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Submitted electronically via regulations.gov

Bruce Summers
Administrator
Agricultural Marketing Service
United States Department of Agriculture

Docket Clerk
Agricultural Marketing Service
U.S. Department of Agriculture
1400 Independence Ave. SW
Washington, DC 20250

Re: Docket No. AMS-FTPP-21-0044, Transparency in Poultry Grower Contracting and Tournaments

Dear Mr. Summers:

The National Chicken Council (NCC) appreciates the opportunity to provide comments on the United States Department of Agriculture (USDA) Agricultural Marketing Service (AMS) proposed rule "Transparency in Poultry Grower Contracting and Tournaments" (Proposed Rule).[1] NCC is the national, non-profit trade association that represents vertically integrated companies that produce and process more than 95 percent of the chicken marketed in the United States. NCC members would be directly affected by the Proposed Rule.

As explained in more detail in these comments, NCC is deeply concerned that the Proposed Rule would have a devastating financial impact on the U.S. chicken industry by raising costs and administrative burdens, contributing to increased food prices for consumers, and ultimately destabilizing a successful compensation system. This would lead to negative ancillary impacts on other related sectors through less efficient use of inputs and resources used for producing poultry such as feed and energy. NCC opposes the Proposed Rule. We urge AMS to withdraw it and refrain from further steps that would undermine a successful compensation system. If

[1] 87 Fed. Reg. 34980 (June 8, 2022), https://www.govinfo.gov/content/pkg/FR-2022-06-08/pdf/2022-11997.pdf.

AMS were to nonetheless proceed with this rulemaking, we have identified several issues for further consideration.

These comments begin with an Executive Summary (Part I), followed by a brief description of the benefits of the poultry grower compensation system (Part II), fundamental concerns with the Proposed Rule (Parts III and IV), and comments on specific aspects of the Proposed Rule (Part V).

I. Executive Summary

NCC opposes the Proposed Rule and urges AMS to withdraw it in its entirety. The current poultry grower compensation system has long worked well to fairly and appropriately reward high-performing growers and drive efficient use of resources. The proposal would undermine the efficiency and global competitiveness of the U.S. broiler industry by imposing needless costs and rigid mandates with no quantifiable benefit but with clear negative impacts. This will ultimately inject costs and inefficiencies into the supply chain at a time when inflation and access to affordable food are key concerns to the American public. Further, the proposal contradicts the clear intent of Congress, is well beyond AMS's mandate under the Packers and Stockyards Act (PSA), and is arbitrary and capricious under the Administrative Procedure Act (APA).

If AMS moves forward with this rulemaking despite these concerns, NCC has identified several issues requiring further consideration, including the following:

- **Assess the true cost of the Proposed Rule:** AMS's cost assessment overlooks numerous key costs industry would shoulder to comply with the Proposed Rule and significantly underestimates the actual costs of the proposal, including the Proposed Rule's potential effects on inflation.
- **Address all PSA amendments in a single rulemaking:** AMS has positioned the Proposed Rule as part of a broader set of planned changes to AMS's PSA regulation. AMS should address all amendments to PSA regulations in a single rulemaking and avoid a piecemeal approach that imposes shifting requirements and hidden costs over several years.
- **Limit scope of disclosures:** AMS should limit the scope of the proposed required disclosures to only information that would actually affect grower compensation expectations and omit all information that is publicly available or unrelated to compensation. Several of the proposed disclosures are unhelpful and introduce unnecessary complexity into an already highly regulated process.
- **Omit the proposed governance framework and certification:** AMS should omit the proposed governance framework and certification in its entirety as this proposal is an incredibly costly measure that does not provide useful information and does not address a real concern.
- **Eliminate the required disclosure of forward-looking projections:** All forward-looking projections should be omitted from a final rule, as they by definition cannot be accurate and risk causing significant confusion.
- **Eliminate the requirement that minimum annual placements and minimum stocking densities be included in contracts:** The proposal's requirement that contracts specify minimum annual placements and minimum stocking densities goes well beyond mere disclosure, imposes terms on private contracts, and would wrongfully impede the ability to adjust to market dynamics.

In addition to these points, we have identified several other aspects of the Proposed Rule that are vague, unnecessary, unworkable, or would otherwise require clarification.

II. The Current Poultry Grower Contracting System Is a Well-Designed, Efficient Structure That Benefits Growers, Dealers, and Consumers

NCC supports the current poultry grower compensation system because it rewards family farmers for their hard work efficiently raising high-quality birds. The current system's fair, honest contracts provide a target pay that high-performing growers can supplement with the efficient use of resources necessary to produce poultry. This system promotes superior results that lower the cost of raising chickens for the benefit of growers, live poultry dealers ("dealers"), and consumers.

The system also efficiently allocates economic risk to the parties best prepared to burden it—dealers supply growers with broiler chickens, feed, veterinary care, technical advice, and other resources, alleviating most of the economic risk from their contract growers as compared to independent growers. Meanwhile, contract growers provide high-quality, day-to-day care, land, and housing for their birds. This mutually beneficial partnership supports the economic viability and independence of family farms by averting risk and promoting stable and predictable income.

Indeed, a March 2022 study conducted by Dr. Tom Elam (the "Elam Study," attached as Appendix A) found widespread benefits and support for this model as mutually beneficial, successful, and profitable.[2] USDA's own data shows that over the last decade, poultry growers on average earned more than the average farm income.[3] Average grower payments per square foot and payments per pound have increased steadily over the past thirty years, and raising broilers generated more than $3.6 billion in payments to growers in 2020 (in 2012 dollars), income that sustains rural communities and gets reinvested back into American agriculture.[4] Revealingly, the Elam Study shows that even with the onslaught of the COVID-19 pandemic, lockdowns, and unprecedented economic disruption, growers earned more in payments from dealers than in any prior year, reflecting the value of the current grower compensation model. Had growers owned their own birds, they would have faced devastating market conditions and met financial ruin. Instead, under the current system, they thrived.

The American poultry industry is the most competitive in the world in significant part because the poultry grower compensation system encourages innovation and investment in the best equipment and practices. NCC is proud to represent an industry that consistently and continuously produces affordable protein, even in times of soaring across-the-board inflation and economic distress that increase prices for consumers.

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[2] T. Elam, *Live Chicken Production Trends*, FarmEcon, LLC (Mar. 2022), https://www.nationalchickencouncil.org/wp-content/uploads/2022/03/Live-Chicken-Production-FARMECON-LLC-2022-revision-FINAL.pdf [hereinafter "Elam Study"].

[3] *Id.* at 10 (citing USDA, Agricultural Resource Management Survey, https://my.data.ers.usda.gov/arms/tailored-reports).

[4] *Id.* at 7. Notably, this figure encompasses payments from integrators to growers. It does not encompass other payments such as COVID-19 relief payments.

The competitive nature of this industry and existing requirements incentivize and ensure poultry processors operate fairly and justly. Most growers are in a position to choose between partnering with two or more processors and can readily cut ties with a bad business partner. Over 50% of growers have been with their current dealer for ten years or more, a statistic unchanged from 2015, with an additional 20% having been with their current dealer for over five years.[5] Given that the majority of poultry growing contracts during the study were for five years or less, and one-third were flock-to-flock arrangements, these statistics show that growers find their relationships with dealers beneficial and willingly continue doing business after their initial contracts end. Moreover, chicken processing plants are expensive and only provide sufficient return on investment if they operate at full capacity. Processors that gain a reputation as bad business partners, including by attempts to manipulate a grower's performance or otherwise drive away growers, would quickly see their plants under-supplied and their grower pool taken by competitors. Notably, AMS cites no evidence of actual unfair dealings to support this proposal.

