anderson, *Turning the Dirty Tide: The Farmer Fairness Act's Attempt to Create Integrator Liability*, 46 Iowa J. Corp. L. 199, 202–03 (2021); Susan M. Brehm, *From Red Barn to Facility: Changing Environmental Liability to Fit the Changing Structure of Livestock Production*, 93 Cal. L. Rev. 797, 799 (2005). AMS should require integrators to disclose typical environmental compliance costs for growers operating with similar systems as those imposed in the grower arrangement under consideration, and disclose aggregate information regarding past noncompliance issues and costs among its similarly situated growers. AMS should also require Integrators to clearly disclose what, if any, shared liability or responsibility the integrator has in the event of noncompliance. Environmental compliance costs can be significant, and as the poultry industry writ large causes ever greater environmental harm in certain regions of the country that necessitate more stringent regulatory controls, those compliance costs very well may increase. These are material and missing details that growers should know about up front.

C. Commenters Support Minimum Placements and Minimum Stocking Density Contract Terms

In addition to informing growers or potential growers of an integrator's intent to provide a minimum number of placements at minimum stocking densities in the Disclosure Document, Commenters support the inclusion of these minimums as binding contract terms. This would ensure that the material information in the Disclosure Document is an enforceable term of the agreement. Although, Commenters note that these minimum numbers still leave integrators essentially unrestrained in their ability to manipulate the quality of those placements.

Commenters[7] also request that AMS consider establishing a substantive floor to these minimum values that is commensurate with the degree of capital investment required of the grower under the agreement or that the integrator may impose at a future date. Growers and especially potential growers may not be well positioned to understand how the disclosed minimum values translate into actual income that can be used to satisfy debt obligations and other operating costs. AMS should establish that an integrator setting unreasonably low minimum values in light of required capital investments engages in an unfair and/or deceptive practice under section 192(a) because the integrator knows or should know that such an arrangement is likely to result in the financial demise of the grower. No concept in law[8] authorizes integrators to construct its commercial transactions in such a way that less informed, less powerful, and less sophisticated offerees are subject to patently unfair arrangements, especially when the PSA is designed to protect against that very kind of unfair commercial conduct. 7 U.S.C. § 192(a).

D. Commenters Support the New § 201.214 Tournament System Recordkeeping and Disclosure Requirements

Commenters generally support the proposed requirements in new section 201.214. Requiring an integrator to produce records showing how it distributed inputs to growers would allow for a higher degree of accountability when a grower alleges that an integrator has engaged in unduly preferential, retaliatory, or discriminatory conduct. Since integrators can and reportedly do use inputs to punish certain disfavored growers, and the variable nature and quality of those inputs can have dramatic financial outcomes within a tournament ranking system, creating and retaining these records for a minimum of five years will empower enforcement and could cause integrators to voluntarily pause before engaging in unlawful conduct.

Commenters also support the proposed requirement that integrators inform growers about the nature and quality of a flock provided by the integrator within 24 hours of placement. As the Proposed Rule notes, these disclosures could enable growers to adjust their management decisions regarding that flock to accommodate any shortcomings in the placement to avoid or at least offset reduced compensation upon settlement. Growers are tasked with raising and caring for the integrator's birds in a responsible manner, and this information is critical to their ability to do that.

Finally, Commenters support greater transparency in ranking system settlement documents for the same accountability benefits and potential to dissuade unlawful conduct as discussed above. Growers should be empowered to ascertain whether their success or failure is a result of their own hard work and skill or the integrator's whims.

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[7] Commenter ALDF does not support imposition of minimum stocking densities by AMS unless such densities are compatible with animal welfare.

[8] Indeed, the Supreme Court long ago dispensed with the notion that the Constitution protects a fundamental right to freedom of contract such that integrators are free to structure their business arrangements in unfair ways. *West Coast Hotel v. Parrish*, 300 U.S. 397 (1937) (holding that freedom of contract is not a fundamental right and government can protect workers in an unequal bargaining position against exploitation); *United States v. Carolene Products, Co.*, 304 U.S. 144 (1938). Since 1937, Commenters do not know of any economic regulation that has been found unconstitutional on the basis that it infringes on a "liberty" interest in freedom of contract.

Commenters respectfully request that AMS consider the following points and responses to AMS's specific questions:

- **Veterinary Care.** AMS must add veterinary care provided or withheld by the integrator in the required disclosures under proposed section 201.214(c). The provisioning of veterinary care to a flock—including the provision of medications and antibiotics—impact overall flock health, and therefore grower compensation. The impact veterinary care, or lack thereof, can have on tournament outcomes is similar to those of other inputs such as breeder flock age or feed quality, and should therefore also be disclosed. This would also provide more transparency into animal welfare practices among growers.

- **Reducing Deception.** AMS asks how well proposed section 201.214 will "reduce the chance of deception in the tournament payment system." Commenters believe that these transparency requirements are an important and necessary first step, but will not on their own substantially reduce integrators' ability or motivation to use deception in the system. AMS must move forward with restrictions on how integrators implement the tournament system in response to the Tournament System Fairness ANPR to accomplish this goal.

- **Future Performance.** AMS asks whether the proposed settlement information will help growers evaluate and improve their performance. Commenters do not believe that these disclosures alone will meaningfully allow growers to improve their future performance because the integrator remains able to manipulate the grower's ranking within a tournament group through variable inputs and group composition at its discretion. These disclosures appear most helpful for a grower to make out a case of unlawful conduct by the integrator, not meaningfully alter a grower's ability to determine future performance within tournament groups. Commenters again stress that AMS should not place the burden of enforcing the PSA on producers. AMS must move forward with restrictions on how integrators implement the tournament system in response to Tournament System Fairness ANPR to accomplish this goal.

