August 23, 2022

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

Re: Transparency in Poultry Grower Contracting and Tournaments; Proposed Rule; RIN 0581-AE03; 87 Fed. Reg. 34980 (June 8, 2022).

Dear Mr. Secretary:

The North American Meat Institute (NAMI or the Meat Institute) submits these comments to the above-referenced Proposed Rule.

The Meat Institute is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat and poultry products. NAMI member companies include more than 350 meat packing and processing companies, large and small, and account for more than 95 percent of the United States' output of these products. The Meat Institute provides regulatory, scientific, legislative, public relations and education services to the meat and poultry packing and processing industry.

On May 26, 2022, USDA's Agricultural Marketing Service (AMS or the Agency) announced a proposed rule on performance-based poultry grower compensation. The Agency refers to performance-based compensation as the "tournament system," and the Meat Institute will adopt that terminology for ease of reference throughout these comments. On June 8, 2022, the Proposed Rule appeared in the *Federal Register*. The Agency also published on June 8 an Advance Notice of Proposed Rulemaking (ANPR) entitled "Poultry Growing Tournament Systems: Fairness and Related Concerns." The Proposed Rule is the first in what AMS describes as a "suite of major actions under the Biden Administration to create fairer marketplaces for poultry, livestock and hog producers."

Both NAMI and the National Chicken Council submitted requests for an extension to the comment period. NAMI appreciates that the Agency granted a short 15-day extension on the last business day prior to the original due date for comments. However, as expressed in the request for extension, NAMI is not only concerned with the short duration of the comment period, but, more importantly, with the piecemeal approach that USDA is using in publishing a "suite" of inextricably intertwined rulemakings. The ANPR includes numerous statements and questions foreshadowing that the Agency may consider completely disregarding its statutory authority and attempt to drastically restructure, restrict or eliminate the tournament system altogether.

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In addition to the two actions directly related to the tournament system, the Agency has announced that it will issue a new rule that "provide clarity to strengthen enforcement of unfair and deceptive practices, undue preferences, and unjust prejudices" and an additional rule that will "clarify that parties do not need to demonstrate harm to competition in order to bring an action under section 202(a) and 202(b) of the P&S Act." All of those rules could have a direct bearing on whether and how stakeholders continue to utilized performance-based compensation arrangements. The piecemealing of the Agency's "suite" of related rulemakings requires stakeholders to submit comments on incremental changes to a payment system that is under siege by an Agency that, at present, appears completely untethered by its statutory mandate while stakeholders await further Agency action on the same topic. This is, at best, the height of inefficiency. At worst, it represents gamesmanship by an Agency less interested in finding policies that serve the best interests of all stakeholders than in finding paths to evade both court precedent and statutory limitations - - including those stemming from the PSA and from the Administrative Procedure Act's provisions related to "significant" rulemakings, which the Agency now seeks to skirt through incrementalism. The Agency should withdraw the Proposed Rule, publish its entire "suite" of interrelated rules at once, and establish a comment period to allow stakeholders to consider the overlapping impact of the proposals and to comment after they have all been shared publicly.

In additions to procedural concerns, the Meat Institute has grave substantive concerns with the Proposed Rule and with the impacts it will have on member companies, on family farmers, and on American consumers. The Proposed Rule will undermine the pro-competitive benefits of the tournament system. Even worse, costs of compliance with the Proposed Rule, threats of litigation, and the reduced efficiency of the Proposed Rule-modified tournament system may cause live poultry dealers to abandon it altogether. The Proposed Rule could also stifle innovation in that it may cause industry participants to abandon the pursuit or development of other types of payment systems that include elements based on relative performance. Perhaps that is the Agency's unstated goal, but if that goal is achieved it would be at great cost to efficiency, competition and downstream customer and consumer prices, all during a time of historic food inflation.

