NATIONAL CHICKEN COUNCIL

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Submitted electronically via Regulations.gov

Bruce Summers
Administrator
Agricultural Marketing Service
U.S. Department of Agriculture
1400 Independence Ave. SW
Washington, DC 20250

Re: Comments on Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 87 Fed. Reg. 60010 (Oct. 3, 2022), Docket No. AMS-FTPP-21-0045

Dear Mr. Summers:

The National Chicken Council (NCC) appreciates the opportunity to comment on the proposed rule, "Inclusive Competition and Market Integrity Under the Packers and Stockyards Act" published in the Federal Register on October 3, 2022, (the "Proposed Rule") by the U.S. Department of Agriculture (USDA) Agricultural Marketing Service ("AMS" or the "agency"). NCC represents vertically integrated companies that produce and process more than 95 percent of the chicken marketed in the United States. Our members would be directly affected by the proposed regulations.

The Proposed Rule would fundamentally alter and constrain the poultry production market to the detriment of growers, consumers, and processors alike. The Proposed Rule suffers numerous legal infirmities and would have devastating effects on the poultry contracting process, resulting in increased costs to our members making it more difficult to fairly reward their contract farmers. For the numerous reasons discussed in these comments, we urge AMS to withdraw the Proposed Rule. To the extent AMS believes a rulemaking remains necessary, we urge AMS to promulgate a single rulemaking addressing all proposed changes to livestock and poultry contracting in one consolidated process.

Executive Summary

NCC urges AMS to withdraw the Proposed Rule because it is legally unsound, unworkable for industry, and poses costs that will inflict irreparable damage to the US economy. The Proposed Rule exceeds AMS's statutory mandate by proposing a rule by which violations would seemingly not require a showing of injury to competition, an essential component of all violations of Section 202 of the Packers and Stockyards Act (PSA). The Proposed Rule further fails to pass constitutional muster because of the litany of vague and undefined terms used throughout that fail to clearly define what conduct is prohibited. The Proposed Rule likewise falls short of Administrative Procedure Act (APA) requirements because it is based on an inadequate administrative record. Moreover, each provision of the Proposed Rule suffers fatal flaws making the proposal fundamentally unworkable. We highlight specific concerns below,

noting in particular the failure to define and protect reasonable business conduct and the broad and subjective definition of "market vulnerable individual." Finally, AMS drastically underestimates the cost of the Proposed Rule overlooking the heavy costs of recordkeeping, contract revisions, and associated labor and technology, much less the substantial litigation costs that would be necessary to define the contours of the Proposed rule. For the many reasons discussed below, AMS should withdraw the Proposed Rule. If AMS continues to believe the proposal is necessary, it should conduct a single rulemaking addressing all proposed changes to livestock and poultry contracting.

I. The Proposed Rule Is Legally Deficient

The Proposed Rule is legally deficient because it would prohibit conduct without regard to injury or likely injury to competition, is unconstitutionally vague, exceeds AMS's statutory mandate, and is not supported by the administrative record.

A. The Proposed Rule would prohibit conduct without regard to injury to competition

Well established caselaw—universal among the many circuit courts of appeal to have considered the issue—holds that establishing a violation of Section 202 of the PSA requires showing injury or likely injury to competition. As recently as two years ago, AMS tacitly recognized this as well.[1] AMS suggests throughout the preamble, however, that it could enforce the Proposed Rule without showing competitive injury.[2] Meanwhile, the plain text of the Proposed Rule is silent on the requirement. As a matter of law, all violations of Sections 202(a) and (b) of the PSA require a showing of injury, or the likelihood of injury, to competition. The Proposed Rule ignores this requirement and attempts to reach much more broadly. As such, it would exceed AMS's statutory authority.

1. The agency lacks statutory authority to promulgate any regulation that permits a finding of a violation of Sections 202(a) or (b) of the PSA without a showing of injury to competition.

When Congress passed the PSA, it specifically intended to prohibit practices that harmed the competitive process. The language that it used in the statute was understood at the time of

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[1] Most recently, AMS recognized "a question" of competitive injury in its 2020 rulemaking addressing criteria for identifying violations of the PSA. 85 *Fed. Reg.* 79779, 79790 (Dec. 11, 2020) ("Whether competitive injury is required to establish a violation of the Act is a broader question applicable to the full provisions of sections 202(a) and 202(b). . . .").

[2] For example, AMS references protecting individual producers without addressing the corresponding need to show a broader injury or likelihood of injury to competition:

> The proposed prohibitions would protect producers at both individual and market-wide levels from undue prejudices and disadvantages and unjust discrimination—both of which AMS has determined violate the PSA. The Secretary is empowered under the PSA to address harms in their incipiency.

87 *Fed. Reg.* 60017. AMS cites *Bowman v. USDA,* to support the above proposition, quoting "the Act is designed to 'prevent potential injury by stopping *unlawful* practices in their incipiency. Proof of a particular injury is not required." 363 F.2d 81, 85 (5th Cir. 1966) (emphasis added). AMS ignores however that the concerns it identifies do not in fact violate the PSA without showing a likelihood of competitive injury. If an action, including one it its incipiency, does not present a likelihood of injury to competition, it is not unlawful under the PSA.

enactment to address those practices that were collusive or monopolistic (or monopsonistic) and had a substantial likelihood of reducing output and ultimately raising prices to consumers. Congress incorporated terminology from other regulatory statutes—most notably, the Interstate Commerce Act (ICA) and the Federal Trade Commission Act (FTCA)—that were plainly designed to protect the competitive process for the benefit of the consuming public. The competitive injury requirement, therefore, is not some judicial gloss on Section 202(a)-(b) but an integral part of the statutory scheme. By importing language from other enactments with well-established legal meaning, Congress necessarily "adopt[ed] the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use convey[ed]."[3] Accordingly, it is the statutory language itself that imposes the requirement of competitive injury. Indeed, there is no other reasonable reading of the statute. The agency has no authority to promulgate any regulation that is broader than, or conflicts with, the underlying statutory provision on which it is based.[4] Because Sections 202(a) and (b) of the PSA mandate a showing of competitive injury, AMS has no power to read out that statutory element through its rulemaking authority.

The PSA is at its foundation an antitrust law. There is no dispute that the purpose of Section 202 of the PSA is the elimination of monopolistic or other anticompetitive practices—that is, to protect competition for the benefit of consumers. Only a year after the Act's passage, the Supreme Court in *Stafford v. Wallace* recognized that the "chief evil" that Section 202 sought to address was "the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and *arbitrarily to increase the price to the consumer, who buys*."[5] "Another evil," according to the Court, was "exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of the live stock through the stockyards, *all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers, on the other*."[6]

The common thread linking the statutory purposes identified by the Supreme Court is the elimination of anticompetitive practices. First, as the *Stafford* Court noted, Congress sought to prohibit the abuse "unduly and arbitrarily" of monopsony power by packers that leads to a monopolistic restriction of output with the effect of "arbitrarily" increasing the price of products purchased by consumers. Second, Congress intended to prevent "exorbitant charges" and other anticompetitive practices resulting from collusion among market participants. As the Court noted, because of that collusion, "[e]xpenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and *increase the price to be paid by the consumer*."[7] In other words, every aim of Section 202 identified in *Stafford* manifests an intent to protect the competitive process for the benefit of consumers.