- **Information Sharing.** Commenters request that AMS include the section 201.214 disclosures in a grower's right to discuss terms with others as provided in proposed section 201.100(b)(7) and (h). Because this information is critical to a grower's ability to ascertain whether their level of compensation is fair, and whether the grower's compensation can be attributed to their hard work and skill as opposed to the whims of an integrator, the same underlying reason for the right to discuss terms of a poultry growing arrangement applies here as well.

- **Breeder Farm Information.** Commenters request that AMS reverse its position that integrators only provide a breeder farm identifier as opposed to the breeding facility's name. Because of extreme vertical integration, many breeding facilities are owned by the integrator that then delivers chicks to a grower. Were growers to

know the actual name of breeders, they may be able to independently assess relevant variables or issues and would not have to rely on the integrator's potentially self-interested representations to the same degree.

- **Feed Disruptions.** Commenters request that AMS shorten the amount of time that a grower can be completely out of feed before triggering the integrator's responsibility to disclose that disruption as part of the settlement disclosures. Operating a poultry growing operation without any feed for the flock can have serious consequences on animal health and tournament outcomes, and growers should know whether an integrator's failure to provide a constant supply of feed is unique to them, widespread, or a fluke occurrence. Commenters support AMS's suggestion to at least shorten this time to six hours, but suggest that *any* period of time where the integrator has failed to provide feed to a grower should be disclosed. Growers may even face civil or criminal liability for failing to provide access to feed to livestock under their care, which is an additional cost and concern that growers should not have to deal with considering feed delivery is out of their control. *See, e.g.*, Neb. Rev. Stat. § 54-902 (defining "Abandonment," which is punishable as a Class I misdemeanor or a Class IV felony under Nebraska law, to mean "to leave a livestock animal [including poultry] in one's care, whether as owner or custodian, *for any length of time* without making effective provision for the livestock animal's feed, water, or other care as is reasonably necessary for the livestock animal's health" (emphasis added)).

III. Conclusion

Commenters thank AMS for taking the first step towards strengthening PSA regulations to protect poultry growers from rampant integrator abuse. The Proposed Rule is more than justified by the PSA, it is required. So too is further rulemaking to clearly prohibit the conduct integrators use to treat growers in unfair, unreasonable, and discriminatory ways. Commenters encourage AMS to move swiftly to adopt the necessary protections that will begin to rein in these abusive practices.

Sincerely,

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On behalf of:

Food & Water Watch
Animal Legal Defense Fund
Broad Riverkeeper

Buffalo River Watershed Alliance
Campaign for Family Farms and the Environment
Catawba Riverkeeper
Center for Food Safety
Center for a Livable Future
Farm and Ranch Freedom Alliance
Friends of the Earth
Public Justice
Socially Responsible Agriculture Project
Ranchers Cattlemen Action Legal Fund United Stockgrowers of America
Waterkeeper Alliance

EXHIBIT B

September 26, 2022

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Submitted to Regulations.gov, Docket AMS-FTPP-22-0046

Re: Poultry Growing Tournament Systems: Fairness and Related Concerns

The undersigned organizations (collectively, "Commenters") respectfully submit these comments in response to the U.S. Department of Agriculture, Agricultural Marketing Service's ("AMS") Poultry Growing Tournament Systems: Fairness and Related Concerns advanced notice of proposed rulemaking, AMS-FTPP-22-0046 ("ANPR"). While AMS's proposed rule addressing transparency in poultry tournament system contracting is an important first step,[1] the extreme consolidation and market power accumulated by a small number of poultry integrators means that transparency alone is not enough to cure systemic unfair, discriminatory, deceptive, and unreasonably preferential conduct by integrators. The top four poultry integrators control 54% of the national market, with many local and regional markets controlled by just one or two integrators.[2] A majority of growers or potential growers have only one or two integrators to choose from, with nearly a quarter of all poultry production occurring in markets with just a single integrator.[3] And a substantial portion of the nation's poultry production occurs under the tournament system.[4] Better information for growers only matters if another live poultry dealer is offering a better deal to attract grower services; transparency alone cannot cure market failures and will not allow for growers to improve their situation when integrators have eliminated

[1] Transparency in Poultry Grower Contracting and Tournaments, 87 Fed. Reg. 34980 (June 8, 2022), Docket AMS-FTPP-21-0044 (hereinafter "Transparency PR").
[2] *The Biden-Harris Action Plan for a Fairer, More Competitive, and More Resilient Meat and Poultry Supply Chain*, WHITE HOUSE (Jan. 3, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/fact-sheet-the-biden-harris-action-plan-for-a-fairer-more-competitive-and-more-resilient-meat-and-poultry-supply-chain/.
[3] Transparency PR, at 35005.
[4] James M. MacDonald & Christopher Burns, *Marketing and Production Contracts Are Widely Used in U.S. Agriculture*, USDA ECONOMIC RESEARCH SERVICE (July 1, 2019), https://www.ers.usda.gov/amber-waves/2019/july/marketing-and-production-contracts-are-widely-used-in-us-agriculture/; AMS, AGRICULTURAL COMPETITION: A PLAN IN SUPPORT OF FAIR AND COMPETITIVE MARKETS at n.42 (May 2022), https://www.ams.usda.gov/sites/default/files/media/USDAPlan_EO_COMPETITION.pdf.

meaningful competition and use the tournament system to distort production markets. Substantive prohibitions and restrictions on how integrators use the tournament system are necessary to realize fairness in poultry contracting, foster competition, and accomplish the goals of the Packers and Stockyards Act ("PSA" or "the Act").