The Proposed Rule is, in multiple respects, unlawful because it is proposed without statutory authority and is arbitrary and capricious under the Administrative Procedure Act (APA). Some of its provisions potentially violate the major questions doctrine as recently applied by the Supreme Court in *West Virginia v. EPA.* It attempts to restructure or render so burdensome as to lead to abandonment a performance-based pay system that has served live poultry dealers, poultry growers, customers and the American consumer well for decades. The tournament system has directly rewarded the most efficient and innovative poultry growers by compensating them for their performance relative to their peers. In addition, the tournament system has fueled continued improvements in feed conversion and growth rates that have benefitted all poultry growers by increasing the number of pounds, and thus income, produced by each square foot of poultry housing. This has also greatly benefitted American consumers as those efficiencies have continued to be reflected in the value and quality enjoyed by American families when they purchase poultry products.

The justification for this overreach by the Agency is to avoid *potential* exploitation of poultry growers stemming from alleged information asymmetries. The Agency has failed to

establish through credible evidence that such exploitation exists, that the measures proposed by the Agency would address it, or that the Agency has the statutory authority to engage in this exercise. In addition, noticeably absent in the Proposed Rule are any efforts by the Agency to create programs for poultry grower education, which might address perceived information asymmetries without necessitating the overhaul of a payment system that has functioned well for decades. For the reasons articulated in more detail below, the Meat Institute urges the Agency to withdraw the Proposed Rule, reconsider many of the proposed sections, and reissue a proposed rule that will not threaten the continued operation of the tournament system at the ultimate expense of American consumers.

I. The Proposed Rule Is Arbitrary and Capricious Because It Is Based Almost Wholly on Anecdotal "Evidence" and Conjecture.

As noted by AMS in the preamble to the Proposed Rule, USDA has made several previous attempts to restructure the tournament system. Those attempts were, largely, either withdrawn or blocked by Congressional action. All of the prior attempts suffered from the same fatal flaw that plagues the Proposed Rule: they were and are unsupported by reliable evidence and economic analysis. The "factual" record underlying the Proposed Rule is bare, as was the record supporting prior attempts. The reason for this is simple. The Agency continues to rely on anecdotal evidence and unsubstantiated complaints supplied by a few disgruntled poultry growers and on conjecture and extrapolations from that unreliable evidence.

One need look no further than the preamble to find ample evidence of the Agency's misplaced reliance on unsound "evidence." Based on the representation that "Growers have consistently expressed concerns about the inadequacy of some production contracts and the discretionary functions exercised by live poultry dealers under those contracts, which they assert have exposed them to deception and other abuses," AMS "agrees many production contracts do not provide enough information . . . ". Similar statements appear often throughout the Proposed Rule and evidence a troubling reliance on anecdotes and hearsay. Which growers expressed concerns? When and where were those concerns expressed? What evidence did those growers provide to support their accusations?

The Agency's continued focus on this type of "evidence" causes the Agency to gloss over or ignore many of the advantages of current industry structure, not just for live poultry dealers, but for poultry growers. For example, by stating that poultry integrators outsource the "major costs of raising the poultry to broiler growers," the Proposed Rule ignores the economic realities of broiler production. The major cost of raising poultry is feed, comprising on average between 65 to 70 percent of the cost of production. Under poultry growing arrangements, feed is supplied by the live poultry dealer. Further, the integrator also provides birds to the grower which insulates growers from the costs and risks inherent in maintaining breeder flocks or the cost of purchasing birds to be grown to slaughter weight. Compared to other enterprises in animal agriculture, this can be considered a unique and significant cost savings and reduced risk profile.