III. AMS's Proposal Exceeds Its Statutory Authority, Contradicts Congressional Direction, and Is Arbitrary and Capricious

A. The Proposed Rule exceeds AMS's statutory authority under the PSA

AMS grounds the Proposed Rule in Section 202(a) of the PSA, which makes it a violation for any live poultry dealer to "[e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device."[6] However, AMS fundamentally fails to identify how plainly written poultry growing arrangements are unfair, unjustly discriminatory, or deceptive. Indeed, they are not.

Instead, AMS attempts to justify the Proposed Rule by arguing that poultry growing arrangements are "incomplete contracts," by pointing to information asymmetries, and by revisiting well-worn allusions to vaguely described grievances made by unidentified growers. As explained below, we question the sufficiency of these statements to support the rulemaking record to begin with. Even if these statements were true, however, they do not establish that Section 202(a) of the PSA authorizes AMS to mandate onerous disclosures as part of the contracting process. First, to the extent that AMS is concerned that some conditions affecting compensation may not be encompassed in the contract, that is common in many entirely lawful business arrangements. A supply agreement might not have minimum volume requirements, an author's publisher agreement does not specify how many books will be sold, an accountant's engagement letter might not specify how many of hours of work the client will request, and a farmer renting a stall at a farmer's market has no guaranteed buyers. None of those situations are unfair or deceptive practices, and indeed, the Federal Trade Commission has not prohibited them despite also having authority to address deceptive practices in other sectors. Moreover, unlike all of these examples, a dealer has an economic interest in keeping growers' farms in

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[5] *Id.* at 3.

[6] 7 U.S.C. § 192(a). AMS also cites PSA Section 410(a)'s full-payment provisions, but nowhere does AMS allege that dealers do not pay growers as called for under their contracts, nor would the Proposed Rule do anything to address actual payments; the stated aim of the Proposed Rule is to provide more information.

steady operation, as dealers also invest costs into the dealer-grower relationship and have every incentive to keep their growers in production.

Second, all markets have information asymmetry; perfect information symmetry exists only in economics textbooks. The fact that dealers may possess information about their businesses not known to growers and that growers may possess information not known to dealers does not in any way mean that dealings between the parties are unfair or involve deceptive practices. Tellingly, most, or all, of AMS's proposed disclosures in no way affect how a grower's settlement will actually be calculated. Settlement calculations are defined through contracts, and growers are provided at settlement all the information necessary to determine how the payment was determined. Growers also have ample opportunity to understand the market before entering into an agreement, including by consulting lenders, financial advisors, agriculture extension offices, and their community members. Further, other remedies are available in the exceedingly unlikely event that a dealer would actually fraudulently induce a grower to sign a contract. AMS has not established that the mere existence of a potential information asymmetry requires the proposed disclosures to remedy unfair or deceptive practices. Section 202(a) requires that parties not engage in unfair or deceptive practices; it does not require that all parties have the exact same information.

Finally, to support its position that widespread Section 202(a) violations would occur without the proposed disclosures, AMS provides only vague references to complaints by growers. AMS provides no details about these purported complaints, including what specifically they alleged happened, when they were lodged, whether they were substantiated, or even how many AMS has received. The long history of rulemaking on this topic has been peppered with allusions to thinly described complaints, but never has AMS provided any real detail. Even more tellingly, no court has ruled that the current grower compensation system violates Section 202(a), nor has AMS taken enforcement action on this basis despite decades of use. In short, AMS has failed to establish that the Proposed Rule is necessary to prevent PSA Section 202(a) violations.

B. The Proposed Rule is contrary to Congressional purpose.

More than a decade of clear Congressional direction reinforces that AMS lacks authority under the PSA to conduct this rulemaking. USDA has a long history of overseeing the PSA through established regulations and within the guardrails established by extensive federal appellate caselaw about the scope of PSA Section 202. The PSA has been law for more than 100 years, and Congress has amended it as needed over the years when it determined additional authorities or requirements were needed.

Congress also addresses PSA issues periodically through Farm Bills and the appropriations process. Congress most recently addressed PSA issues through the 2008 Farm Bill and subsequent appropriations bills. In the 2008 Farm Bill, Congress directed USDA to identify the criteria that would be used to evaluate whether four different types of conduct violated the PSA.[7] In 2008, the broiler industry was using more or less the same style of grower compensation system as is being used today. Notably, although Congress directed USDA to address several topics, the 2008 Farm Bill did not direct USDA to take any actions related to poultry grower compensation or the so-called tournament system. When USDA responded with a wide-ranging

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[7] H.R. 6124, 110th Cong. § 1106 (2008).

proposed rule that addressed poultry grower ranking systems, among other topics, in great detail, Congress used its appropriations powers to prevent USDA from finalizing and implementing the rulemaking for several years.[8] When the appropriations restriction eventually lapsed, USDA never further pursued rulemaking to address poultry grower compensation.

This history demonstrates exceedingly clear Congressional direction about the nature of topics appropriate for USDA rulemaking under the PSA. Through the 2008 Farm Bill, Congress provided USDA with clear direction to address topics that Congress determined needed additional regulations. Congress was undoubtedly well aware of the types of poultry grower compensation systems being used, as those systems had been in place for many years. Nonetheless, Congress specifically did not direct any action with respect to poultry growing arrangements. This directly reflects Congress's view that the prevailing regulatory framework for poultry growing arrangements be maintained. If that were not direction enough, when USDA attempted nonetheless to change the prevailing regulatory structure, Congress promptly stepped in and used its appropriations authority to halt further rulemaking on poultry grower compensation systems, maintaining that prohibition for years. Moreover, Congress did not intervene when USDA stopped pursuing and eventually withdrew the proposed rule on poultry grower compensation systems.

Taken together, this sequence of events clearly shows how, over more than a decade, Congress expressed its consistent view that the then-existing approach toward poultry grower compensation systems was the desired one and that USDA was overstepping by trying to change the system. Despite the current poultry grower compensation system being in use for decades, no federal court has held that the system violates Sections 202(a) of the PSA, further reinforcing that the current regulatory approach, not the proposed one, is the one intended by Congress.

Given this clear direction from Congress, whether to take any steps to change the current poultry grower compensation system is a major question requiring Congressional direction. As such, AMS may not expand its regulatory framework to change or undermine the currently used system. As recently stated by the Supreme Court in *West Virginia v. EPA*, in certain cases of "economic and political significance," an agency must demonstrate "clear congressional authorization" to exercise its powers.[9] As evidenced by the amount of public attention devoted to chicken industry contracting and attention from the highest levels of USDA and the White House, chicken grower contracting has taken on "political significance." It is also of great economic significance, as it drives billions of dollars in revenue to growers and forms the foundation for the U.S. broiler industry, benefiting growers, processors, and consumers. Not only does AMS lack the necessary "clear congressional authorization" to advance rulemaking into this topic, Congress has also already voiced its support for the current system and its objection to USDA efforts to further regulate the existing poultry grower compensation system.

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[8] Consolidated and Further Continuing Appropriations Act, 2015, H.R. 83, 113th Cong. § 731 (2014); Consolidated Appropriations Act, 2014, H.R. 3547, 113th Cong. § 744 (2014); Consolidated and Further Continuing Appropriations Act, 2013, H.R. 933, 113th Cong. §§ 742–43 (2013); Consolidated and Further Continuing Appropriations Act, 2012, H.R. 2112, 112th Cong. § 721 (2011).

[9] 142 S. Ct. 2587, 2613–14 (2022).