Raising birds is the riskiest step in the poultry production process and integrators not only deliberately shift nearly all that risk onto growers, but also dictate nearly every facet of how a grower may operate.[5] Risks growers face include illness in flocks, low quality inputs, income variability, and environmental noncompliance. Unfair practices by integrators often exacerbate these risks. Integrators also require growers to undertake large capital investments that typically require a grower to assume large amounts of debt.[6] As one economist explained it, "Integrators do not wish to tie up half of their assets in the grow-out function when better profit opportunities exist elsewhere, yet they want control of this important stage of the vertical system."[7] This system raises inherent fairness concerns because integrators use their market power to get the best of both worlds, foisting risks and liabilities on growers who have dramatically less bargaining power and few to no other options, while accruing most of the benefits. Integrators control all the levers from egg to slaughter and dictate all of the most important variables that determine whether a grower will succeed. Inherent to this system is essentially unbridled integrator control and discretion, which the evidence shows leads to unfair, discriminatory, deceptive, and unreasonably preferential conduct. In fact, integrators have repeatedly engaged in unreasonable retaliation and discrimination against growers *during USDA rulemakings* intended to address integrator abuses.[8] In other words, current poultry contracting is deeply asymmetrical and unfair, and allows integrators to obscure unlawful conduct through the vast discretionary control they are able to exert over growers. AMS must move forward with rulemaking to prohibit and restrict the unlawful and abusive conduct rampant in poultry growing contracting, especially under the tournament system, to begin to remedy these problems.

AMS has the authority and obligation to promulgate those strong prohibitions and restrictions on how integrators contract with growers. Designed to halt unfair, discriminatory, deceptive, and other conduct before integrators harm producers or engage in anticompetitive practices, the PSA is a comprehensive and purposefully broad statute. USDA has ample evidence, and will collect more via this ANPR, that integrators are routinely violating sections

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[5] PEW CHARITABLE TRUSTS, The Business of Broilers: Hidden Costs of Putting a Chicken on Every Grill 16–19 (2011) (hereinafter "The Business of Broilers"), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/peg/publications/report/businessofbroilersreportthepewcharitabletrustspdf.pdf.

[6] *E.g.*, James M. MacDonald, U.S. DEP'T OF AGRIC. ECON. RSCH. SERVICE, EIB #38, The Economic Organization of U.S. Broiler Production 8 (June 2008); The Business of Broilers, *supra* note 5, at 23 ("Most growers borrow the capital for building modern poultry houses.").

[7] The Business of Broilers, *supra* note 5, at 22 (quoting Richard T. Rogers, professor of resource economics at the University of Massachusetts, Amherst).

[8] Transcript of Public Workshops Exploring Competition in Agriculture: Poultry Workshop, at 165 (May 21 2010), https://www.justice.gov/sites/default/files/atr/legacy/2010/11/04/alabama-agworkshop-transcript.pdf (hereinafter "2010 Poultry Workshop") ("[N]umerous growers are not attending these workshops because of being afraid of retaliation on them by their integrator. A grower this morning has already been threatened by his service person if he attends and speaks at this forum."); Leah Douglas, *Big U.S. Chicken Company, Mountaire, Asks Contractors to Oppose Transparency Rule*, REUTERS (Aug. 5, 2022), https://www.reuters.com/world/us/big-us-chicken-company-mountaire-asks-contractors-oppose-transparency-rule-2022-08-05/ (USDA "has heard concerns about companies coercing farmers to oppose the rule").

192(a) and (b) of the PSA through their abuse of growers and manipulation of production markets. Congress intended the PSA to foreclose the very circumstances presently facing poultry producers and poultry markets, but now that we are here it is imperative that AMS exercise its authorities under the Act to restore fairness and competition. Commenters support AMS in its efforts to strengthen the PSA through this ANPR and subsequent rulemakings.

I. Interests of Commenters

Commenters are a diverse group of non-profit organizations representing farmer, sustainable agriculture, environmental, animal welfare, public health, and consumer interests. Collectively, Commenters represent millions of members and supporters across the country.

Food & Water Watch ("FWW") is a national, nonprofit membership organization that mobilizes regular people to build political power to move bold and uncompromised solutions to the most pressing food, water, and climate problems of our time. FWW uses grassroots organizing, media outreach, public education, research, policy analysis, and litigation to protect people's health, communities, and democracy from the growing destructive power of the most powerful economic interests. FWW has long advocated for better controls over integrators to protect farmers, consumers, and the environment.

The **Buffalo River Watershed Alliance** ("BRWA") is a non-profit, 501(c)(3) volunteer organization created in early 2013 in direct response to the first and largest hog CAFO of its kind in Arkansas. BRWA was organized by stakeholders living in the Buffalo River watershed, but its supporters span the state and region. Its mission is to help preserve and protect the scenic beauty and pristine water quality of the Buffalo National River by opposing and preventing the construction and proliferation of industrial concentrated animal feeding operations within the watershed. After the successful closing of the swine CAFO in 2019, BRWA continues to monitor developments that could threaten the watershed. This includes continued work on a permanent moratorium on hog CAFOs in the watershed as well as monitoring other threats such as the spread of agricultural waste beyond agronomic need and plans for extensive logging in the headwaters of the watershed.

The **Campaign for Family Farms and the Environment** ("CFFE") is a coalition of state and national organizations, including Dakota Rural Action (SD), Iowa Citizens for Community Improvement, Land Stewardship Project (MN), Missouri Rural Crisis Center, Food & Water Watch and Institute for Agriculture and Trade Policy. We work together to support family farmers, rural communities and a vibrant, sustainable food system.