The Agency's hesitancy to rely on actual evidence is likely due to two factors. One, it does not exist. Two, when the Agency has been forced to offer proof in the past, the Agency could not support its positions. A notable example of that is a case decided by USDA's Chief Administrative Law Judge. That case is particularly relevant to the Proposed Rule as it alleged that a live poultry dealer had violated the Packers and Stockyards Act by settling poultry growers of alleged varying input quality against each other in the same "tournament." Specifically, the live poultry dealer had switched breeds at a complex and during the transition period placed two different breeds of bird with competing growers. After hearing the evidence, the Judge found that:

> **The most significant drivers of flock performance are growing practices and the skill and expertise of individual growers** . . . Management of such factors . . . as temperature, feed, ventilation and litter management are critical to the success of the operation . . . Failure to manage flocks in accordance with the best practices can and will lead to less successful flocks regardless of the breed.[1]

The Judge's finding, based on sworn testimony and evidence, stands in stark contrast to the views of the Agency as expressed in the Proposed Rule. A constant theme of the Proposed Rule is the allegation that the live poultry dealer controls the most important variables to grower income, the inputs such as chicks, feed and medication. However, the Agency's Chief Administrative Law Judge found that poultry growers control the single most important variable, *i.e*. the management of their farm. Unfortunately, the Agency credits anecdotal statements at a workshop that occurred 12 years ago that "their success or failure is depending on factors controlled by the integrators" more than it credits a finding by the Agency's Chief Administrative Law Judge reached after reviewing duly admitted evidence and hearing sworn testimony.

The Proposed Rule is rife with instances of the Agency basing decisions on anecdotal and unsupported "concerns" voiced by unidentified "poultry growers." The Agency credits those "concerns" even when the alleged misdeeds of the live poultry dealers would not be practically feasible, would be counter to how the industry works; or, in many cases, would be against the economic best interest of the live poultry dealer. Respectfully, reliance on this type of evidence in promulgating rules that have the potential to upend a pro-competitive and efficient payment system while disregarding the findings of the Chief Administrative Law Judge of the Agency is the epitome of arbitrary and capricious rulemaking.

An equally concerning theme throughout the Proposed Rule is the Agency's continued assertion that "market concentration" and "market consolidation" has had negative impacts on poultry growers. The Agency states that live poultry dealers often operate as monopsonists or oligopsonists in their relevant regional market. The Agency also cites an alleged imbalance of bargaining power between poultry growers and live poultry dealers. As in past rulemaking

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[1] *In re Tyson Farms, Inc.,* Dkt. No. 12-0123 (U.S.D.A. March 8, 2013)

attempts, the Agency has cited no systematic study to support these claims. To the knowledge of the Meat Institute, there is no such study.

First, in the majority of instances, poultry growers have more than one live poultry dealer in their area and can switch to another live poultry dealer if displeased with their current poultry growing arrangement. In fact, a study cited by the Agency stated that only one quarter of poultry growers stated there was only one live poultry dealer in their area, leaving 75% or more of poultry growers with more than one contracting option. The Agency's assertions to the contrary notwithstanding, poultry growers can and commonly do switch live poultry dealers for a variety of reasons. Competition for grower services among live poultry dealers is common. And even where there is only one live poultry dealer in an area, the live poultry dealer is incentivized to treat poultry growers fairly and to enter contracts that provide a sustainable rate of return. If there is only one live poultry dealer in a geographic area, it follows that there is no "supply" of other growers for a live poultry dealer to draw from. Those companies have no short-term supply option if they lose a grower and thus are strongly incentivized to maintain their existing grower base.