C. The Proposed Rule is based on a flawed administrative record and thus is arbitrary and capricious.

The Proposed Rule is based on a flawed administrative record that reflects a fundamental misunderstanding of poultry contracting supported only by unsubstantiated hearsay. This flawed administrative record renders the Proposed Rule arbitrary and capricious under the APA.[10]

The Proposed Rule is fundamentally unnecessary for the efficient operation of the chicken raising market. AMS justifies the Proposed Rule as being necessary to address the perceived "gap between expected earnings and the ability to actually achieve those outcomes through reasonable efforts by the grower" by "increas[ing] transparency in all poultry growing contracting."[11] In fact, the chicken grow out market has long operated efficiently without these government-mandated disclosures, and most of the proposed disclosures would not provide any meaningful information about what income a grower might anticipate from a contract that is not already provided due to private market dynamics.

Broiler processors have long used various permutations of competitive grower compensation systems to drive efficiency in production. In many ways, this is no different than any arrangement between a business and a service provider, in which service providers compete with others to provide the highest quality services as efficiently as possible and buyers of those services compete with each other to secure the best providers at favorable prices. This process has resulted in a highly efficient market and is an important driver of the global cost-competitiveness of U.S. chicken meat. Chicken meat has never been more affordable in the U.S. on a real-dollar basis or when viewed against a typical household's overall buying power, even considering the immense inflationary pressures facing consumers and businesses from all directions. AMS fails to explain why these broadly recognized economic principles do not apply in the poultry growing market. In fact, AMS has previously conceded that the economic literature on the industry supports a finding of no anticompetitive market power effects, which one would expect to see before intervening in a market.[12]

The chicken growing contracting process is highly efficient and is also mutually beneficial for both parties. If it were not, contracts would not be extended through mutual agreement, entrepreneurs would not continue to enter the poultry raising business, and growers would shift away from poultry production to other substitute agricultural land uses. Instead, contracts are regularly renewed (even flock-to-flock arrangements), farmers willingly invest in improving their farming operations, and a thousands-strong waiting list of farmers seeking to enter the chicken raising business or expand their farms to raise even more birds, willingly investing to improve

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[10] 5 U.S.C. § 706(2)(A).

[11] 87 Fed. Reg. at 34980.

[12] *See Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act*, 81 Fed. Reg. 92711 (Dec. 20, 2016) (noting that in a review of thirty-three studies published since 1990 relevant for assessing the effect of concentration on commodity or food prices in agricultural sectors, a majority of the studies "found no evidence of market power, or found that the efficiency gains from concentration were larger than the market power effects").

farming operations.[13] Although NCC understands AMS is aware of at least one study demonstrating growers' interest in renewing their agreements (the Elam Study discussed elsewhere in these comments), AMS fails to address this in its proposal.

Further, AMS's characterization of growers as being unsophisticated, financially uninformed neophytes who are unable to understand contracts and make informed business decisions does a great disservice to rural America. The history of PSA rulemaking over the past twelve years has been rife with vague suggestions and insinuations that growers are in some manner misled or mistreated during the contracting process. But at no point in numerous rulemakings over more than a decade has AMS actually identified specific instances that would constitute a PSA violation or even concretely demonstrated that the perceived harm is real and widespread at a level justifying costly and invasive regulations that will harm industry participants, including growers and consumers. Nor has AMS obtained court rulings that find the vaguely alluded-to conduct violates the PSA. Instead, AMS would base this rulemaking on conjecture and vague allusions to unsubstantiated complaints, many of which likely date back to a listening session more than a decade ago.

In fact, chicken growers are savvy small business owners, many of whom have decades of farming experience and are part of multi-generation farming families. They understand the business and enjoy average incomes that exceed that of the typical American farmer.[14] At the same time, chicken growers know they do not have nine-to-five jobs in air-conditioned offices. They choose to enter and stay in the business because they are committed to farming, and those who value hard work and innovation see their efforts rewarded. They understand how to read their contracts, project income under various scenarios, and maximize their income by raising birds as efficiently as possible.

Moreover, like most businesses in the country, many chicken farmers rely on loans to finance parts of their operations. This market attribute provides additional protection for farmers that displaces AMS's theoretical concerns. The banks that specialize in agricultural lending to chicken growers have an extremely sophisticated understanding of the chicken industry, and they are able to make informed decisions about a farmer's creditworthiness and likely income based on a farmer's experience with the industry and the contents of existing contracts. If a lender does not believe a particular contract would provide adequate income for a chicken grower to meet his or her loan obligations, the lender is unlikely to issue the loan. This aspect of the private market provides an incentive for the dealer to ensure that the chicken grower has the information necessary for the grower and lender to evaluate the contract, as the dealer has an interest in a grower being able to secure necessary financing on favorable terms. Importantly, this happens through efficient market dynamics and in the absence of costly and prescriptive regulations. And just as importantly, it works. For example, the Elam Study found that the deficiency percent and charge-off percent for poultry grower loans amount to merely one-third of the average agricultural loan, based on Small Business Administration loan quality data.[15] The data overwhelmingly show that growers and their lenders are able to effectively and accurately evaluate expected income from poultry growing arrangements without the

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13 *See* Elam Study at 3, 4, 11, 12.

14 *Id.* at 10.

15 *Id.* at 11.

burdensome and largely uninformative disclosures called for in the Proposed Rule. AMS entirely overlooks the role that lenders play in helping to structure the poultry raising market, despite the fact that agricultural loans are administered by a sister agency, yet again underscoring the arbitrary and capricious nature of this rulemaking and lack of an adequate administrative record.

Under current practices, growers are provided contracts that clearly set forth how their payments are determined. With this information, a grower can review the contract, assess his or her ability to perform as well as or better than his or her competitors, and make an informed decision as to whether to enter the chicken raising business. Other American small business owners make critical business decisions with much less information. Moreover, at settlement, dealers provide the information necessary for growers to understand their payment under the contract, and growers with concerns about payments can raise those concerns directly with the dealer or pursue numerous other avenues for relief.

Importantly, none of the factors identified in the proposed disclosures meaningfully impact grower payments over the length of a typical growing arrangement. Dealers provide growers with inputs from a common supply in an essentially random manner (with the obvious exception of growers supplied with specific types of birds or specific feeds to meet various specifications, which would already be separately addressed). While inputs may naturally vary due to the practical reality that the industry involves live animals, such as slight variations in feed supply or in breeder flock age, any natural discrepancy would naturally dissipate over the life of a typical growing arrangement, and any such variation is statistically insignificant over time. Providing precise inputs while accounting for minor flock-by-flock variations would rigidly impose extremely complicated systems on dealers that would certainly increase costs on the sector and that would not result in greater overall grower compensation or more efficient results. In fact, a grower would be disappointed to see his or her payment adversely adjusted because of a minor variation in a dealer input, when in reality his or her excellent care and hard work was the actual reason the flock performed well.

Fundamentally, the grower's skill and expertise in managing the birds and deploying the grower's resources drives grower payments under broiler production contracts. The proposed disclosures entirely fail to acknowledge this premise. In contrast, under the current system, a grower's skills and efficiency are reflected in settlement payments. The information covered in the proposed disclosures is ancillary at best and, in many cases, immaterial to grower payments. Requiring complicated disclosures as contemplated in the Proposed Rule will not improve a grower's ability to project income. AMS again glosses over the disconnect between the broad and burdensome disclosures and how settlement payments are actually determined under the parties' agreed-upon terms. There must be a "rational connection" between a regulation and the issue it is trying to address, but the clear disconnect between the disclosures and how payments are actually determined means that standard is not met.[16]

Further, the proposed governance and certification framework is entirely unnecessary, does not achieve the Proposed Rule's objectives, is well outside the scope of the basis for the rulemaking, and, as discussed further below, would impose exorbitant compliance costs on the chicken supply chain with no benefit. Even if the disclosures called for under the Proposed Rule helped growers better project their income under contracts, AMS has not identified any

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[16] *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.,* 463 U.S. 29, 43 (1983).

compelling reason to suggest the information provided would be inaccurate or would otherwise require the proposed complex auditing and oversight scheme seemingly inspired by public financial reporting for publicly listed companies. Companies have been required to maintain various documents showing compliance with the PSA for decades and have successfully met those requirements without cumbersome and costly auditing and certification functions. There is no evidence that such a function would improve the reliability of disclosed information. However, these functions would be needlessly costly to the detriment of growers, dealers, and consumers. Including this provision is likewise arbitrary and capricious.