Food Animal Concerns Trust ("FACT") is a national non-profit organization that was founded in 1982. FACT believes that all food-producing animals should be raised in a humane and healthy manner, and that everyone should have access to safe and humanely produced food. To achieve this vision, FACT partners with, and invests in, livestock and poultry producers who raise their animals in well-managed, pastured-based systems. FACT increases knowledge and skills related to good grazing practices by providing farmers and ranchers with funding, training and educational opportunities. FACT also advocates for strong corporate and government

policies such as ending the overuse of antibiotics on farms, banning dangerous veterinary drugs, and requiring farms to control foodborne pathogens.

Friends of the Earth ("FOE"), founded by David Brower in 1969, fights to create a healthy and just world. Our Climate-Friendly Food Program aims to reduce the harmful impacts of industrial animal agriculture and build a more just and resilient food system through policy change and by reducing institutional purchases of industrial meat and dairy while driving increased demand for plant-based foods and organic, high welfare, and pasture-raised animal products.

Institute for Agriculture and Trade Policy ("IATP") is a nonprofit that works locally and globally at the intersection of policy and practice to ensure fair and sustainable food, farm, and trade systems. IATP works to reduce the harmful economic, environmental and social impacts of industrialized animal agriculture and promote farmer empowerment and agroecological systems.

The **Johns Hopkins Center for a Livable Future** ("CLF") operates out of the Johns Hopkins Bloomberg School of Public Health from the Department of Environmental Health and Engineering and works with students, educators, researchers, policymakers, advocacy organizations and communities to build a healthier, more equitable and resilient food system.

Public Justice is a national public interest advocacy organization that specializes in connecting high-impact litigation with strategic communications and the strength of our partnerships to fight these abusive and discriminatory systems and win social and economic justice. The Public Justice Food Project employs those techniques to take on industrial animal agriculture and its ills. Among its work, it is presently advocating alongside poultry growers and ranchers to stop anticompetitive practices facilitated by industry and USDA.

Socially Responsible Agriculture Project ("SRAP") has served as a mobilizing force for more than 20 years to help communities protect themselves from the damages caused by industrial livestock operations and to advocate for a food system built on regenerative practices, justice, democracy, and resilience. Our team includes technical experts, independent family farmers, and rural residents who have faced the threats of factory farms in their communities. When asked for help, SRAP offers free support, providing communities with the knowledge and skills to protect their right to clean water, air, and soil and to a healthy, just, and vibrant future.

Waterkeeper Alliance is the largest and fastest-growing nonprofit solely focused on clean water. The organization works to preserve and protect water by connecting and mobilizing more than 300 local Waterkeeper groups worldwide. Waterkeeper Alliance strengthens and grows this global network of grassroots leaders, and also engages in advocacy work to organize, educate, and litigate to ensure all habitable watersheds on earth are drinkable, fishable, and swimmable.

The **Western Organization of Resource Councils** ("WORC") is a network of eight grassroots organizations (located in Colorado, Idaho, Montana, Montana's seven Native American reservations, North Dakota, Oregon, South Dakota, and Wyoming) with 18,435

members and 39 local chapters. WORC's mission is to advance the vision of a democratic, sustainable, and just society through community action. WORC is committed to building sustainable communities that balance economic growth with the health of people and stewardship of their land, water, and air resources.

II. AMS Has the Legal Authority and Mandate to Proceed with Rulemaking to Prohibit Certain Poultry Contracting Practices

In this section, Commenters respond to the ANPR's questions regarding the scope of the PSA and what the Act does or does not authorize AMS to do. Congress delegated to AMS the authority to prohibit integrators from "engaging in any unfair, deceptive, or unjustly discriminatory practices or device in the conduct of their business." H.R. Rep. No. 85-1048, at 1–2 (1957). Upon its enactment, legislators described the PSA as "a most comprehensive measure [that] extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act." H.R. Rep. No. 67-77, at 2 (1921). Prohibiting or otherwise regulating the tournament system is well within the scope of the PSA and AMS's authority because USDA has ample information, and will gather more through this ANPR, to establish certain practices as unfair, unjustly discriminatory, or deceptive, or giving an undue or unreasonable preference or advantage in violation of the PSA. *See* 7 U.S.C. § 192(a)–(b).

The prohibitions found in section 192 of the PSA are robust and purposefully broad:

It shall be unlawful for … any live poultry dealer with respect to live poultry to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or

(b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.

The Act and these prohibitions are intended to "halt unfair trade practices in their incipiency, before harm has been suffered," not just remedy harms after the fact. *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999) (quoting *Farrow v. U.S. Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985)); *De Jong Packing Co. v. USDA*, 618 F.2d 1329, 1336–37 (9th Cir. 1980). Furthermore, because the PSA is remedial legislation, it must be construed liberally "in accord with its purpose to prevent economic harm to producers and consumers." *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Farrow*, 760 F.2d at 214; *Been v. OK Industries Inc.*, 398 Fed. Appx. 382, 392 (10th Cir. 2010).