Second, the Agency's uses of the terms monopsonist or oligopsonist are, at best, lacking context and, at worst, severely misleading. To the extent a live poultry dealer lacks significant competition for grower services in a given geographical area, the cause is likely the inherent nature of poultry production. Unlike other species, poultry cannot be transported over long distances, yet volume and scale are import factors to economically sustainable poultry production and processing. Further, poultry processing is a capital-intensive enterprise. Those production factors determined the market structure that has evolved. Nothing in the Proposed Rule stands to change those fundamental market dynamics. The Agency cites in a footnote the Merriam-Webster online definition of oligopsony: "a market situation in which each of a few buyers exerts a disproportionate influence on the market." This is another example of the Agency's use of conjecture and inferences about the industry. More refined economic definitions of the term distinguish between a *homogenous* and *differentiated* oligopoly. In a homogeneous oligopoly a few firms all produce the same product and could exert a disproportionate influence. To the extent segments of the poultry industry may appear to constitute an oligopoly in certain areas, the poultry industry, like countless U.S. processing and manufacturing industries, is a differentiated oligopoly, where firms produce slightly differentiated products to build product identification and brand loyalty in order to compete in the market. This is done to meet consumer demands and compete for consumer market share. In short, the poultry industry is competitive. Indeed, it is this competitive structure of the industry which ultimately drives the nature and terms of poultry grower contracts. Efforts to overregulate the terms of contracts, such as those proposed by AMS, risk the unintended consequence of driving the industry towards a homogenous oligopoly model counter to the Agency's stated objective.

Moreover, the Agency acknowledged recently that "[e]mpirical evidence does not show a strong or simple relationship between increases in concentration and increases in market power." 81 *Fed. Reg*. at 92711. Most studies of the industry have "found no evidence of market power, or found that the efficiency gains from concentration were larger than the market power effects." *Id.* The Agency's justifications here rest not on actual evidence or examples of live poultry dealers actually suppressing grower pay. The Agency has failed to show a "rational connection between the facts found and the choice made," thus rendering its proposals arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.,* 463 U.S. 29, 43 (1983).

Repeating another worn trope from past rulemaking attempts, the Agency also points to the alleged risk of "hold-up" in the poultry growing relationship. The Agency describes this risk as occurring when a live poultry dealer, at the time of contract renewal, imposes additional requirements that were not part of the original live poultry arrangement. The Agency again relies on anecdotal "evidence," stating that "growers have reported that they must accept unfavorable contract terms because they are tied to production to pay off lenders and they have few, if any, alternative dealers with whom they can contract." First, the Agency provides no evidence that "hold up" occurs. In fact, live poultry dealers have no incentive to require costly upgrades that do not result in increased efficiency for both the live poultry dealer and the poultry grower. Live poultry dealers depend on poultry growers to raise the birds placed in their care. It would be detrimental to live poultry dealers if the poultry growers were saddled with unnecessary debt that made it more difficult for the growers to provide for the basic needs of the birds, such as utilities to provide heating, cooling and water. Second, live poultry dealers who behaved in a predatory manner would suffer reputational damage, not only among potential growers but among lending institutions. This would cause difficulties attracting potential growers and difficulties in obtaining financing.

Finally, the Agency's "hold up" allegations are undercut by the simple fact that live poultry dealers across the nation continue to report significant waiting lists of potential growers. According to the results of a 2022 broiler industry survey[2] by FarmEcon LLC, which was designed to capture key industry and production statistics and collected data from members of the National Chicken Council, integrators reported that they have 1,672 applications from potential live chicken producers who would like to get into chicken production. Those applications are 19 percent of the current growers reported. Also reported were 335 open applications from existing farmers for expansion of their existing operations.[3] Taken together, these responses indicate active expansion and interest in investment on the part of potential and current growers. Simply put, if live poultry dealers engaged in the abuses that the Agency

[2] Elam, T., Live Chicken Production Trends, 2022 Revision, FarmEcon LLC, March 2022
[3] Survey was of top 32 integrators, with 83 percent response rate, covering 10,291 contracts held with 8,971 individual growers.

contends *could* occur, potential growers would not be lining up to enter the business or expand existing operations.

As with the "market concentration" allegations, the Agency has failed to either: (1) establish that the problem exists; or (2) adequately explain how their proposed solution remedies the problem. Nothing in the Proposed Rule would increase the number of live poultry dealers in a given area. Nothing in the Proposed Rule would add to the options or choices available to a poultry grower. In sum, nothing in the Proposed Rule would remove the supposed threat of "hold up." Again, there is no rational connection between the facts found (or alleged) and the choice made.