Moreover, proposed § 201.100(f)(1)(ii) would apparently have the proposed governance framework apply not only to the proposed disclosures but also to all of PSA compliance. PSA compliance beyond disclosures falls well outside the scope of this rulemaking. If additional compliance is considered at all, it should be addressed in a separate rulemaking appropriately focused on those issues. Many aspects of PSA compliance are not conducive to auditing systems, and nothing indicates that such a system would materially improve PSA compliance. Finally, as written, the proposed governance framework would apparently apply only to live poultry dealers, which would create troubling inconsistencies in how companies marketing different species would have to demonstrate compliance with the PSA.

AMS's rationale for the proposed governance framework suffers an even more egregious and alarming flaw in the record. As justification for the need for the burdensome governance framework, AMS points to "current civil and criminal actions" against various individuals or companies alleging certain antitrust violations, citing to a press release indicating that the Department of Justice had brought charges against certain individuals.[17] It is entirely inappropriate for an agency to point to *ongoing* criminal or civil litigation to justify rulemaking of any kind. The mere filing of a civil complaint or criminal charges in no way indicates the alleged events actually occurred or that the individuals or companies are liable for or guilty of the conduct. Defendants are presumed innocent unless proven guilty, and an agency should never use unproven charges as the basis of a rulemaking or use the rulemaking process to influence public view of a case. Otherwise, there would be nothing stopping the government from bringing charges or filing complaints solely to manufacture an administrative record. Underscoring this point, the Department of Justice has dropped charges against several of the defendants in the case that AMS references as justifying the governance framework. This stated rationale deeply reinforces the arbitrary and capricious nature of the rulemaking.

Lastly, it has come to NCC's attention that officials at USDA or the Department of Justice may have on its own accord contacted growers about submitting comments to this rulemaking, and that it is possible these communications may have had the intent or effect of dissuading growers from submitting comments not in support of the Proposed Rule. NCC and our members place great weight on all Americans' First Amendment rights to speak their opinions freely, as well as on the freedom of all stakeholders to freely share their views on proposed regulatory action (or to refrain from doing so), to do so anonymously if they so desire, and above all, to do so without coercion or influence by the regulatory agency conducting the rulemaking. To the extent USDA or the Department of Justice has contacted growers or any other stakeholders in a manner that presents even the possibility of influencing the nature of comments that may be received, such

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[17] *See* 87 Fed. Reg. at 34996.

action would irreparably poison the administrative record, and AMS would need to withdraw the rulemaking in its entirety.

For all these reasons, as well as the specific infirmities discussed further below with respect to specific proposed provisions, the proposal is arbitrary and capricious and should be withdrawn.

IV. AMS Has Significantly Underestimated the Costs of Complying with This Regulation

AMS has significantly underestimated the costs of the Proposed Rule and failed to consider other adverse consequences of these regulations, including the risk of increased frivolous litigation, industry-wide efficiency losses, costs to farmers and consumers, and the effects on inflation.

AMS predicts the ten-year aggregate combined costs to dealers and poultry growers under the Proposed Rule to be $20,492,160. AMS estimates that $9,039,442 of these costs will be carried by dealers and that an even greater amount—$11,452,718—will fall on poultry growers. These costs alone would affect the bottom line of growers and dealers with no clear benefit. Moreover, these exorbitant costs will burden food supply chains across the country in a time when severe inflation has raised the cost of food to record levels. Further, we fail to see how AMS can credibly claim this rule benefits growers when more of its financial burden is placed on the shoulders of those who it purports to protect and when AMS all but concedes the Proposed Rule will not actually increase overall grower pay.

AMS has underestimated the hourly rates, number of people involved, and time required of executives, compliance officers, regulatory consultants, attorneys, and other services required to implement the Proposed Rule. For example, to implement the proposed governance framework, dealers would need to procure new data management systems and potentially custom software and substantially expand their compliance departments to collect, maintain, organize, and verify the information. Establishing compliance programs requires highly compensated skilled professionals, and smaller dealers may suffer the most due to their lack of scale to better absorb these costs. Because the Proposed Rule would require contracts be amended directly, dealers would incur extensive costs studying and evaluating necessary modifications, renegotiating thousands of contracts, and implementing each individual change. Similarly, growers would incur legal and advisory costs as they work to understand any changes and decide whether to accept them. The proposed disclosures would almost certainly generate frivolous litigation, and the proposed requirement to disclose prior and ongoing litigation could deter settlements, further increasing legal fees for growers and dealers as cases that would have otherwise settled drag out and cases that should never have been filed have to be litigated. AMS does not adequately consider any of these costs in the Proposed Rule.

Moreover, AMS entirely fails to consider the negative effects of the proposed disclosures on growers, especially high-performing growers. AMS apparently contemplates that dealers might adjust payment based on various factors. AMS's presumption is entirely misplaced. If a dealer were to increase pay for lower-performing growers, that money would have to come from somewhere, and it might have to be offset by decreasing the income of high-performing growers who are accustomed to being rewarded for their hard work. This would lead to payment compression and fewer incentives and rewards for the best performers. It would also harm the highest-performing growers, especially those with excellent track records who have invested in their farming operations based on an understanding that their high performance will continually be rewarded.

Removing incentives for high performance would trigger a vicious cycle of efficiency and productivity losses as growers who are no longer rewarded for high performance have fewer incentives to perform highly. This would compromise the overall global competitiveness and the resources of the U.S. chicken industry, shrinking the pool of revenue available to growers and driving up costs while also further squandering our already limited resources during a period of already historic inflation. Dismantling the current structure, which rewards higher performance, will disincentivize growers from making their operations more efficient and risks raising the cost of production, ultimately harming consumers, integrators, and growers alike. The American chicken industry is extremely competitive worldwide, due in large part to efficiencies and innovation driven by the current system. Under the proposal, AMS risks increasing costs, reducing efficiencies, and stifling innovation, which could make the American chicken industry less competitive against growing international competition to the detriment of American agriculture as a whole.

Finally, AMS fails to consider the negative consequences of injecting needless and extensive production costs into the broiler supply chain in the midst of the highest inflationary period in forty years. Chicken has earned its place on the table through a relentless focus on efficiency at all steps of production, making it America's number one, and most affordable, animal protein. However, supply chain disruptions, loose fiscal and monetary policy, labor shortages, rising feed costs, lingering effects of the coronavirus pandemic, and geopolitical events have all placed immense cost pressures on the supply chain. AMS's reckless injection of additional costs into the supply chain will hurt everyone who touches chicken—growers, dealers, and consumers. As an affordable and nutritious food, chicken is an especially important protein source for food insecure individuals and those who participate in USDA's nutrition assistance programs. AMS has failed to consider the negative consequences to society of increased production costs and especially the consequences to the nation's most vulnerable individuals who may find themselves able to afford less chicken. AMS's cost estimates are likely low by orders of magnitude.