However, because USDA has never defined the key terms in section 192 via rulemaking, integrators have for decades been able to exploit uncertainty around what practices or conduct violates the Act, leading to unfair and otherwise unlawful conduct to become a pervasive feature

of poultry growing arrangements. This has left USDA unable to fully implement the "liberal construction" appropriate for the PSA. *See Farrow*, 760 F.2d at 214. Thus, AMS must define "unfair" and other key terms to ensure that they capture integrator practices that substantially harm growers with no reasonable justification.[9] By doing so, AMS can avail itself of the "liberal construction" appropriate for the PSA. And in recognition that the PSA was intended to go beyond earlier antitrust laws such as the Sherman and Clayton Acts, AMS must clarify that while the PSA is designed to protect competition, it *also* protects producers from the abuses of packers and live poultry dealers — injury to competition is therefore not a necessary element to every violation of the PSA. *See* 7 U.S.C. § 192(a)–(b).[10] To read a harm to competition requirement into sections 192(a) or (b) is textually incoherent and violates the canon of statutory construction against rendering statutory provisions "surplusage," as other subsections of 192 already prohibit anticompetitive conduct. *See, e.g.*, *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 375 (5th Cir. 2009) (Garza, J., dissenting) (finding that the majority's reading "makes no sense" and violates the "basic precept of statutory construction that we should give effect to every clause and word of a statute where possible" (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001))). This is USDA's long-standing position, and AMS should codify it to carry out the provisions of the Act. *See* 7 U.S.C. § 228(a); *see also Been v. OK Industries Inc.*, 495 F.3d 1217, 1239 (10th Cir. 2007) (Hartz, J., dissenting) (noting that USDA's position goes back decades and arguing it should receive some degree of deference even without rulemaking).

Furthermore, USDA's lack of adjudicatory authority over violations of sections 192(a) & (b) by live poultry dealers does not reduce AMS's authority to promulgate rules defining the scope of the Act's application to live poultry dealers. AMS has clear authority to promulgate rules "necessary to carry out the provisions" of the Act and USDA is authorized to "cooperate with any department or agency" in doing so. 7 U.S.C. § 228(a). Enforcing the protections of the Act against live poultry dealers, which can be done by growers themselves under 7 U.S.C. § 209 or by the U.S. Department of Justice in "cooperation" with USDA, is a necessary function of the PSA. Only USDA has authority to define what conduct is prohibited. Therefore, AMS should receive substantial deference for its interpretation of the statute via rulemaking pursuant to 7 U.S.C. § 228(a). *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (stating that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference

[9] The effectiveness of a rule that springs from this ANPR will depend in part on AMS's other PSA proposed rulemakings to ensure they are complementary and establish strong foundations for prohibitions and enforcement actions. *See* Unfair Practices in Violation of the Packers and Stockyards Act (AMS-FTPP-21-0045); Clarification of Scope of the Packers and Stockyards Act (AMS-FTPP-21-0046).

[10] Proving an impact to competition is not required by the PSA, and AMS can overcome court opinions to the contrary by promulgating regulatory definitions of the terms used in section 192(a) and (b) that are true to the statutory text. *See Swift & Co*, 393 F.2d at 253 ("Section 202(a) of the Act does not require the Government to prove injury to competition." *citing Wilson & Company v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961)); *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 375 (5th Cir. 2009) (Garza, J., dissenting) (outlining why the PSA's plain text does not require harm to competition); *M&M Poultry v. Pilgrim's Pride Corp.*, 2015 U.S. Dist. LEXIS 195184 at *19–21 (D.W.V. Oct. 26, 2015) ("only a strained reading of the statute could require that practices that are 'unfair' or 'deceptive' within the meaning of § 192(a) must also be 'monopolistic' or 'anticompetitive' to be prohibited"); Michael Kades, Washington Center for Equitable Growth, Protecting Livestock Producers and Chicken Growers 38–51 (May 2022), https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/ (providing overview of caselaw and why section 192(a) and (b) do not require this showing).

was promulgated in the exercise of that authority"). Cases concluding that USDA receives no deference when interpreting the PSA for purposes of adjudicating violations by live poultry dealers are distinguishable because they dealt with enforcement actions brought by private parties who argued that USDA's informal position should receive deference. *See London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1304 (11th Cir. 2005); *Been*, 495 F.3d at 1238; *Org. for Competitive Mkts. v. USDA*, 912 F.3d 455, 457 (8th Cir. 2018). The *Been* court distinguished a promulgated rule from the less authoritative agency statements to which it would not afford any deference. 495 F.3d at 1227 ("Here, however, the Secretary has not promulgated a regulation applicable to the practices the Growers allege violate § 202(a)….").

The PSA not only authorizes AMS to prohibit or curtail specific integrator practices, but requires it when, as here, AMS has evidence that a practice has been used and is likely to be used by integrators to engage in violations of the PSA that substantially harm growers and/or distort properly functioning markets.[11] The unfortunate reality is that this evidence shows USDA has long been asleep at the wheel and allowed "harm [to be] suffered" despite the Act's intent to halt such harms in their incipiency. *IBP, Inc. v. Glickman*, 187 F.3d at 977; *De Jong Packing Co.*, 618 F.2d at 1336–37. USDA has already fallen behind on its obligation to protect producers and markets because of decades of poor enforcement and uncertainty as to what the PSA prohibits in poultry markets.

AMS can do better. In fact, past USDA enforcement of section 192 against livestock dealers shows that the kinds of practices now the norm in poultry production markets violate the PSA. In *Swift & Co. v. United States*, USDA successfully enjoined a livestock dealer from manipulating production markets by refusing to purchase directly from producers in favor of purchasing from a dealer. 393 F.2d 247. Doing so virtually eliminated competition among buyers willing to purchase from the local market's producers. As the Seventh Circuit recognized, "lack of competition between buyers, with the attendant possible depression of producers' prices, was one of the evils at which the Packers and Stockyards Act was directed." *Id.* at 254 (citing Meat Packer Legislation hearings before the House Committee on Agriculture, 66th Cong., 2d Sess., pp. 22, 229, 250, 303, 1047, 2284 (1920)). Yet, poultry integrators have accomplished the same end, but even more effectively than the livestock dealers at issue in *Smith*, through extreme consolidation and the imposition of take-it-or-leave-it, predatory production contracts on growers. Current, abusive and anti-competitive conditions in poultry production, and especially within the tournament system, are not an accident or a reflection of free market efficiencies, they are the result of a deliberate campaign by integrators to eliminate competition and secure captive producers beholden to integrator demands, unable to resist their abuses. This violates section 192 of the PSA.