Nothing in *Stafford* or in the language of the statute suggests that Congress intended the Act to protect individual market participants from the stringency of competition. Rather, market

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3 *Morissette v. United States,* 342 U.S. 246, 263 (1952).

4 *Morrison v. National Australia Bank, Ltd.*, 130 S. Ct. 2869, 2881 (2010) (regulation promulgated under a statute "'does not extend beyond conduct encompassed by [the statute's] prohibition'") (quoting *United States v. O'Hagan*, 521 U.S. 642, 651 (1997)); *Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 (1975) ("scope [of a rule] cannot exceed the power granted the [agency] by Congress under [the relevant statute]").*

5 *Stafford v. Wallace*, 258 U.S. 495, 514–15 (1922) (emphasis added).

6 *Id.* (emphasis added).

7 *Stafford*, 258 U.S. at 515.

participants are protected from conduct that itself would have the effect of harming competition and consumer interests. In identifying the aims of Section 202, *Stafford* explicitly connects any protection of producers to the protection of consumers. The Court explained that Congress sought to remove "undue burden[s] on . . . commerce"[8] and "unjust obstruction[s] to . . . commerce"[9] flowing from any "unjust or deceptive practice or combination," confirming that Congress enacted the PSA to maximize market output for the benefit of consumers.

Courts have long recognized that the PSA is rooted in antitrust law.[10] Antitrust law exists to protect the competitive process so that consumers may obtain the highest quality goods and services at the lowest possible cost.[11] In the absence of some likely consumer harm, "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws."[12] In short, the Sherman Act and other antitrust statutes have not been construed to protect producers from the rigors of competition or to strike against aggressively competitive practices. Instead, these laws aim to enhance consumer welfare by ensuring that markets operate efficiently and that products are produced and priced competitively. *Stafford* makes clear that the goals of the PSA are identical.[13]

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8 *Id.*

9 *Id.*

10 *De Jong Packing Co. v. United States Dep't of Agric*., 618 F.2d 1329, 1335 n.7 (9th Cir.), *cert. denied*, 449 U.S. 1061 (1980) (PSA "incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation"); *Armour & Co. v. United States*, 402 F.2d 712, 722 (7th Cir. 1968) ("Congress gave the Secretary no mandate to ignore the general outline of long-time antitrust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged.").

11 *See, e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 225 (1993) (the antitrust laws protect "*competition*, not *competitors*") (emphasis in original) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription'") (quoting R. Bork, *The Antitrust Paradox* 66 (1978)); *Sanderson v. Culligan Int'l Co.*, 415 F.3d 620, 623 (7th Cir. 2005) ("The antitrust laws protect consumers, not producers. They favor competition of all kinds, whether or not some other producer thinks the competition 'fair.'"); *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1154 (9th Cir. 2003) ("Inefficiency is precisely what the market aims to weed out. The Sherman Act, to put it bluntly, contemplates some roadkill on the turnpike to Efficiencyville."); *Chicago Prof'l Sports Ltd. P'ship v. National Basketball Ass'n*, 95 F.3d 593, 597 (7th Cir. 1996) ("The core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem.").

12 *Brooke Group*, 509 U.S. at 225.

13 The PSA may be broader than some antitrust provisions in that it prohibits acts that are *likely* to have a detrimental effect on competition rather than only those having an *actual* anticompetitive effect. *See, e.g.*, *De Jong*, 618 F.2d at 1335 n.7 ("the courts that have considered § 202 have consistently looked to decisions under the Sherman Act for guidance, although recognizing that § 202 in some cases proscribes practices which the Sherman Act would permit"); *Armour & Co*., 412 F.2d at 722 ("While Section 202(a) of the Packers and Stockyards Act may be broader than antecedent antitrust legislation found in the Sherman Act, Clayton Act, FTCA and ICA, there is no showing that there was any intent to give the Secretary of Agriculture complete and unbridled discretion to regulate the operations of packers."). The point remains, however, that Section 202 does not permit either the agency or a private plaintiff to dispense with some showing of competitive injury—actual or likely—to prove a violation.

2. Every appellate court to have considered the issue has held Section 202 of the PSA requires a showing of competitive injury.

In light of *Stafford*, every appellate court to have construed Section 202 of the PSA has held that no violation of subsections (a) or (b) occurs without a showing of competitive injury. Eight different circuits have addressed the issue, and they have uniformly and resoundingly affirmed this understanding.[14] In several of these cases, the agency argued its position directly to the court in question[15]; in others, it filed *amicus* briefs urging the court to adopt its preferred construction.[16]

The Sixth Circuit thoroughly summed up the judicial landscape in its 2010 *Terry* decision. The court concluded that, while the question of "whether a plaintiff asserting unfair discriminatory practices or undue preferences under §§ 202(a) and (b) of the PSA must allege an adverse effect on competition to state a claim" was new to the Sixth Circuit, other courts had addressed the question:

> This issue is not novel to other courts; it has been addressed by seven of our sister circuits, with consonant results. All of these courts of appeals unanimously agree that an anticompetitive effect is necessary for an actionable claim under subsections (a) and (b). For the reasons that follow, we join this legion.[17]

In surveying court precedent, the Sixth Circuit noted the "prevailing tide" of circuit court decisions holding "that subsections (a) and (b) of § 192 [PSA § 202] require an anticompetitive effect," after which it concluded:

> The tide has now become a tidal wave, with the recent issuance of the Fifth Circuit Court of Appeals' en banc decision in *Wheeler v. Pilgrim's Pride Corp.,* 591 F.3d 355 (5th Cir.2009) (en banc), in which that court joined the ranks of all other federal appellate courts that have addressed this precise issue when it held that "the purpose of the Packers and Stockyards Act of 1921 is to protect competition and, therefore, only those practices that will likely affect competition adversely violate the Act." *Wheeler,* 591 F.3d at 357. All told, seven circuits—the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits—have now weighed in on this issue, with unanimous results.[18]

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[14] *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 276–79 (6th Cir. 2010); *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (en banc); *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1230 (10th Cir. 2007); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006); *London v. Fieldale Farms Corp*., 410 F.3d 1295, 1303 (11th Cir.), *cert. denied*, 546 U.S. 1034 (2005); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *Philson v. Goldsboro Milling Co.*, 1998 WL 709324 at *4–5 (4th Cir., Oct. 5, 1998); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985); *De Jong*, 618 F.2d at 1336–37; *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369–70 (7th Cir. 1976); *see also Armour & Co.*, 402 F.2d 712.

[15] *IBP*, 187 F.3d 974; *Farrow*, 760 F.2d 211; *De Jong*, 618 F.2d 1329; *Armour & Co.*, 402 F.2d 712.

[16] *Terry*, 604 F.3d 272; *Wheeler*, 591 F.3d 355.

[17] *Terry*, 604 F.3d at 276.

[18] *Id.* at 277 (lengthy string citation of supporting cases omitted).

Tellingly, USDA participated in the *Terry* appeal as an amicus curiae and advanced the position that a showing of injury is not required for a Section 202(a) or (b) violation. The court expressly recognized USDA's involvement, noted USDA's argument that the court should read Section 202(a) and (b) to not require a showing of injury to competition, and pointedly concluded, "We decline to do so."[19]

The agency offers no analysis undermining any of these court decisions, nor could it. The agency has participated in some capacity, either as a party or an *amicus*, in six of the ten appellate cases holding that competitive injury is an element of a Section 202 violation. In light of this record of litigation futility, AMS is not free to ignore the prevailing judicial authority or seek to undo it through the rulemaking process.