Worse, AMS proposes to impose these costs without identifying any real quantifiable benefit. AMS can only point to a highly theoretical explanation that "a risk averse producer will benefit economically from a reduction in revenue risk."[18] In short, AMS concedes that growers will not actually earn more income overall under the proposal and alleges only that the costs of the rule may make it somewhat easier for growers to predict how much income they might earn. AMS tries to assign a theoretical dollar value to this benefit by hypothesizing the value of reduced uncertainty around revenue for individuals with theoretical amounts of risk aversion, conjuring a wide range of potential one-year and ten-year discounted values based on possible variations in net revenue. These figures range from about $1.5 million at the low end of the one-year range to $305 million at the high end of the discounted ten-year range. In other words, AMS believes that growers might benefit from the assumption that they would have a better idea of how much money a contract might bring and further attempts to assign an economic value to having that certainty. Critically, AMS does not propose that a grower would actually make more money, just that the grower might have a better idea of how much money he or she would make (in fact, the added costs would likely decrease overall grower pay in the aggregate). This attempt to quantify benefits strains credulity and belies the lack of any real benefit to justify the costs of this proposal. Put differently, under one scenario, AMS's analysis says it is worth $305 million to growers over ten years to be able to better predict how much income they will make under their

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[18] 87 Fed. Reg. at 35008.

contracts (again, not to actually make more money under the contracts, just to know with greater certainty how much they will make). This would mean that rational growers collectively should be willing to pay up to $305 million dollars right now to receive the income clarity the Proposed Rule would supposedly bring. Of course, no grower would actually make such an offer, reinforcing that AMS's attempt to quantify the benefits constitutes hand-waving at best.

At bottom, AMS is proposing to inject tens of millions of dollars of compliance costs into the chicken supply chain with no actual benefits. At a minimum, AMS must conduct a properly comprehensive cost-benefit analysis that better reflects the exorbitant costs of this Proposed Rule and compares those against any real, quantifiable benefits. AMS should withdraw the proposal entirely.

V. Comments on Proposed Regulations

Although NCC strongly urges AMS to withdraw the Proposed Rule for the reasons explained above, if AMS moves forward with the rulemaking, we urge it to revise the proposal to reduce the costs imposed on stakeholders and better focus the rule on AMS's goal of providing useful, essential information to growers. In particular, we highlight the following considerations.

A. AMS should limit the scope of the proposed regulations and ensure the timing of these disclosures reflects business realities.

1. Scope of information subject to disclosure

AMS states the goal of the Proposed Rule is to provide growers with information that USDA believes will help growers anticipate income under poultry grower contracts. To achieve its goal, AMS should focus only on those disclosures that might inform grower incomes. To this end, NCC recommends AMS omit from the required disclosures the following items that are irrelevant for determining how much income a grower may earn: dealer's bankruptcy history, litigation history, general rights and obligations under the PSA, payment information for different regions, and breeder flock information.

The scope of these data would result in extremely lengthy, burdensome disclosures, especially for large dealers, that will not be helpful for growers and will only introduce confusion and complexity into contracting. Omitting the requirements listed above would reduce the costs of the rule and the administrative burden on dealers. Similarly, its omission would help reduce confusion over the disclosures provided and focus growers' attention on information that might be indicative of income.

Likewise, AMS should not place on dealers the administrative burden of collecting publicly available information. For information like bankruptcy proceedings, anyone, including growers, can easily obtain that information at their own initiative. Similarly, growers, not dealers, are in the best position to understand a grower's variable costs. In addition, AMS should not include in its required disclosures any item that would be included in the poultry grower contract arrangement.

Further, AMS must ensure that competitively sensitive information is protected. Some of the information that would be disclosed under the Proposed Rule may be competitively sensitive information. For example, grower payments may provide information about the company's costs and live side operations. Breeder information, such as strategic changes in breed or efforts to deal with chick health, might be proprietary, especially if a third-party breeder is used. Details about feed outages or other internal operations might reveal proprietary information that

would adversely and unfairly negatively impact a company's competitive position. To the extent that any competitively sensitive or proprietary information is required to be released under a final rule, it is imperative that growers respect the proprietary nature of the information and not share it beyond their advisors, and that companies be allowed to take steps to ensure their information is properly protected.

Finally, in limiting the Proposed Rule to only those factors that might conceivably advance AMS's stated goal, AMS should eliminate the proposed governance framework, which, as explained, is unnecessary and costly.

2. Scope of regulated parties

We urge AMS to exclude from the scope of the Proposed Rule poultry grower compensation systems where there is a fixed base pay plus an incentive-based bonus, regardless of how the bonus is calculated. The regulations appear to contemplate only two contract types—flat payment or a tournament system. In today's business environment, there are many forms of contracting. NCC urges AMS to ensure its proposed regulations allow sufficient flexibility to accommodate different types of contracts and allow for innovative contracting. AMS's proposed regulations should maintain a key feature of the current grower compensation system: allowing performance incentives for global competitiveness of the industry and rewarding the top performers and those who invest in state-of-the-art practices and technologies. AMS can accommodate market innovation and other ways of contracting by revising the definition of "poultry grower ranking system" in 7 CFR § 201.2 to address grower *base* payments as follows:

> *Poultry grower ranking system* means a system where the contract between the live poultry dealer and the poultry grower provides for **base** payment to the poultry grower based upon a grouping, ranking, or comparison of poultry growers delivering poultry during a specified period.

In addition, the contract scenarios identified in the Proposed Rule are overly simplified. For example, a poultry growing contract could have both new and older housing in the same complex under the same agreement. In addition, poultry growing contracts may cover multiple complexes. AMS should ensure the Proposed Rule reflects and accommodates differing contract structures.

Further, AMS should not exempt small dealers from the requirements of this rule. In § 201.100(e), the Proposed Rule would exempt small dealers slaughtering fewer than two million live pounds of poultry weekly from needing to provide a true written copy of the poultry growing arrangement and the Live Poultry Dealer Disclosure Document ("Disclosure Document") to growers. If, as AMS asserts, the information in the Disclosure Document is necessary for growers to make informed decisions about investments in their business, no dealer should be exempt from these requirements. The exemption could result in growers leaving a dealer complying with the regulations for a small dealer not subject to the same requirements.

3. Timing of disclosures

The Proposed Rule would require dealers to furnish the Disclosure Document whenever a dealer seeks to renew, revise, or replace an existing growing contract or establish a new contract that does not contemplate modifications to existing housing specifications. Because contracts may be regularly amended to reflect changes in the business environment, NCC urges AMS to modify the Proposed Rule to require dealers to furnish the required information

only at initial signing, and then on a periodic basis (e.g., every year). This scheduled disclosure of information would reduce administrative burdens on dealers, ensure uniformity of the disclosures provided, and alleviate confusion from growers who may receive different information at different times.

B. AMS should address all amendments to PSA regulations in one rulemaking. Otherwise, all changes required of industry should have a single implementation date.

NCC is concerned that AMS is taking a piecemeal approach to promulgating regulations for industries regulated by the PSA and urges the agency to propose and implement all amendments in a single rulemaking process. This Proposed Rule and the advance notice of proposed rulemaking (87 Fed. Reg. 34814 (June 8, 2022)) issued on the same day as the Proposed Rule signal AMS intends these regulatory actions to be the first in a line of planned changes affecting the poultry industry. Imposing constant regulatory changes on poultry growers and dealers would spurn confusion, needless costs, uncertainty, and frustration with shifting requirements.

In this already highly regulated sector operating on thin margins, and given the multitude of uncertainty from external market factors, businesses need certainty and predictability from regulators. Dealers can only effectively shield growers from risk as described in section I above if dealers themselves are afforded some level of certainty from regulators. Affected parties can only evaluate the impact of proposed changes and the actual costs of regulations if they are shown the entire regulatory structure the agency proposes to implement. A piecemeal approach obscures USDA's true intent, hides costs of constant transitions, and fuels distrust in government. NCC urges AMS to be transparent with industry about its plans.

Similarly, NCC anticipates AMS plans to incorporate the changes to 7 CFR § 201.2 (terms defined) in future rulemakings. AMS should afford industry the opportunity to comment on the changes to these definitions with a full understanding of how they will apply to planned amendments.