Growers have been complaining about harmful integrator practices to USDA for decades, and USDA has conducted substantial fact finding that supports better grower protections.[12] AMS should establish regulatory presumptions, based on the ample evidence compiled by USDA, researchers, and advocates that integrators' use of the tournament system involves practices that inherently violate the prohibitions of section 192. *See Cole v. USDA*, 33 F.3d 1263, 1267 (11th

[11] *See, e.g.*, 2010 Poultry Workshop; The Business of Broilers, *supra* note 5. Comments submitted to this ANPR are likely to provide additional, ample evidence from growers.
[12] *E.g.*, 2010 Poultry Workshop, at 165.

Cir. 1994) (a regulatory presumption is valid "if there is some rational connection between the facts proved and the ultimate fact presumed, and the inference of one fact of proof of another is not so unreasonable as to be a purely arbitrary mandate" (quoting *Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511, 1517 (11th Cir. 1984))). Such presumptions will enable AMS to clearly and confidently delineate the rules of poultry growing contracting, providing clarity to integrators and empowering growers and regulators.

As discussed in the next section, AMS should flatly prohibit or at least significantly restrict several widespread practices in the tournament system. USDA has amassed a more than sufficient body of evidence that these practices cause substantial harm to growers and are used to weaponize integrators' excessive market power to achieve unfair, deceptive, or otherwise violative ends. Under these circumstances, the PSA dictates that AMS should use its regulatory authority to end integrators' abuses and market manipulations.

III. Responses to Select Enumerated Questions

AMS must move forward with a proposed rule that addresses the well-documented problems with poultry grower contracting and use of the tournament system. Even after AMS finalizes the tournament system transparency rule, the contracting system will continue to facilitate and obscure integrator abuses as well as market distortions that violate the plain text of the PSA.

Commenters provide the following responses to specific questions posed in the ANPR to assist AMS in development of a robust and defensible poultry contracting fairness rule.

A. What specific practices under the tournament system are the most problematic?

Growers have consistently complained of specific conduct the integrators use to abuse growers for over a decade. Those firsthand accounts and experiences should be AMS's guiding light as it proceeds to a proposed rule.

Based on those accounts, these are some of the most problematic practices under the tournament system:

- **Lack of guaranteed base pay**. Growers are enticed by integrators' representations that they can expect income in line with a simple average of all the integrator's growers, which obscures the realities of the tournament system where every settlement group must have winners and losers regardless of the quality of an individual grower's performance. Without a sophisticated understanding of how inputs are distributed (which is impossible at present because integrators hide this information) and how the quality of those inputs may affect flock performance, growers and especially potential growers may not understand the uncertainty of their position or the distorting effects of the payment system. This system has long harmed growers "because they have no

way of estimating in advance how much to expect in payment."[13] Requiring a guaranteed base pay, while retaining an objective bonus system for higher-performing growers, is a commonsense safeguard that some of the largest integrators have already agreed to adopt. United States v. Cargill Meat Solutions Corp., et al.; Proposed Final Judgment and Competitive Impact Statement, 87 Fed. Reg. 57028, 57048, 57050 (Sept. 16, 2022).

- **Integrators providing poor inputs such as chicks, feed, or veterinary care**. In the current system, poor inputs provided by the integrator become the growers' problem during tournament group settlement, despite growers having no control over the quality of the inputs. Input variability has major ramifications for flock performance, which ends up dictating grower compensation in the relative ranking of a tournament group. *E.g.*, 2010 Poultry Workshop, at 98–99; Michael Kades, Washington Center for Equitable Growth, Protecting Livestock Producers and Chicken Growers 21–22 (May 2022), https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/. Integrators are thus able to deliver, or even dump, substandard inputs on growers with little to no risk to themselves. This structure has no market benefits, as substandard inputs decrease output. The only rationale for this system is to provide integrators a tool to punish and/or transfer the risks of their own low-quality products onto growers.

- **Variable and uncertain flock placements**. Allowing integrators to exercise unbridled discretion over whether and when to place a flock with a grower and how many birds will be in a flock gives integrators complete control over a growers' income and future as a poultry grower. *Id.* at 190–91 ("You have to do as you are told or you could be refused placement of birds of could face a drop in the number of birds place[d] or worse."), 284–85 (explaining that the integrator "was trying to figure out a way to extend my out time"), 338 ("They cut my placement, which cuts my pay"). In addition to being a tool of retaliation, and obscuring retaliation or other unreasonable and abusive conduct, increasing the time between flock placements, also known as "out time," can have dire effects on a growers' financial stability but "benefits the integrators" who "manipulate out times" so that growers are essentially "subsidizing the success" of the integrator. *Id.* at 150. Once again, there is no market benefit here and only facilitates integrator abuses and market manipulation.