II. The Proposed Rule Contains Numerous Examples of the Agency Exceeding its Statutory Authority.

As the Agency notes in the Proposed Rule's preamble, Congress enacted the Packers and Stockyards Act in 1921. The Agency asserts, without citing to the statute or a court decision, a very broad mandate arising from the Act. The Supreme Court held shortly after passage of the PSA that Congress enacted the PSA to secure "the free and unburdened flow of live stock" and to prevent the packers from exercising monopoly power by lowering prices to sellers and raising prices to buyers. *Stafford v. Wallace,* 258 U.S. 495, 514-15 (1922). Likewise, when the PSA was expanded in 1935 to include live poultry dealers, Congress was concerned about the "various unfair, deceptive, and fraudulent practices and devices" that might be employed because *"they are an undue restraint and unjust burden upon interstate commerce."* Packers and Stockyards Act of 1921, Pub. L. 74-272, § 501, 49 Stat. 648, 648 (1935)) (emphasis added). The Supreme Court recently reiterated that "'enabling legislation'" is generally not an open book to which the agency may add pages and chance the plot line." *West Virginia v. EPA,* 597 U.S. ____(2022). Agencies must point to "clear congressional authorization for the power [they] claim." *Id.*

The Agency does not, and cannot, point to legislative history showing that Congress intended for the Agency to have a roving, unfettered mandate to rewrite private contracts and upend the relationships between live poultry dealers and poultry growers. For example, the Agency states in the preamble that "poultry growing . . . returns can be unstable and fail to meet reasonable grower expectations." The Agency further states that "perhaps even more concerning than the range of grower contract payments are the low returns on equity for poultry operations." Concerns about returns to poultry growers are a constant theme and justification throughout the Proposed Rule. First, it bears repeating that live poultry dealers have no incentive to suppress grower returns to an unsustainable level. Live poultry dealers depend on poultry growers to raise their birds and need them to stay in business and to have sufficient resources to provide inputs such as utilities and labor. Second, live poultry dealers would be harmed if poultry growing were not a potentially profitable enterprise for poultry growers for an obvious reason, *i.e*. no rational potential grower would want to enter a poultry growing arrangement. However, companies have consistently stated and the Agency has not disputed

that they have waiting lists of potential growers who would like to enter the business. Regardless, it is not the role of the Agency to determine a sufficient rate of return for poultry growers and then try and enact regulations the Agency believes will achieve that goal. The Agency has not, and cannot, cite a shred of Congressional authority for the notion that USDA is the arbiter of what constitutes "fair income" for a poultry grower. Any proposals that hinge on that underlying goal are *ab initio* outside the Agency's statutory authority.

Another example of the Agency exceeding its statutory authority is its attempt to address "asymmetrical information," a situation it claims results from "incomplete contracts" between live poultry dealers and poultry growers. The Agency claims "incomplete contracts" occur when "one party to a contract has more and/or better critical information than the other party." First, it is difficult to conceive of a commercial transaction or negotiation of any sort where the two parties have exactly the same set of information or perceived "bargaining power." The Agency includes as an example the fact that live poultry dealers have access to payment records for other growers, and poultry growers do not possess that same information. Again, it is difficult to conceive of another commercial transaction where the expectation is that both parties operate from exactly the same set of information. When one applies for employment, for example, one does not expect that he or she will be provided an organization chart and associated salaries of all other employees with a company. The Agency also discusses the provision of "pro forma income statements" to prospective growers and lenders. The Agency states that growers have complained that the estimates are usually based on "average pay" and that certain assumptions are controlled by the live poultry dealer and may be disclaimed. AMS states it believes that the Proposed Rule will "reduce the risks of these information asymmetries and enable growers to improve their decision-making and risk management." This statement is a powerful example of why the Proposed Rule lacks statutory authority and is arbitrary and capricious.