Even if AMS moves forward with its piecemeal approach to rulemaking, it should implement a uniform effective date for all changes to PSA regulations currently identified in the Unified Agenda, including "Clarification of Scope of the Packers and Stockyards Act (AMS-FTPP-21-0046)" (RIN 0581-AE04) and "Unfair Practices in Violation of the Packers and Stockyards Act (AMS-FTPP-21-0045)" (RIN 0581-AE05). Because the Proposed Rule contemplates that firms develop and audit data in a certain way and that firms must disclose five years of data, the effective date for disclosures by definition must be five years after the implementation date for the auditing system. Any effective date before five years after the implementation of the auditing system would prevent consistent comparison and undermine the usefulness of any disclosures. This timeframe also allows industry sufficient opportunity to develop and implement the required data management systems and to educate growers on information provided. Any period less than five years is not sufficient because the industry would not be able to effectively adapt in light of the considerable differences in what and how information is maintained.

C. AMS should provide ample educational resources for regulated entities regarding the complex changes in this rule and provide clarity on how the proposed regulations would be enforced.

Based on our communications with members to date and reporting on the proposed regulations, we anticipate significant uncertainty from regulated entities as to how AMS intends to implement this rule. Given the breadth, complexity, and unique level of involvement in poultry growing contracts, NCC strongly urges AMS to provide additional clarity for industry through educational materials, information sessions, and template disclosures.

In addition, AMS should work to ensure growers fully understand the information provided to them by dealers, including what it does and does not say. Instead of requiring contracting documents to include boilerplate disclaimers, AMS should undertake education initiatives to ensure contracts are fully understood. Finally, AMS should ensure its educational initiatives reach non-English-speaking growers. Specifically, AMS should ensure any educational events, guidance, templates, and other regulatory materials are available in other languages, particularly Spanish.

As it develops implementing and educational materials, AMS should clarify how the agency plans to enforce its rule. In particular, NCC seeks clarity on the following enforcement-related components:

- How AMS will inspect the disclosure and auditing framework, including how AMS will train staff to inspect financial accounting systems;
- How frequently the Disclosure Document must be updated;
- How dealers can properly update the Disclosure Document to correct errors if identified;
- How required disclosures should reflect operational changes to placement schedules;
- If AMS moves forward with including forward-looking projections in the rule, how the agency will evaluate the accuracy of these projections. As discussed below, we reiterate AMS should not penalize dealers if it forces them to estimate projected income and costs that later turn out to be imperfect.

D. Comments on proposed 7 CFR § 201.100.

1. Requirement to include minimum placements and stocking densities in poultry growing contracts, § 201.100(b)(5)

The Proposed Rule would create a new paragraph at renumbered § 201.100(i)(2) requiring that contracts specify the minimum number of annual placements and the minimum stocking density for such placements. Imposing mandatory terms on private contracts is beyond the stated goals and scope of the rulemaking, and these changes should be removed from any final rule. According to AMS, this rulemaking is intended to address perceived information asymmetries through mandatory information disclosures to help growers better predict the income they might earn under poultry growing arrangements. But these proposed requirements are not mere disclosures. Rather, they would impose mandatory terms on private contracts, which is vastly different than requiring information disclosures.

Poultry growing contracts do not necessarily include terms addressing guaranteed placement frequencies or durations. Accordingly, this provision would potentially require amending potentially every single grower contract. Doing so would impose substantial costs not accounted for in AMS's cost analysis, and it could cause substantial confusion if growers are all

suddenly presented with new contracts to accommodate these terms. Moreover, the Proposed Rule does not account for the possibility that a grower may not wish to agree to amend a contract or, worse, could create a situation where a grower might refuse to enter into an agreement for the express goal of placing a dealer in a position of regulatory noncompliance to bolster a negotiating position. Moreover, including this information as a contract term is redundant to the information that would be included in the Disclosure Document, which would also include information about minimum annual placements and minimum stocking densities.

Further, these proposed provisions fail to accommodate the breadth of potential contracts used in the industry. Many growers operate under flock-to-flock contracts, which some growers may prefer because they provide flexibility to choose whether to take a flock and the ability to seek other business partners. It is entirely unclear how a minimum annual placement rate and minimum stocking density would even be determined for a flock-to-flock contract. To the detriment of all involved, this provision risks eliminating flock-to-flock arrangements altogether. On the other end, some growers operate under long-term contracts of ten, fifteen, or even twenty years. These long-term contracts have their own benefits, including providing stability for growers and dealers alike and helping parties commit to a long-term business strategy. But it is impossible for anyone to predict placement frequencies or stocking densities ten or fifteen years out. For example, factors like increased growth rates, faster or slower growing breeds, target bird size, and cleaning practices, to name a few, could change significantly over a ten-year period, and all affect placement frequency and stocking density (for example, faster-growing birds may reduce grow-out time, allowing for more frequent placements, or larger target weights may reduce initial stocking density). By requiring that contracts guarantee minimum annual placements and minimum stocking densities for the length of the contract, AMS risks driving many desired contract types out of the market.

Moreover, guaranteeing a minimum number of placements risks putting a party in breach of a contract and in violation of AMS regulations under situations that would not violate the parties' bargained-for agreement or constitute a PSA violation, leading to absurd results. For example, a contract signed in November that guarantees three flocks annually would likely see a grower receive at most one flock that year, which could be viewed as a breach of the contract and a violation of the Proposed Rule. A contract signed in late December might not see any flocks delivered that year. Similarly, any number of factors might result in a grower receiving fewer flocks than initially anticipated or even no flocks in a given year, such as natural disasters (floods, fires, hurricanes), public health emergencies and pandemics, avian disease outbreaks and APHIS quarantines, unexpected market shocks, a change in target bird size or breed, disruptions to key inputs, and planned facility repairs or renovations. Force majeure clauses or other contract provisions might address these situations, but it is unclear which provision AMS would view as prevailing, and in any case significant confusion could result. Likewise, a dealer should never be required to continuing providing birds to a grower who neglects or mistreats a flock, but a guaranteed placement provision might expose a dealer taking steps to protect bird welfare to breach of contract claims and allegations of PSA violations. Nor does this provision address how to handle a situation in which a grower does not want to receive a flock at a given time, perhaps due to medical issues, farm repairs, improvements, or labor shortages.

Finally, AMS's concerns that contracts need to guarantee minimum placements and densities for growers to make sound financial decisions is misplaced. Chicken growers are experienced businesspeople who understand their business, and they have been able to make good decisions without this information for decades. Further, many farm operations are financed, typically through loans from sophisticated agricultural lenders. As demonstrated by decades of

expanded poultry production,[19] for years, banks have had little problem determining whether a grower's future income stream is sufficient to support a loan, even without guarantees. The market has thus demonstrated this is not an issue.

In light of these considerations, AMS should not finalize proposed § 201.100(i)(2). If AMS were to conclude this information must be provided, it would be more consistent with the rulemaking's rationale to include minimum annual placements and minimum stocking densities as tentative projections to be included in the Disclosure Document at proposed § 201.100(b)(5) (discussed next). If AMS were to keep the proposed § 201.100(i)(2) provisions in a final rule, it must revise the rule to accommodate the above concerns.

2. Disclosure of minimum placements and stocking density disclosures in proposed § 201.100(b)(5)

All of the issues identified above in discussing proposed § 201.100(i)(2) also apply to the requirement in proposed § 201.100(b)(5) that the Disclosure Document include the minimum annual placement frequency and minimum stocking density, and it is critical that AMS ensures that any final Disclosure Document requirement address those concerns as well. Moreover, given that AMS anticipates that growers will make financial decisions based on the Disclosure Document, information about placements and stocking density should be presented as tentative projections and expressly not as guarantees. The Disclosure Document should make clear that actual placements and densities may vary and will depend on any terms that might be specified in the contract as well as factors that might be outside any party's control and that growers should not rely on the projected placements.