- **Contract durations that are out of step with the large capital investments required of the grower under the contract**. Integrators require growers to make long-term capital investments for single purpose infrastructure that is not only suitable only for poultry production, but is often so specialized that it is only acceptable to a single integrator. *Id.* at 73 (explaining that "if you end up trying to go to another integrator; then that integrator is going to say, 'Well, you know, you're going to have to make all these changes'"). Yet, the integrator retains discretion to cancel the contract on a much shorter timeline, sometimes after just

[13] *See, e.g.*, Armando Levy & Tomislav Vukina, *The League Composition Effect in Tournaments with Heterogeneous Players: An Empirical Analysis of Broiler Contracts*, 22:2 J. LABOR ECON. 353, 356 (2004).

one flock. *Id.* at 105 ("they can cancel my contract at any time"), 348 (speaker on behalf of a grower who was "cut off of chickens" and the integrator "pulled his contract"); Transparency PR, at 34986 ("However, live poultry dealers write production contracts for substantially shorter terms, with contract durations ranging from a few weeks (the time needed to raise one flock) to five years" compared with the typical 15-year mortgage). Integrators also demand costly "upgrades" that some growers have reported to be arbitrary and apparently untethered to any reasonable assurance of increased compensation. *E.g., id.* at 93, 105–06 ("These upgrades usually cost a substantial amount of money, which means I've got to take out another loan. And when I do that I'm not necessarily reimbursed for it by the company in any way."), 114–17, 139–140. This places growers in deeply vulnerable positions, where they have little choice but to do whatever the integrator says or otherwise leave the business altogether and abandon their investments, forcing growers into crushing cycles of debt. Integrators know as much and use this to further advantage their position. *See* Kades, Protecting Livestock Producers and Chicken Growers at 10. Such capital requirements create artificial exit costs that further the creation of functional monopsonies.

- **Retaliation against growers who do not walk the company line**. Growers have long complained to USDA that they are subjected to retaliation through a variety of mechanisms when they speak out against the industry or otherwise do anything that displeases their integrator. 2010 Poultry Workshop, at 101, 108, 165, 216, 292–93, 343. "The threat of retaliation for a grower speaking out publicly is well documented." *Id.* at 193–94. This lack of accountability has no place in a functioning market.

B. Which practices should be addressed through regulatory or other administrative steps? Are regulatory steps the only path to curbing these practices?

As explained above, AMS has ample authority to prohibit or restrict integrator conduct to remedy the well-established harms caused by the tournament system and integrators' ability to surreptitiously engage in conduct that violates section 192. Regulations clearly prohibiting such practices are necessary.[14] Voluntary or otherwise discretionary approaches will not yield more fair and equitable poultry growing markets. This is not an industry interested in doing better by growers of their own volition; therefore, regulatory action to compel better conditions is necessary.

AMS should prohibit the following practices:

- **Reducing grower compensation below an established base pay**. AMS should prohibit integrators from paying below an established base pay for any growers that have reasonably performed under the contract. This guaranteed base pay

[14] As noted above, USDA's failure to promulgate rules in this area has allowed integrators to exploit uncertainty and has led some courts to impose atextual requirements that severely limit the protections Congress intended growers to enjoy. *See* Kades, Protecting Livestock Producers and Chicken Growers, at 38–51.

should be set as a minimum payment per square foot of poultry house at the grower's facility. Because integrators control nearly every variable that may place a grower near the bottom or top of a settlement group, integrators should not be able to hedge their risk by underpaying growers irrespective of that individual grower's absolute performance. Integrators also dictate the configuration and size of poultry houses used to raise birds. By requiring a minimum pay based on the square footage of a grower's poultry house(s), the impacts of integrators' unilateral decisions regarding capital investments, various inputs and flock densities will be properly borne by the integrator and not unfairly shifted to the grower. That some of the largest integrators have already accepted similar requirements shows that this is reasonable and doable. 87 Fed. Reg. at 57048, 57050.

- **Arbitrary bonus payments above established base pay.** Integrators should be allowed to provide bonus payments above the guaranteed base pay. But such bonus payments must be determined by objective, transparent criteria to eliminate avenues of integrator abuse via discrimination and/or undue or unreasonable preferences or advantages. Growers should be able to assess what metrics will lead to bonus payments, thereby catering their performance accordingly. This would also allow growers and AMS to objectively assess whether an integrator is fairly issuing bonus payments.

- **Inequitable distribution of inputs**. Where a grower's compensation depends in any way on their performance relative to other growers, AMS should require the integrator to equitably distribute inputs among settlement group participants. Additionally, AMS should make clear that manipulating input distribution for any end other than ensuring equitable distribution is an unfair and unreasonably preferential or unduly prejudicial practice prohibited by section 192. Delivering substandard inputs or withholding high quality inputs without offsetting the impacts to the grower's ultimate performance (and compensation) is an unfair and deceptive (and anticompetitive) practice. If integrators wish to offload risk to growers but retain control over nearly every aspect of how a grower operates, they must be barred from unfair or deceptive conduct and unreasonable preferences in the distribution of the inputs they control and require growers to accept and use.

- **Retaliatory or discriminatory conduct**. The PSA prohibits discrimination and retaliation because they are by definition unreasonable preferences or advantages and/or undue prejudice or disadvantage. *See* 7 U.S.C. § 192(b). But enforcing this prohibition is difficult because of the opaque nature of the tournament system and grower contracting generally. In other words, because integrators have such control and discretion, they can easily obscure retaliatory or discriminatory conduct as benign business operations. The tournament system facilitates this unlawful conduct. AMS should mandate that integrators create, retain, and produce to AMS important records regarding administration of any tournament system. AMS can impose this requirement under 7 U.S.C. § 221 (empowering AMS to require integrators to "keep such accounts, records, and memoranda as

fully and correctly disclose all transactions involved in its business"). At a minimum, these recording keeping requirements should cover input distribution, veterinary care provided while birds are with a grower, tournament group composition, actual grower compensation, and the number and timing flock placements and flock densities for each placement. By requiring this information be compiled and retained, AMS will be in a much better position to assess grower complaints of an integrator's disparate treatment of similarly situated growers.