3. When the PSA was enacted, the language of Sections 202(a) and (b) was understood to proscribe conduct that harmed competition.

AMS blindly ignores the competitive injury requirement in Section 202, instead implying the language of the section is malleable and open to interpretation. Rather than base this argument on any legal authority, AMS dredges up contemporaneous dictionary definitions of the terms and then seeks to impress them on the statute's language.[20] The agency cites no authority for this proposed form of statutory construction, which borders on frivolous. In exercising its rulemaking authority, AMS must follow the canons of statutory interpretation. It is neither "free to pour a vintage that [it] think[s] better suits present-day tastes"[21] nor otherwise permitted to construe a statute in a linguistic vacuum. The APA does not sanction such "make-it-up-as-the-agency goes-along" exercises of regulatory power.

The relevant provisions of the Act prohibit "unfair," "unjustly discriminatory," and "deceptive" practices and devices, as well as "undue" or "unreasonable" preferences and advantages and "undue" or "unreasonable" prejudices and disadvantages. All of these terms had established statutory and common-law antecedents that were well-known to members of Congress when the statute was enacted. Read in legal context, these terms concern only business conduct that has an actual or likely adverse effect on competition.[22] Therefore, the interpretation given by the courts to Sections 202(a) and (b) is not merely the best reading but rather is the only permissible reading of the statute.

The language of Sections 202(a) and (b) is lifted almost verbatim from provisions of the ICA and the FTCA.[23] By the time of the PSA's passage in 1921, these statutes had been addressed a number of times by the Supreme Court. There was no question at the time that the aims of those laws were to preserve or restore competition and prevent monopolistic practices either generally, in the case of the FTCA, or in specific economic sectors, in the case of the ICA.[24]

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19 *Id.* at 278.

20 87 *Fed. Reg.* 60015–16.

21 *United States v. Sisson*, 399 U.S. 267, 297 (1970).

22 *Wheeler*, 591 F.3d at 364 (Jones, J., concurring). The term "unreasonable," for example, had a clear antitrust meaning by the time of the passage of the PSA. The Supreme Court had used that terminology to distinguish between those business practices that unlawfully restrained competition from those that were permissible under the Sherman Act. *See, e.g., Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

23 81 *Fed. Reg.* at 92570.

24 *See generally Wheeler*, 591 F.3d at 365–70 (Jones, J. concurring) (collecting cases).

The language used in those enactments was understood to effectuate those Congressional goals.

Words used in a statute that "have acquired a specialized meaning in the legal context must be accorded their *legal* meaning."[25] When Congress transports phrases from one statute to another, there is a strong presumption that adoption of such terminology "carries with it the previous judicial interpretations of the wording."[26] Moreover, Congress "presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed."[27] "[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it."[28] Here, nothing in Sections 202(a) and (b) of the PSA suggests that Congress intended the words used in those provisions to have a meaning different from the meaning given them in other statutes.[29] Rather, Congress used terms of art to describe the unlawful practices prohibited by Sections 202(a) and (b). The "plain language" rule requires that those terms of art be given their commonly understood meaning at the time of the PSA's passage. Accordingly, the statutory language itself requires that either the agency or a private plaintiff prove a competitive injury to show a violation of Sections 202(a) and (b).

4. The structure of Section 202 of the PSA mandates a competitive injury requirement.

The existence of a competitive injury requirement is also manifest from the structure of the statute. Sections 202(a) and (b) do not ban all forms of economic discrimination, preference, or advantage. Rather, they prohibit only those that are "unjust," "undue," "unfair" or "unreasonable." Therefore, there must be some forms of discrimination, preference or advantage that are legitimate and some that are not. Both the courts and the agency must have an objective standard by which to distinguish lawful conduct from unlawful conduct. The explicit requirement of competitive injury in other subsections of Sections 202 demonstrate precisely what Congress intended that objective standard to be. When examined in context, the only reasonable conclusion that can be drawn is that Sections 202(a) and (b) are intended to be catch-all provisions that sweep up anticompetitive practices not otherwise prohibited by the more narrowly drawn subsections of the statute.[30] Otherwise, Sections 202(a) and (b) would prohibit activities specifically exempted from the other Section 202 subsections, depriving those sections of any meaning and rendering them null, contrary to the canons of interpretation.

Without the competitive injury requirement, there is no objective standard by which courts, or the agency, can separate prohibited practices from lawful ones. Cut loose from their moorings

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[25] *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Resources*, 532 U.S. 598, 615 (2001) (emphasis in original).

[26] *Carolene Prods. Co. v. United States*, 323 U.S. 18, 26 (1944).

[27] *Morissette*, 342 U.S. at 263.

[28] *Moskal v. United States,* 498 U.S. 103, 121 (1990) (quoting F. Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L.R. 527, 537 (1947)).

[29] Although resort to the legislative history of the PSA is unnecessary for a proper construction of Sections 202(a) and (b), that legislative history also confirms that Congress understood the terms used in the statute to address anticompetitive conduct. *See* H.R. Rep. No. 67-77, at 2–10 (1921) (detailed discussion of Supreme Court cases construing the language of the ICA and the FTCA).

[30] *Wheeler*, 591 F.3d at 371 (Jones, J., concurring).

in competition law, the terms "discrimination," "preference" and "advantage" would have broad meanings that extend well beyond the economic realm. Yet, even AMS has not suggested that the PSA applies to noncommercial practices. The agency's own understanding of the statute, therefore, confirms that Congress intended the PSA to be economic legislation governing commercial relationships. Once that fact is recognized, it follows that the terms "unfair," "unjust," "undue" and "unreasonable" must also have economic content. The only way to give those terms such content is to apply a clear set of objective economic principles that allow a court or agency to ferret out those practices that are harmful—that is, "unfair," "unjust," "undue," or "unreasonable" —from those that are efficient and beneficial to competition overall based on the legal definitions of these terms when the PSA was adopted. The competitive injury requirement, in turn, is the only way to do so consistent with the structure and purposes of Section 202.

Any other interpretation would make it virtually impossible for a business subject to the PSA to order its affairs rationally to comply with Section 202(a) or (b). What is "unfair," "unjust," "undue," or "unreasonable" would depend solely on what an agency adjudicator or, in civil litigation, a judge or jury decided that it meant in any particular case. To exercise that function, the agency or court would have to make value judgments, choosing one set of priorities over another without any guidance from the statutory text or any other source about which value or set of values is to be preferred in any particular case. Such an approach raises significant constitutional issues, but in any event, there is no need to address those matters because nothing in the statutory text suggests Congress intended to empower the agency or the courts to make such standardless value judgments.[31]

In sum, the plain language of Section 202 of the PSA, its aims, and its structure reveal that Congress intended that the practices banned by subsections (a) and (b) be those that harm competition in some fashion. That conclusion has been unanimously confirmed by every appellate court to address the issue. Therefore, the competitive injury requirement is not merely some gloss on an allegedly ambiguous provision but an integral and permanent statutory command.