3. Litigation summary, § 201.100(c)(1)

The proposed requirement in § 201.100(c)(1) to include ligation information should be omitted from any final rule because it is not relevant to a grower determining how much income the grower might anticipate receiving under a contract. If the purpose of the Proposed Rule is to provide growers with more information to determine how much income they might earn through a contract, it is hard to understand how information about litigation—much of which likely has nothing to do with grower contracts—is relevant to calculating what the contract says a grower might earn under different situations. In fact, the proposed litigation disclosure presents a number of issues:

- **The proposed disclosure is overly inclusive of all litigation.** The proposed disclosure would appear to require a dealer provide information about all litigation between the dealer and growers, without regard for the nature or merits of the case. The proposal would appear to require even the disclosure of a case that resulted in sanctions against the plaintiff for filing frivolous claims. Especially for larger companies, this could result in a lengthy disclosure of virtually no value that is difficult and costly to maintain and distracts from more important elements of the agreement. There is no useful reason to require all this be listed, especially when companies have multiple subsidiaries, and many lawsuits would have nothing to do with PSA issues.

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[19] United States Department of Agriculture Economic Research Service, *Poultry Sector at a Glance*, (June 13, 2022) https://www.ers.usda.gov/topics/animal-products/poultry-eggs/sector-at-a-glance/#:~:text=U.S.%20poultry%20production%20mostly%20expanded,percent%20below%20that%20of%202012.

- **The disclosure risks skewing incentives in litigation.** Requiring that dealers list all litigation could create skewed incentives not in the interest of any party to a litigation. For example, if a dealer knows that settlements will be listed on a disclosure, the dealer might be reluctant to settle cases for fear of projecting a reputation as being quick to settle and thus inviting more litigation, which would in turn make it more difficult for growers and dealers to resolve disputes in an efficient manner.
- **Keeping this information current would be extremely burdensome.** Especially for larger companies that are more likely to have multiple cases ongoing, it would be highly burdensome for companies to have to maintain and update this information on an ongoing basis, especially with cases involving multiple parties and highly active dockets.
- **Disclosure might violate court orders and settlement agreements.** There are a number of situations in which a dealer might not be permitted to disclose information about a litigation. For example, a key filing might have been made under seal, or a settlement or court order might include a confidentiality agreement preventing the parties from disclosing any related information. As written, proposed § 201.100(c)(1) would put a dealer in the position of having to choose whether to violate AMS regulations by not disclosing a case and certifying the disclosure or violating a court order or settlement agreement.
- **The six-year period is inconsistent with the rest of the Proposed Rule.** It is not clear why AMS proposes that the litigation disclosure cover six years while other aspects of the proposal, such as the financial disclosures, cover shorter time periods.
- **It is unclear how to determine if a case fits into the disclosure window.** As proposed, a dealer must provide a summary of litigation "over the prior six years." It is unclear from the proposal whether this would include cases filed in the past six years, cases that had an open docket at any point in the past six years, or something else.

4. Bankruptcy information, § 201.100(c)(2)

As with the proposed litigation disclosure, it is unclear why disclosing a dealer's bankruptcy history would be relevant to determining how much income a grower might anticipate earning under a contract. A grower's potential income is based on the contract, not the dealer's bankruptcy history. Bankruptcy history is publicly available if a grower wants the information. For larger companies with multiple subsidiaries, there may be relatively complex histories, making this information both confusing and cumbersome to maintain. It is also not clear why AMS proposed a six-year period for bankruptcy history when other provisions have shorter periods.

5. Statement regarding sale of grower facilities, § 201.100(c)(3)

Again, it is unclear how this provision relates to determining how much income a grower might anticipate earning under a contract, and including it in the Disclosure Document is unnecessary. If the parties wish to make any binding commitments about how facility sales will be handled and whether a contract may be transferred, the parties can address that in the contract itself.

6. Financial disclosures, § 201.100(d)

The proposed financial disclosures in proposed § 201.100(d) would require dealers to compile complex information, imposing significant costs on dealers but providing growers little of value because past economic information cannot be relied on to predict future economic conditions. Fundamentally, a grower's income is determined as specified in the contract and driven

primarily by the grower's care and skill. If these disclosures are required, AMS should consider several points:

- **Extraneous information not directly related to grower payments should be omitted.** As discussed earlier, financial disclosures should require only the basic information necessary for a grower to make a general assessment of potential income under the agreement. Other information is extraneous for this purpose and should be omitted given the burdens in assembling and certifying this information. For example, the Disclosure Document should not have to include contact information for a state university extension service (proposed § 201.100(d)(5)). That information is readily available through other channels, and AMS or state organizations can promote it through educational outreach.
- **Flexibility is critical**. Dealers should be provided as much flexibility as possible in how they present the required information and should be expressly permitted in the regulation to provide additional qualification or disclaimers as they determine may be appropriate.
- **Information should be limited to only the grower's local complex.** Different geographic areas face different economic conditions that have little or no bearing on grower income in different areas. For example, different regions will have different costs of living, state and local tax structures, state and local regulatory burdens, land costs, fuel costs, and labor costs, to name but a few variations. Grower incomes may vary across regions—even within the same company—to account for these differences. Presenting income across a company or for different complexes would be confusing because the income might vary to reflect higher costs in some regions and would do nothing to help a grower determine how much that grower might earn in his or her local complex. The disclosure in proposed § 201.100(d)(1) should be omitted from any final rule.
- **The quintile-based reporting system is too complex.** Reporting normalized income by quintile would make the information difficult to read and understand. If this is included in a final rule, for simplicity, the disclosure should present the average income for the complex and the upper and lower bounds of the range.
- **Five years of data is too long to be meaningful.** Changes in markets, product offerings, demand, global trade, and inflation all make it difficult to draw meaningful conclusions from five-year-old data. If AMS mandates any such disclosure, a shorter timeframe would be more appropriate.
- **The disclosure needs to include a disclaimer that past income does not guarantee any future payments.** The amount of detail called for in the proposed financial disclosures risks confusing growers into making inappropriate assumptions about future income. Just as with financial investments, mandatory backward-looking generalized income information should be accompanied by a disclaimer making clear that past performance or income does not guarantee any future income, and that actual income will be governed by the terms of the contract, the parties' performance, and possibly factors beyond anyone's control. Dealers should also be permitted to provide any additional disclaimers in the Disclosure Document that they determine may be appropriate.
- **Forward-looking projections should not be required under any circumstance.** The supplemental forward-looking income information contemplated in proposed § 201.11(d)(3) is inappropriate and should be omitted. First, it is entirely unclear how a dealer might know that past grower annual payments would or would not reflect projected grower payments, as no one can predict future economic conditions. Second, it is unclear what is meant when the proposal references past payments not reflecting

future payments "for any reason." Past grower payments will never exactly match future grower payments, and there are any number of reasons that might cause changes. For one, inflation means that there will inevitably be changes year-to-year in payments, but that should be no reason for needing to project future income. Third, it is impossible for dealers or anyone else to predict what grower payments will be in the future, and requiring dealers to make future projections puts them in an impossible position while doing a disservice to growers, who might mistakenly treat projections as guarantees. As recent years have demonstrated, natural disasters, geopolitical events, supply chain issues, and inflation can all affect future economic conditions, and they are impossible to predict. Fourth, it is unclear how far into the future any projections would need to be made. Instead of providing forward projections, all financial disclosures should include a caveat that past information is not indicative of future results and that results will depend on a variety of factors, some outside any party's control, as well as the grower's performance.