AMS should restrict the following practices:

- **Mismatch between contract duration or integrator obligations and capital investment requirements**. AMS should place limits on disparities between what a growing arrangement promises in terms of flock placements and the duration of the contractual relationship, and the capital investments required by an integrator. Integrators' practice of demanding large capital investments without commensurate assurances of income springing from those investments is an unfair and deceptive practice or device in violation of section 192(a). AMS should prohibit integrators from arbitrarily canceling contracts without just cause, especially when the integrator had made capital investment demands of the grower within the previous five years. AMS should also prohibit integrators from demanding "upgrades" or other infrastructure modifications without pairing them with assurances of compensation sufficient to service the debt plus a reasonable profit for the grower. Just as the FTC has restricted certain business conduct that places an undue burden on consumers as unfair under the Federal Trade Commission Act,[15] AMS should establish that imposing massive debt on growers to advance integrators' interests without commensurate assurance of reasonable compensation for grower services is unfair and deceptive and violates section 192(a). This should also lead integrators to be more efficient and responsible with such demands because they would have a financial stake in the use and utility of such investments. *See* 2010 Poultry Workshop at 124–25.

- **Manipulating tournament group composition**. AMS should limit integrators' discretion to structure settlement groups for purposes of determining bonus payments above the guaranteed base pay. Instead, integrators should be required to place similarly situated growers together to the maximum extent possible. And AMS should clearly prohibit manipulating tournament group composition unless it has a reasonable business justification and is not unduly harmful to any grower. Growers should be secure in knowing that their compensation is based on their performance, not the machinations of an integrator that picks and chooses who a grower must compete with for bonus compensation (and if AMS fails to impose guaranteed base compensation, restrictions here are even more imperative).

[15] Examples include the Credit Practices Rule, which protects against unfair terms and conditions in credit contracts, 16 C.F.R. Pt. 444, and stopping oil companies from using coercive contracts where they are the dominant firm and have used their market power to impose onerous terms that furthered their own competitive advantages, *Alt. Reg. Co. v. FTC*, 381 U.S. 357, 368–72 (1965); *FTC v. Texaco, Inc.*, 393 U.S. 223, 225–30 (1968); *Shell Oil Co. v. FTC*, 360 F.2d 470, 475–78 (5th Cir. 1966).

- **Placing environmental compliance liability on growers**. AMS should require integrators to share the liability associated with environmental permitting and compliance. Integrators typically place all liability for environmental compliance and proper waste disposal on growers, despite the integrator dictating nearly every facet of the operation that might alleviate or exacerbate those compliance burdens. *See, e.g.*, Evan Anderson, *Turning the Dirty Tide: The Farmer Fairness Act's Attempt to Create Integrator Liability*, 46 Iowa J. Corp. L. 199, 202–03 (2021); Susan M. Brehm, *From Red Barn to Facility: Changing Environmental Liability to Fit the Changing Structure of Livestock Production*, 93 Cal. L. Rev. 797, 799 (2005). AMS should regulate this practice to ensure that integrators share responsibility for the environmental hazards their dictates create. Because integrators dictate nearly every aspect of how a grower conducts their operation, and those requirements result in substantial liability for the environmental harm associated with the integrators' intensive production methods, it is an unfair and deceptive practice to create environmental liability and then assign that responsibility to growers who do not have the flexibility to operate in less environmentally destructive ways. This is an example of integrators shifting risk to growers with absolutely no benefit to the grower. Integrators mandate the environmental risk, require operations to operate with methods and at scales that often trigger permitting requirements and unavoidably harm the environment and public health, and should similarly bear the liability. AMS could require contractual terms to accomplish this, or it could require that integrators appear as co-permittees in any environmental protection permit required of a grower serving that integrator.

C. Conditional approaches to the tournament system.

Each of the proposed conditions to make the tournament system less problematic are important changes that Commenters support. But standing alone, none of the proposed conditions can remedy the harms imposed and the illegal conduct facilitated by the tournament system. Therefore, Commenters oppose continued use of the tournament system conditioned on only one or more of the proposed conditions. Each of the regulatory prohibitions and restrictions outlined above are necessary to realizing fairness in poultry grower contracting.

D. What role can reforms of lending and loan guarantee systems play to ensure better alignment between borrowers and lenders?

USDA's Farm Service Agency ("FSA") loans and loan guarantees are a central feature of poultry production, providing large amounts of financing for growers to meet capital investment demands made by integrators. FSA should not issue loans or guarantee loans without first ensuring that the contract terms between the loan recipient and the integrator provide a reasonable likelihood that the grower will be able to service that debt for the life of the loan. In other words, FSA should not finance capital investments where there is a mismatch between contract duration and/or integrator obligations under the contract and any current or future, potential capital investment demands.

IV. Conclusion

Commenters thank AMS for the opportunity to submit these comments in anticipation of a proposed rule clearly prohibiting and restricting the integrator practices outlined above. We represent a diverse group of farmer, sustainable agriculture, environmental, animal welfare, public health, and consumer interests – all of which are calling for reforms that will finally rein in poultry integrators. AMS has ample authority under the PSA to act, and we call on it to act quickly to restore fairness and competition to poultry production.

Sincerely,

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On behalf of:

Food & Water Watch
Buffalo River Watershed Alliance
Campaign for Family Farms and the Environment
Food Animal Concerns Trust
Friends of the Earth
Institute for Agriculture and Trade Policy
Johns Hopkins Center for a Livable Future
Public Justice
Socially Responsible Agriculture Project
Waterkeeper Alliance
Western Organization of Resource Councils