5. Any effort to omit the PSA's competitive injury requirement exceeds AMS's statutory mandate and raises a major question requiring Congressional direction.

Congress has not authorized AMS to forego the competitive injury requirement of Section 202. The Proposed Rule ultimately stems from rulemaking driven by the 2008 Farm Bill.[32] The 2008 Farm Bill granted no authority to AMS to promulgate a rule that excuses the competitive injury requirement of Section 202(a) or (b). Section 11006 of the 2008 Farm Bill stated in pertinent part that the "Secretary of Agriculture shall promulgate regulations with respect to the Packers and Stockyards Act, 1921 (7 U.S.C. § 181 *et seq.*) to establish criteria that the Secretary will consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of such Act."[33] The Farm Bill, therefore, authorized only a rule setting forth *criteria* that the agency would use in determining whether a violation of Section 202(b) of the

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31 *Id.* at 365 (Jones, J., concurring) (PSA "certainly did not delegate any such free value-choosing role to the courts") (quoting R. Bork, *The Antitrust Paradox* 53 (1993 ed.)).

32 Pub. L. 100-246.

33 *Id.* § 11006(1).

PSA has occurred. It did not authorize AMS to alter, abrogate, or ignore the fundamental elements of the statute.

Not only did the plain language of the 2008 Farm Bill make that clear, but the legislative record unmistakably demonstrates that Congress authorized no radical alteration of Sections 202(a) or (b). The original draft of the 2008 Farm Bill proposed by Senator Harkin contained an express provision eliminating the competitive injury requirement under Sections 202(a) and (b). Congress removed that language from the final enactment. Accordingly, the 2008 Farm Bill did not authorize AMS to forego the competitive injury element of Section 202 violations.

When AMS's predecessor agency charged with PSA implementation, the Grain Inspection, Packer and Stockyards Administration (GIPSA), nonetheless tried to read into the 2008 Farm Bill a mandate to circumvent the injury to competition requirement, Congress reacted swiftly and clearly by preventing GIPSA from finalizing an overly broad rulemaking for several years.[34] Moreover, the 2014 and 2018 Farm Bills did not renew the call for criteria, nor did they make any reference to GIPSA's 2010 rulemaking that had started—and then had been halted by Congress—in response to the 2008 Farm Bill. And they certainly did not indicate Congress supported attempts to read the injury to competition requirement out of the PSA. Had Congress intended for the agency to reinterpret Sections 202(a) and (b), Congress readily could have clarified as much in the 2014 or 2018 Farm Bill, especially in light of the considerable controversy caused by GIPSA's 2010 proposed rule. Instead, the 2014 and 2018 Farm Bills were silent on the topic, suggesting, if anything, that Congress felt it was time to move on from the issue raised in that rulemaking. When GIPSA ultimately promulgated an appropriately tailored rulemaking, resulting in 9 C.F.R. § 201.211, Congress did not object.

Given this clear direction from Congress, AMS's attempt to read the injury to competition requirement out of the PSA and to effectively expand the PSA into a general antidiscrimination law raises a major question requiring Congressional direction. As such, AMS may not expand its regulatory framework to change or undermine the current application of Sections 202(a) and (b). 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.[35] The PSA is a hundred-year-old law, and at no point in its history has it been applied to broadly address the type of conduct encompassed in the Proposed Rule or to prohibit conduct that does not result in an injury or the likelihood of injury to competition. Congress knows what the PSA does and does not do, and only Congress may expand the law's reach to cover new conduct. Through the present series of rulemakings, of

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[34] *See* 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).

[35] 142 S. Ct. 2587, 2613–14 (2022) (explaining that in certain cases of "economic and political significance," an agency must demonstrate "clear congressional authorization" to exercise its powers); *see also Nat'l Fed'n of Ind. Business v. OSHA*, 142 S. Ct. 661 (2022) (per curiam) (rejecting the Occupational Safety and Health Administration's claims of regulatory authority regarding emergency temporary standards imposing COVID-19 vaccination and testing requirements on a large portion of the national workforce); *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (per curiam) (rejecting the Centers for Disease Control and Prevention's claims of regulatory authority regarding a nationwide eviction moratorium).

which this Proposed Rule is a part, AMS seeks to completely upend animal production contracting in the livestock and poultry industry. These sectors account for more than one trillion dollars of annual economic impact and touch all fifty states, and they would be drastically affected by a change in the injury to competition requirement. Any attempt to rewrite by regulation the PSA's injury to competition requirement is the very definition of an issue of "economic and political significance." AMS cannot take it upon itself to dramatically expand the scope of such a longstanding statute.

B. The Proposed Rule is unconstitutionally vague

A regulation having the force of law must give persons and entities subject to it fair notice of what is prohibited so that they may comply with it. Several portions of the Proposed Rule fail this basic constitutional test. Under the due process clause of the Fifth Amendment, a rule of law must define a legal violation "with sufficient definiteness that ordinary people can understand what conduct is prohibited and . . . in a manner that does not encourage arbitrary and discriminatory enforcement."[36] Any legal rule failing to meet that standard is "void for vagueness." While the vagueness doctrine is most often employed in criminal cases, it has also been applied in cases in which a party faced civil sanctions as well.[37]

The Supreme Court has applied the void-for-vagueness doctrine to strike down economic regulations that are remarkably similar to the Proposed Rule. In *Cline v. Frink Dairy Co.*,[38] the Court held unconstitutional under the Fourteenth Amendment Due Process Clause a Colorado antitrust statute prohibiting certain business combinations except those that were necessary to obtain a "reasonable profit." Similarly, in *United States v. L. Cohen Grocery Co.*,[39] the Court held unconstitutional Section 4 of the Lever Act, which made unlawful any "unjust or unreasonable rate or charge" for "necessities." And in *International Harvester Co. v. Kentucky*,[40] the Court concluded that a Kentucky antitrust statute proscribing the fixing of prices at levels "greater or less than the real value of the article" was unconstitutionally vague. The fatal flaw in each law was the indeterminate liability standard imposed. None of the statutes proscribed any specific conduct but rather made illegality turn on "elements . . . [that] are uncertain both in nature and degree of effect to the acutest commercial mind."[41]

The Proposed Rule includes many vaguely or even undefined terms, but failure to comply with those terms would result in a regulatory violation. For example, "market vulnerable individual" would be defined so broadly as to include potentially anyone. It is unclear how to determine whether a contract is "generally or ordinarily offered," when "differential contract performance or enforcement" would be considered to have occurred, or what it means to "inhibit market access," "take an adverse action," or use a "pretext." The Proposed Rule would prohibit conduct that is deemed to be a "prejudice or disadvantage" or "retaliation,"[42] but the proposal provides only examples, not definitive lists or definitions, making it impossible for a company to know whether any given conduct would be allowed under the regulation. Because these

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36 *Skilling v. United States*, 130 S. Ct. 2896, 2927–28 (2010).

37 *Gentile v. State Bar*, 501 U.S. 1030, 1048–50 (1991) (invalidating state bar disciplinary rule under the void-for-vagueness doctrine).

38 274 U.S. 445, 453–65 (1927).

39 255 U.S. 81 (1921).

40 234 U.S. 216 (1914).

41 *Id.* at 223.