- **If projections were required, they must be qualified and exempt from any certifications.** Projections are by definition unlikely to be completely accurate, and in many cases, even reasonable projections could be off by a significant amount. It is impossible to certify the accuracy of a forward-looking projection, which is one reason they are treated with such caution in the financial world. If projections were to be required, they must be exempt from any certifications, as no officer can certify that a projection will be correct. Moreover, projections would need to be accompanied by substantial qualifiers explaining that the projections are unlikely to reflect actual payments and should not be relied on.
- **The grouping scenarios in the Proposed Rule are too simplistic.** The Proposed Rule appears to contemplate that a grower will raise the same type of bird in the same type of housing. In reality, some growers may have a mix of older and newer housing and may raise distinct types of birds. It is unclear how a dealer would be expected to treat these and other types of mixed situations in preparing the proposed financial disclosures.
- **AMS must clarify how to provide historical data for periods before the effective date of any final rule.** It is unclear how AMS expects companies to obtain and handle financial data from periods that predate the effective date of any final rule. Companies may or may not currently possess the historical data required to prepare the proposed disclosures. In the event a company does possess such data, the company did not develop and maintain it in anticipation of being used in financial disclosures. AMS would need to explain how dealers can comply with the financial disclosure and certification requirements if historical data predating a final rule is required.
- **Information about grower variable costs is inappropriate.** Dealers should not be required to collect, produce, or certify the accuracy of information about grower variable costs. Growers are responsible for understanding and controlling their costs of production, in keeping with the efficient allocation of responsibilities in poultry grower compensation frameworks. Dealers do not systematically maintain all of this information, and any information provided could be incomplete or inaccurate. Proposed § 201.100(d)(4) should be omitted. If the provision were included in a final rule, it should be accompanied by significant qualification, it should be specifically exempt from any certification, and it should not have to be included in any governance framework.

7. Governance and certification, § 201.100(f)

The Proposed Rule includes a governance framework that AMS states is intended to "ensure the accuracy and completeness of the Disclosure Document, and ensure the dealer's

compliance with its obligations under the PSA and the regulations." AMS hopes the framework will ensure corporate attention and accountability. Such a governance framework is unnecessary for the proposal, needlessly costly and complex, and inappropriate for the type of information required in the proposed disclosures. In addition, AMS has grossly underestimated the costs associated with this portion of the Proposed Rule, especially because this requirement goes beyond the scope of this proposal and requires firms to evaluate their obligations under all PSA regulatory requirements. We urge AMS to omit this requirement from the final regulations for these reasons and those discussed earlier in these comments.

If AMS were to include a governance framework in a final rule, it should simplify the requirements and provide additional clarity on what is required. AMS should particularly address the following:

- **Clarify what "reasonably designed" means.** AMS must clarify the agency's expectations for a "reasonably designed" governance framework, including providing an example of how such a framework is designed with specifics about personnel needs, review frequency, frequency of data updates, and nature of executive review. The term "reasonably designed" should be fully defined.
- **Omit the requirement for certification by an executive officer.** This requirement is unnecessary and inappropriate for a contract document. It is inappropriate to require an individual corporate official to personally certify the proposed disclosures. A grower could have recourse if deceptive statements were made in an agreement regardless of whether someone certifies the information, and including this requirement appears to be motivated by an effort to inject individual liability into what is in essence a private commercial contracting issue, which is wholly inappropriate. AMS should continue its longstanding approach of permitting companies to determine how best to comply with any regulatory requirements. If a certification is included, it should certify that the disclosures are made pursuant to a system designed to capture generally accurate information rather than to the accuracy of any particular information.
- **Exempt any forward-looking financial information required by the regulation from any certification.** This information is, by definition, projections or estimates, the accuracy of which cannot be guaranteed. Requiring a certification for forward projections could lead growers to misunderstand the nature of the projection and rely on it as guaranteed income.
- **Clarify "material fact."** In relation to the certification, AMS needs to explain and provide examples of what constitutes a "material fact" such that its untruthfulness or omission would render the Disclosure Document misleading.

8. Receipt by growers, § 201.100(g)

Proposed § 201.100(g) should be revised to require that a dealer maintain documentation that required disclosures were transmitted to a grower through a reliable means of communication, and the grower's signature should not be required as evidence of receipt by the grower within the required time period. The Proposed Rule appears to require that the dealer obtain the grower's signature as evidence that the disclosures were provided within the required timeframe. However, a dealer cannot control whether a grower signs the disclosures. For example, mail delays, illness, internet outages, a grower's delay in opening mail or email, vacation, natural disasters, or even a grower's refusal to sign could all prevent a dealer from obtaining the signature required under proposed § 201.100(g)(2) despite timely delivery of the disclosures. AMS should revise any final rule to expressly allow dealers to show they used a

reliable means of communication to deliver a disclosure in a timely manner, such as placing the disclosure in the mail, sending it by email, or delivering it by hand.

E. Comments on proposed 7 CFR § 201.214.

1. Placement disclosures, § 201.214(b)

If the placement disclosures in proposed § 201.214(b) are included in a final rule, AMS should consider several points:

- **"Health impairments" requires clarification.** It is unclear what would constitute a health impairment of the flock or breeder flock under proposed § 201.214(b)(6). Health impairments requiring disclosure should at the most be limited to a medical diagnosis made in writing by a licensed veterinarian that could reasonably affect the growth and mortality of the broiler flock.
- **Third-party breeder information should be considered.** Some companies might obtain birds or eggs from third-party breeder operations, which might consider the identity of the source farm to be proprietary information or subject to a nondisclosure agreement. AMS should address how a dealer should make the placement disclosures when required information is unavailable to the dealer or when a dealer is prohibited by law or contract from providing the information.
- **Reinforce that adjustments are not required based on the disclosed information.** Proposed § 201.214(b)(7) references the disclosure of "Adjustments, if any, that the dealer may make to the calculation of the grower's pay based on the inputs in (1) through (6) of this paragraph." We understand this to mean that dealers are not required to make adjustments based on the referenced information and that a payment system that does not make adjustments based on this information would not be in violation of the PSA. We urge AMS to reinforce this point in any final rule.

2. Settlement disclosures, § 201.214(c)

Proposed § 201.214(c) requires disclosure of much of the same information as called for in § 201.214(b), and the issues raised in the above discussion apply to proposed § 201.214(c) as well. Moreover, dealers already provide the information used to calculate a grower's payment under their contracts. Providing the additional information called for in proposed § 201.214(c) is unnecessary and would be confusing to the extent the information is not actually part of the contracted-for settlement calculation. If this disclosure were included in a final rule, AMS should address the following:

- **Include proper context for the information.** Because disclosing at settlement information not actually used to calculate payment could be confusing, dealers should be permitted to include a statement providing context around the information, including a statement that the disclosures address only a limited number of factors and that the disclosed factors are unlikely to fully or even substantially explain a grower's relative performance.
- **Clarify how to address multiple housing types.** It is unclear how a dealer should address in the comparison sheets situations involving different housing types on the same farm. AMS should clarify this and other situations that do not fit neatly into the scenarios contemplated in the Proposed Rule.

- **Clarify situations in which not all chicks are sexed.** AMS should provide clarity on how to address situations in which the sex of birds may be known for some but not all of the growers in the settlement pool.
- **Clarify feed disruption.** AMS should clarify exactly when a feed disruption occurs, such as when the feed lines have run completely empty. AMS should also address how to handle a situation in which all participants in the settlement pool experienced substantially the same feed interruption (for example, in the case of a natural disaster that affected all growers in the settlement pool).

* * *

NCC appreciates the opportunity to comment on the Proposed Rule. Please feel free to contact us with any questions. Thank you for your consideration.

Respectfully submitted,

Mike Brown
President
National Chicken Council

Enclosures

Appendix A: T. Elam, *Live Chicken Production Trends*, FarmEcon, LLC (Mar. 2022).