42 Proposed §§ 201.304(a)(2), 201.304(b)(3).

provisions purport to identify conduct that would be violative or specific records that would need to be kept to demonstrate compliance, they must be spelled out in a definite manner so that regulated entities can understand how to comply with the Proposed Rule. The proposal would likewise prohibit "pretexts" without elaborating on what is a pretext and what is a legitimate explanation, or even how "legitimacy" might be determined.[43] The proposal would impose a strict recordkeeping requirement without specifying what records must be kept or, again, what conduct would even trigger the recordkeeping requirements.[44]

These criteria provide virtually no guidance on when conduct would be unlawful. Rather, an act could be determined to be unlawful under the Proposed Rule only *after* some event has occurred. A poultry dealer or other entity subject to Sections 202(a) and (b) acting in utmost good faith and ordering its affairs in the most rational fashion in an effort to comply with the Proposed Rule could not reasonably anticipate, much less determine with any reasonable degree of certainty, what business practices would ultimately be held illegal under these and other provisions. The Proposed Rule, therefore, cannot withstand constitutional scrutiny. It must be withdrawn.

C. An insufficient administrative record fails to support the Proposed Rule

The Proposed Rule is a solution in search of a problem, as evidenced by an insufficient administrative record. Perpetuating a fatal flaw that has plagued rulemaking on this topic for thirteen years, AMS fails to identify any actual harmful conduct requiring this regulation. Yet it would impose substantial cost and administrative burden on the entire poultry production industry with no tangible benefit.

The preamble to the Proposed Rule is littered with vague allusions to potentially violative conduct and generalized complaints lacking sufficient detail for meaningful evaluation. AMS has certainly shown no systemic or endemic problem in poultry contracting requiring such an extreme intervention to correct. The agency's rationale repeatedly falls back on broad conclusory statements or incomplete market analysis. For example, in describing the perceived need for market vulnerable individual provisions, AMS can state only that certain groups "arguably" are exposed to risk of abuse and that "undoubtedly" the type of discrimination contemplated in the Proposed Rule exists "in some form today," without citing a single actual example of this occurring.[45] More broadly, the entire rulemaking seems to simply presume there are widespread "market abuses observed in the sector today" without actually identifying any instances in which this particular set of regulations would be needed.[46]

The preamble is heavy on economic theory and light on actual facts to support the rulemaking. Stripped to its essence, the factual administrative record to support this rulemaking consists of references to unspecified allegations of unfair treatment by producers, a highly selected set of court cases, and similar past rulemakings that never came to fruition. None of these are sufficient to establish the need for such an untenable set of regulations. The preamble is rife with vague references of "concerns" that have been "reported to USDA" but never acted on.[47] AMS provides no details about these purported complaints, including what specifically they

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43 Proposed § 201.306(b)–(d).
44 Proposed § 201.304(c)(2).
45 87 *Fed. Reg.* at 60013.
46 *Id.*
47 *Id.*

alleged happened, when they were lodged, whether they were substantiated, how AMS investigated or responded to them, what conclusions AMS reached, 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. If the unspecified "concerns . . . reported to USDA" reflected PSA violations, why did USDA not investigate them and take enforcement action under the statute? Tellingly, AMS's response to this question in the preamble is essentially that AMS did not think it had statutory authority to do so. At the least, USDA might have developed a factual record to inform policy decisions. Instead, it appears USDA was content to simply assume these vague allegations were true. Moreover, many of these vague allegations seem to have come from a 2010 listening session,[48] and some even earlier.[49] They are long out of date and have never been verified or subjected to the searching scrutiny warranted to support federal rulemaking. Unsubstantiated complaints lodged in 2010 and 2004 cannot meaningfully support a 2022 rulemaking under vastly different economic conditions.

The only concrete examples of alleged PSA violations in the entire proposal come in the form of selected court cases. However, many of these cases do not actually stand for the proposition for which they are cited, and they appear to have been opportunistically selected and used.

For example, AMS cites *Swift & Co.* v. *United States*[50] for the proposition that "price discrimination in favor of a larger grocery store chain, and higher prices to its competitors, are another type of unjust discrimination that the Act has prevented."[51] However, AMS neglects to mention that in *Swift*, a prerequisite of the holding was a finding that there was substantial evidence of injury to competition.[52] Similarly, AMS's reliance on *Denver Union Stock Yard Co.* is misplaced because in that case, the Supreme Court specifically addressed the discrimination at issue in the context of marketplace harm, explaining that "[a]s written [the PSA] is aimed at all monopoly practices."[53] AMS cites to the *Terry* decision described above to support AMS's position that discriminatory or retaliatory acts by packers or integrators intended to prevent transfer of rents negatively affects efficiency, but in *Terry*, the Sixth Circuit actually held there was *no* PSA violation because the plaintiff could not point to a competitive injury.[54] AMS similarly misconstrues the *James* case. AMS describes the *James* case as standing for the proposition that "fifty-four poultry growers sued the integrator for retaliatory actions and were awarded $10 million in damages as a result."[55] But in fact, in *James*, the Supreme Court of Oklahoma reviewed evidentiary proceedings from the trial that AMS referenced, *overturned the verdict*, and granted defendants a new trial citing concerns with the conduct of the trial.[56] Similarly, AMS cites *Philson v. Cold Creek Farms, Inc.* for the proposition that skipping placements and terminating contracts with turkey growers allegedly in retaliation for growers voicing complaints about the integrator.[57] Yet *Philson* was a ruling on the defendants' motion for summary judgment and thus focused on the sufficiency of the factual record. Importantly, in

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48 *Id.*

49 *Id.* at 60013 n.32.

50 317 F.2d 53, 55–56 (7th Cir. 1963).

51 87 *Fed. Reg.* at 60016.

52 317 F.2d at 55.

53 *Denver Union Stock Yard Co.* v. *Producers Livestock Mktg.,* 356 U.S. 282, 289–90 (1958).

54 *Terry* v. *Tyson Farms, Inc.*, 604 F.3d 272 (6th Cir. 2010).

55 87 *Fed. Reg.* at 60026.

56 *James* v. *Tyson Foods, Inc.*, 292 P.3d 10, 18–19 (Okla., 2012).

57 87 *Fed. Reg.* at 60028.

denying defendants' motion to dismiss with respect to alleged PSA violations, the court noted *Stafford's* emphasis that the PSA was fundamentally focused on preventing monopolistic practices and concluded that "[c]onsequently, only those unfair, discriminatory or deceptive practices adversely affecting competition are prohibited by the Act."[58] The *Philson* court expressly rooted its denial of the defendants' motion in findings that triable issues of fact remained as to whether the complained-of conduct caused injury to competition.[59]

But even if one were to overlook the actual holdings of these cases and take AMS's explanations at face value, these cases suggest that actual serious PSA violations are rare—AMS cites only a handful of cases over more than half a century—and that when they do occur, the PSA provides USDA or harmed individuals with ample statutory authority to pursue them. If anything, these cases show that the current regulatory approach is working. They certainly do not support additional, burdensome rulemaking. Likewise, poultry growing contracts are also subject to state contract and tort law, and one would expect extensive state-law litigation if integrators were engaging in abusive contracting practices. That has not happened, again reinforcing that the purported evils AMS is trying to address simply do not exist.

Finally, AMS recounts some of USDA's past PSA rulemaking efforts, seeming to imply that because USDA decided to initiate rulemaking in the past, there must a problem that requires solving. But a federal agency cannot simply conjure a problem into existence by saying it tried to address that problem in the past, nor does the fact that rulemaking occurred legitimize that administrative record. As discussed above, Congress specifically objected to many aspects of those past rulemakings, and the rules were withdrawn.

In short, nothing in the record indicates there is pervasive, or even occasional, discrimination, retaliation, or deception of the type raised in the Proposed Rule, much less that a burdensome series of contracting restrictions, compliance hoops to jump through, and recordkeeping obligations is justified to address it. This flawed administrative record renders the Proposed Rule arbitrary and capricious under the APA.[60]

II. The Proposed Rule Is Fundamentally Flawed and Unworkable

The Proposed Rule would do much harm and little if any good for anyone involved. It suffers from several critical overarching flaws, as well as flaws specific to each provision.

A. The Proposed Rule fails to expressly protect and define reasonable business conduct

First, the regulatory text of the Proposed Rule fails to address legitimate or reasonable business decisions. The reality of business dealings means that in many cases two parties will be treated differently simply because of economic conditions or business realities. One grower might be offered a contract whereas another was not simply because of processing plant capacity. One might be offered an opportunity to raise birds to different specifications because that grower has established a track record of successfully innovating her husbandry practices. A grower might

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58 *Philson* v. *Cold Creek Farms, Inc.,* 947 F. Supp. 197, 200–02 (E.D.N.C. 1996).

59 *E.g.*, *id.* at 201–02 ("In addition, a genuine issue of material fact remains as to whether [Defendant's] method of computing 'head sold' was injurious to competition and unfair, discriminatory or deceptive.").

60 5 U.S.C. § 706(2)(A).

have a contract terminated because the grower mistreated birds. Although all of these are reasonable and appropriate business justifications for differential treatment, on the surface, they could also appear to violate the Proposed Rule. It is essential that regulated entities be able to make these and other reasonable business decisions with confidence they will not later face liability under the Proposed Rule.

Although AMS recognizes in the preamble its intent to "leav[e] room for differential treatment based on legitimate business purposes,"[61] that protection is not clearly enshrined in the regulatory text itself. Specifically, the Proposed Rule fails to recognize that differential treatment based on a reasonable business decision does not violate proposed Sections 201.304 or 201.306, regardless of any other factors. Although AMS references "legitimate" business decisions, a more appropriate approach would be to create a safe harbor for "reasonable" business decisions. Courts and agencies are well versed in applying reasonableness standards, whereas "legitimacy" implies value judgments that are far more difficult and, in any event, inappropriate for evaluating business decisions. Focusing on "reasonable business decisions" would also better harmonize the Proposed Rule with existing 9 C.F.R. § 201.211, creating better consistency across AMS's PSA regulations.

Moreover, AMS fails to identify how a company would be expected to demonstrate that an action was based on a reasonable business decision. Without clear direction, regulated entities would be forever exposed to the risk of AMS deciding after the fact that the company lacked sufficient documentation to demonstrate its decision was appropriate.

Equally as important, the emphasis must be on demonstrating the existence of a reasonable business decision, as opposed to lack of existence of any other explanation. Business decisions must be presumed to be reasonable unless proven otherwise. Business relationships, especially long-term ones, can be complicated.

Examples of complicated fact patterns abound. Consider, for instance, a poor performing grower who is unsatisfied with his pay and initiates a dispute with an integrator and who then grossly mismanages a flock and creates serious bird welfare issues. The integrator might reasonably decide to terminate the contract with that grower based on mistreatment of the birds, regardless of any other considerations, and it should be enough for the integrator to demonstrate that basis for the adverse action.

Or consider a grower who is signed to a one-year contract to make up growout capacity after part of a large multi-house farm is destroyed by a fire. After the year-long contract is up, the larger farm is once again operational, the additional grow-out capacity is no longer needed, and the integrator elects not to renew the grower's contract. If the temporary grower is a market vulnerable individual, how would the integrator demonstrate the non-renewal was for appropriate reasons? Or consider the same example, but several temporary growers were brought on board for the year, some of whom were market vulnerable individuals and some of whom were not, and due to demand increase, the integrator decides to convert some of these temporary growers to longer-term growers by renewing their contracts. How is the integrator to evaluate the growers and justify its decisions? Would it have to prioritize renewing contracts with the market vulnerable individuals?

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[61] 87 *Fed. Reg.* at 60016.

The Proposed Rule fails to provide any guidance on how a regulated entity could document its business decisions in these and many other complicated scenarios.

B. Issues with proposed Section 201.302 – Market Vulnerable Individual

AMS proposes an extremely broad and subjective definition of "market vulnerable individual." Under the proposed definition, nearly anyone could be a market vulnerable individual in one way or another. Individuals are multifaceted and could be considered members of dozens, if not hundreds, of groups. So long as a person might be identified with even one "group" whose members are at a "heightened risk" of "adverse treatment," the person qualifies as a market vulnerable individual. This extremely broad definition would in effect require a company to assume every grower is a market vulnerable individual. This in turn would create tremendous administrative burden and stifle the free market contracting that has helped make chicken production so efficient for consumers and so rewarding for growers.

The proposal overlooks the extremely complex nature of individual identities. In reality, nearly everybody could identify an aspect of his or her personhood that could be associated with a group whose members are at heightened risk of adverse treatment. The proposed definition goes well beyond concepts of protected classes familiar under Equal Protection Clause law and instead encompass every facet of a person's appearance, mannerisms, attitudes, actions, beliefs, affiliations, lineage, and so on. Any individual is almost certainly a member of a group that puts the individual at heightened risk of adverse treatment as well as a group that makes favorable treatment more likely. The traits that make one a market vulnerable individual might vary by community or might change over time. An individual's associations with different groups might change over time as well; if a person was once part of a group but no longer is, would that person still be considered a market vulnerable individual? It is impossible to fully disentangle the complex nature of individuals, but AMS's proposal would reduce all business decisions to an exercise of identifying every way in which an individual might face a disadvantage and then requiring the integrator to prove that no such disadvantage occurred, in every single interaction with every single grower.[62]

In fact, read plainly, the proposal would lead to absurd results, with market vulnerable individual protection extending to many people who ought not receive protection. For example, individuals convicted of animal cruelty offenses would almost certainly be part of a group (known animal abusers) who are heightened risk of adverse treatment in animal production contracting (no integrator would want to entrust its birds to a known animal abuser), yet AMS's proposal would appear to protect them as market vulnerable individuals. Ironically, as proposed, if an integrator perceives a grower to be an animal abuser (a group whose members are at heightened risk of adverse treatment in poultry contracting), and that grower in fact abuses chickens, it might be impossible for the integrator to terminate the grower's contract due to the abuse because the contract termination would be an adverse action against someone the integrator perceives to be a market vulnerable individual on account of that person being a market vulnerable individual.

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[62] Notably, the Proposed Rule also appears to overlook definitions used in other USDA programs that appear to have similar goals, providing no analysis of how its proposed definition would differ or be similar to those or whether it considered basing its approach on other programs' definitions instead. *See, e.g.*, 7 U.S.C. 2003(e)(1) (defining "socially disadvantaged groups" of farmers or ranchers for USDA target participation rates in certain regulatory programs as groups "whose members have been subjected to racial, ethnic, or gender prejudice because of their identity as members of a group without regard to their individual qualities").

Many other unsavory traits could also trigger market vulnerable individual protection, with the ironic and unfortunate result that AMS's proposal could actually make it more difficult to refuse dealings with or to take adverse action against such people. Surely AMS does not intend such absurd outcomes, but the overly broad and nebulous concept of a market vulnerable individual all but invites such problems and the accompanying legal expenses to resolve them.

The Proposed Rule could lead to situations that are less absurd but just as difficult. Consider an integrator is approached by someone who wants to raise chickens but who does not speak English. This person presumably would be a market vulnerable individual. But none of the integrator's farm service technicians speak the prospective grower's language, and it would be impossible for them to effectively communicate with the grower and ensure the grower is able to raise birds to the integrator's standards. If the integrator declines to sign a contract with this prospective grower for this reason, the proposal would appear to treat that as an adverse action based on the individual's perceived status as a market vulnerable individual, yet doing business would seem to be impossible in this situation.

Moreover, under the proposal, it is entirely unclear how to determine whether a regulated entity "perceives someone to be a market vulnerable individual. For example, which employee's perception is relevant—the employee who interacts with the grower, the employee who approves the contract, the employee who makes placement decisions, or any of the many other employees likely involved in managing the grow-out process? What if one employee perceives the grower to be a market vulnerable individual, but another does not? What if three employees are jointly involved in a decision with respect to a grower, and one perceives the grower to be a market vulnerable individual while the other two do not? What if an employee incorrectly perceives an individual to be a market vulnerable individual, or perceives someone to be a market vulnerable individual for an incorrect reason? What if an employee's perception changes over time or is corrected someone else? What if a grower indicates he is not a market vulnerable individual?

The proposal also leaves it unclear how to determine what constitutes a "group," how to assess that group's "risk" of adverse treatment, and what amount of risk differential constitutes a "heightened risk," again reinforcing that virtually anyone could be a market vulnerable individual for a myriad of reasons.

The result of this proposed definition would be an avalanche of paperwork. Integrators would be forced to defensively document every interaction and business decision for every actual or prospective grower to demonstrate that individual was not treated adversely due to his or her status as a market vulnerable individual. The administrative cost and hassle would be immense and would impose substantial costs on integrators and growers. With significantly greater stakes for making a "wrong" decision, integrators would face a significant disincentive to bringing on new growers or taking any actions that could create their exposure with regards to market vulnerable individuals.

C. Issues with proposed Section 201.304(a) – Prohibited Bases

Proposed Section 201.304(a) suffers from numerous issues in addition to those mentioned above.

As discussed above, many critical terms used in this provision are vague (*e.g.*, "inhibit market access," "adverse action," "market vulnerable individual"). Without clear and concrete definitions, it is impossible to determine what conduct would violate this section and thus how to

comply. The non-exhaustive list of conduct that constitutes prejudices or disadvantages makes it impossible to know in advance what is prohibited. It is likewise unclear when conduct is said to "inhibit" market access or how much "inhibition" must occur for there to be a violation. For example, someone new to farming might be considered a market vulnerable individual under the proposal because new farmers are riskier business partners than established partners. If an integrator asks someone new to farming to take modest additional steps to demonstrate her fitness as a farmer, but does not make the same request of a longtime farmer, has the integrator "inhibited mark access" of a market vulnerable individual? These vague terms expose companies to arbitrary after-the-fact review and enforcement. All of the scenarios described in the sections above illustrate the very real challenges and costs regulated entities would face in trying to determine what conduct is appropriate.

It is also unclear how one would determine whether contract terms are "less favorable," especially when there are multiple terms involved. One farmer might prefer a short-term contract whereas another might prefer a longer-term contract. These preferences might also vary by geography. Similarly, it is unclear how to evaluate contracts where multiple terms differ. If a contract offered a higher guaranteed base rate but lower potential overall compensation because of lower bonus pay opportunities, would that be a more or less favorable term? It might depend on the individual farmer's preferences.

It is also unclear how contracts entered into at different times, in different regions, or in different economic conditions would be compared. Regional economic issues, such as land prices, natural disaster risk, or fuel prices might require different contracting approaches even if the growers ultimately earn the same net profit, but it is unclear whether arrangements like this would be allowed under the Proposed Rule. If integrators were forced to harmonize all contracts across regions or time, it could result in windfalls for some growers or arbitrary cuts for others.

Likewise, it is nearly impossible to determine when differential contract performance or enforcement might violate the Proposed Rule. Integrators manage hundreds or thousands of grow-out contracts, and by necessity, that process requires business judgment. An integrator might reasonably excuse a one-time issue with a longtime grower who has a proven track record, whereas that same issue might need require contract action with a new grower. The same goes with deciding whether to enter, terminate, or renew a contract.

These provisions would significantly deter entering into new contracts or new grower relationships, both because the act of entering into a new contract or relationship would trigger comparisons with all other contracts, and because it would be difficult to exit a contractual relationship with a poor performing or inattentive grower. A rational integrator would be wary under the Proposed Rule about making any changes to contracts, no matter how reasonable or how beneficial it would be for a grower, out of fear that the change could force the integrator to automatically update all other contracts to avoid allegations of disparate treatment, even if the change was based on a completely rationale, case-specific issue. Likewise, the Proposed Rule imposes substantial difficulties and risk in ending a business relationship, which could create a significant disincentive to entering into new grower relationships, especially if the prospective grower is new to farming or unknown to the integrator. The proposal could have the perverse effect of making it more difficult for individuals not established in farming, many of whom may be market vulnerable individuals in one way or another, to enter the chicken farming market in the first place.

Finally, AMS does not address how to demonstrate compliance. As described above, the proposal's vague terms and far reach would cloak nearly all grower-integrator dealings in legal jeopardy, and AMS provides no direction on how integrators could ensure they comply with these provisions.

D. Issues with proposed Section 201.304(b) – Retaliation

In addition to those issues mentioned above, we have a number of concerns with proposed Section 201.304(b).

The list of activities that constitute retaliation is not exhaustive, so there is no way to know what activities are actually prohibited. It is impossible for a regulated entity to read the regulation and understand specifically what actions it must avoid taking to comply. AMS fails to provide any rules for determining whether conduct constitutes retaliation, forcing regulated entities to guess and creating great risk of arbitrary enforcement of what is essentially a "you know it when you see it" standard.

Moreover, it is unclear how it would be established whether a live poultry dealer, and the specific employees involved in grower contracting, knew that a grower had engaged in one of the protected activities. Most of those activities are activities that a live poultry dealer would not necessarily be aware of, or that only some employees might know about. As with the above discussion about "perception" and market vulnerable individuals, the Proposed Rule provides no direction on how to determine what the company knows.

Further, the provision seems to create a presumption that all protected actions by growers are legitimate. This risks exposing live poultry dealers to strategically planned actions to trigger retaliation protections, especially by poor performing growers facing potential contract termination. This poses especially significant risks in the event a grower commits animal welfare violations.

The information sharing contemplated in proposed Sections 201.304(b)(2)(iv) and (v) provides no exception for confidential or proprietary information. The unauthorized release of confidential business information can inflict substantial and irreparable harm on businesses. Confidential and proprietary information must be governed by any contractual protections controlling its dissemination, and it cannot be considered retaliation if a company exercises its contractual rights to protect any confidential information. AMS makes no allowance for this.

It is also unclear how AMS views details related to co-op activity. For example, regardless of whether growers were to form co-ops, live poultry dealers would still need to be able to select which specific growers to contract with, to choose where to place birds, and to evaluate and approve housing and other grow-out specifications. The Proposed Rule is silent on whether exercising these basic logistical and business prerogatives could be considered retaliation.

E. Issues with proposed Section 201.304(c) – Recordkeeping

The recordkeeping provision in proposed Section 201.304(c) raises several issues in addition to those discussed above.

The proposal fails to identify specific records that would need to be kept, or what records would need to be generated to show compliance with proposed Section 201.304(a) and (b). As proposed, companies will not know which records are actually subject to the regulation's

recordkeeping provision until after the fact. There is simply no way for a regulated entity to know what records AMS might consider, years after the fact, to have been "relevant to its compliance" with proposed Section 201.304. This exposes companies to arbitrary enforcement, including arbitrary allegations of record destruction.

The proposed recordkeeping provision is as broad as it is vague. Potentially every document related to grower interactions—every email, every record from a farm visit, every correspondence with farm technical support staff, and every note taken during a call or meeting could in theory be "relevant to … compliance" with proposed Section 201.304, triggering the proposed five-year record-retention period. This would create an overwhelming administrative burden on regulated entities and would impose exorbitant compliance costs. AMS fails to explain why such a broad recordkeeping provision is necessary or provide specificity about what records must be kept to demonstrate compliance.

Moreover, it is inappropriate to include Board of Director materials and other corporate governance materials as routine PSA compliance records, as suggested in the Proposed Rule. These materials are not routine compliance records and would not speak to whether any particular act violated the Proposed Rule. Instead, this appears to be a transparent attempt to create executive- or Board-level liability for everyday regulatory compliance matters.

Finally, the record retention period is excessively long. Most other PSA recordkeeping provisions require retention for two years. Five years is needlessly long and imposes substantial administrative costs and complexity. There is simply no reason to require such voluminous records maintenance.

F. Issues with proposed Section 201.306 – Deceptive Practices

In addition to those discussed above, proposed Section 201.306 raises several significant issues.

As discussed earlier, AMS does not define what a "pretext" is in this context, nor how a company would demonstrate that an explanation is not pretextual. Without knowing what would make a statement pretextual, companies may become reluctant to provide detailed explanations to growers, stifling rather than promoting clear communication. And without a clear definition, companies would have no idea how to ensure they comply or demonstrate they are in compliance after the fact. The Proposed Rule seems to invite second-guessing of a regulated entity's motives. Without knowing how to demonstrate compliance, regulated entities are at great risk of not having the necessary records to refute allegations.

In many cases, there are multiple reasons for a contract action. The proposal does not address a situation where multiple reasonable business reasons support an action and could be read as requiring that every single reason be included in an explanation to avoid an omission of material fact in violation of the Proposed Rule, even if one factor drove the decision or any one factor would have formed a sufficient basis for the action.

The proposed provisions also risk making it more difficult and more costly to terminate relationships with poorly performing growers or a grower who neglects or abuses birds. Facing the fear of making a misstep in communicating a grower's termination, regulated entities may be incentivized to keep poor-performing growers on contract to avoid costly lawsuits about pretextual explanations and whether a particular fact was material. This would drain efficiency out of the system, to the detriment of consumers.

Fundamentally, the proposed provisions will impair efficient contracting by deterring legitimate adverse actions. If each adverse action creates the risk of litigation and large liabilities, regulated entities will face disincentives to terminating dealings with poor-performing growers or engaging in discussions with new growers. This is doubly harmful for individuals wishing to enter chicken farming, as it means poor-performing growers will occupy more of the grow-out supply, and they will face a harder time getting started. This will only harm rural communities long-term as younger farmers see fewer financial opportunities in their communities.

III. The Proposed Rule Would Impose Significant Costs on Society

AMS appears to have given no thought to its economic impact analysis, drastically underestimating the costs of the Proposed Rule at every possible opportunity. To prepare for the Proposed Rule, regulated entities would need to re-assess contracts and develop communications with their growers, evaluate and implement extensive recordkeeping programs and record-retention systems, develop and implement new compliance policies, and implement an administratively complicated oversight and compliance system. These programs would require highly paid professionals and substantial attorney time. Moreover, the proposal would make contracting more difficult, and it could deter companies from entering into new grower relationships, reducing overall economic efficiency in the poultry production market, driving up consumer costs, harming processors, and harming growers. The proposal would also drive costly, frivolous litigation. In fact, owing to its vagueness, the Proposed Rule almost seems premised on the need for years of litigation to define and refine the ambiguous terms AMS has proposed. The litigation costs necessary to define the requirements in the proposal alone would amount to many millions of dollars per year, on top of the likely frivolous litigation that will be brought based on a misunderstanding of, or perhaps to take advantage of, the proposal's vagueness.

AMS predicts the Proposed Rule would impose costs of only $504 per live poultry dealer in the first year, and costs of about half that amount in subsequent years. This simply defies belief. It seems to assume that regulated entities would devote no effort and no resources to complying with the proposal. The cost of the actual filing cabinets needed to hold the voluminous paper records that would be required by the Proposal would exceed that much, not to mention the extensive recordkeeping programs and computer systems and hardware that would be necessary to properly manage digital materials. AMS likewise completely overlooks the labor that would be necessary to comply with the proposal and dramatically understates the extent and cost of the professional services, including legal services, that would be necessary to implement the proposal. Moreover, AMS completely fails to consider the cost of the litigation that will undoubtedly result from the vague terms and unclear scope rife throughout the Proposed Rule.

AMS also fails to consider costs to growers, who as part of the same economic system would inevitably bear some of the compliance costs. New growers would face fewer opportunities for new entrants, and it would be more difficult to reward top-performing growers. Consumers, too, would suffer costs in the form of a less efficient chicken production system, leading to higher costs at the supermarket and restaurants. AMS fails to even acknowledge these costs.

In reality, the cost of compliance together with anticipated litigation will undoubtedly result in costs of over $100 million, orders of magnitude greater than AMS predicts. By comparison, independent economic analyses of previous AMS rulemakings on similar topics have indicated

economic impact costs in excess of $1 billion,[63] and these were prepared 13 years ago, before unprecedented inflation. It is simply not credible for AMS to conclude the Proposed Rule would impose such paltry costs.

IV. Conclusion

NCC appreciates the opportunity to comment on the Proposed Rule. We are deeply concerned that the Proposed Rule would impose substantial costs, expose live poultry dealers to significant legal and compliance risks, and undermine the successful and mutually profitable grower contracting system. We urge AMS to withdraw the proposal. If AMS were to continue to pursue this rulemaking, it should repropose this and all other similar PSA proposals together in a single consolidated rulemaking process.

Sincerely,

Mike Brown
President
National Chicken Council

[63] *Scope of Sections 202(a) and (b) of the Packers and Stockyards Act*, 81 *Fed. Reg.* 92566, 92576 (discussing cost estimates prepared by Thomas Elam and Informa Economics).