In enacting the PSA, Congress simply did not authorize the Agency to be the sole arbiter of what level of information is "adequate" in a commercial transaction between two private parties to a contract. The Agency's ongoing references to "incomplete contracts" are particularly baffling because the Packers and Stockyards Act and existing regulations spell out the required contents of a poultry growing arrangement. There has been no allegation that live poultry dealers are failing to follow the statute or the existing regulations on poultry growing arrangements. Describing a contract that contains all legal elements required of a contract and that is drafted in compliance with the PSA and existing regulations as "incomplete" is arbitrary and capricious and counter to the Agency's statutory authority.

The Agency's criticisms of pro forma income statements are, first, unsupported by actual evidence, and, second, misplaced. If the Agency's statements about the typical contents of these documents are correct, all the Agency needs to do to understand why a live poultry dealer would be hesitant to provide forward looking prognostications of a particular poultry grower's income is to reference the finding of the Chief Administrative Law Judge that the "**most**

significant drivers of flock performance are growing practices and the skill and expertise of individual growers" (emphasis added). Live poultry dealers have no way of forecasting with any certainty what the future skill and expertise of a potential grower will be and thus cannot reliably project future income for a particular potential grower.

Absent statutory authority in the PSA, the Agency cites the authority of a different federal agency operating under a different statutory scheme as support for its actions. Specifically, the Agency states in the preamble that "disclosure for the primary purpose of providing adequate information necessary for parties in asymmetrical business relationships and risk assessments has long been the subject of Federal Trade Commission (FTC) regulation under section 5 of the FTC Act." The Agency goes on to analogize to the FTC's Franchise Rule. The mention of Section 5 of the FTC Act *undermines* the Agency's view of its authority, not just in relation to the Proposed Rule, but in relation to rules the Agency has announced are in the pipeline regarding eliminating the competitive injury requirement.

The FTC Act predated the PSA and Congress drew from it, along with the Sherman Act and Interstate Commerce Act, in drafting the PSA. Section 5 of the FTC Act outlaws "unfair methods of competition," which, when the PSA was enacted, had been interpreted to prohibit anti-competitive and monopolistic conduct, but not to restrict legitimate competitive activity. The FTC Act has been applied to unfair practices that cause or likely cause substantial injury to consumers. When "a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it." *Moskal v. United States*, 498 U.S. 121 (1990). A "tidal wave" of courts have thus held that Congress' intent in passing the PSA was to prohibit only practices that are likely to harm competition. In this instance, the tournament system promotes competition. By definition, the tournament system requires poultry growers to *compete* against each other resulting in the rewarding the most efficient growers. This results in higher quality products that provide greater value for consumers. Far from harming consumers, the tournament system benefits consumers. The Agency's efforts to hinder the tournament system threaten, and do not promote, competition.

III. <u>The Agency's Cost Benefit Analysis is Flawed</u>

The most compelling evidence that the Agency's cost benefit analysis is flawed comes from the Proposed Rule's Regulatory Impact Analysis. The Agency states "[t]hough AMS is **unable to completely quantify the benefits of the regulations**, this analysis has explained numerous benefits derived from increased information, reduced information asymmetries, and reduction in risk of deception by live poultry dealers. Each of these disclosures . . . **should be useful** to growers in making more informed decisions and reducing grower concerns resulting from lack of access to information" (emphasis added). The Meat Institute appreciates the Agency's frank assessment of its inability to quantify or explain adequately the benefits of the Proposed Rule. However, the language above and the discussion below demonstrates why the Proposed Rule is fundamentally and fatally arbitrary and capricious.

The Agency's discussion of the "benefits of reduction in profit uncertainty to contract growers with the rule changes promoting greater transparency in return," which appears both in the Regulatory Impact Analysis and in Appendix 2 to the Proposed Rule, reveals fundamental flaws in its attempts to measure costs and benefits from the rule. The Agency states that:

> "[a] potential benefit of the contract disclosure rules providing increased transparency is that doing so could lower the uncertainty in a contract grower's revenue stream. According to economic principles, a risk averse producer will benefit economically from a reduction in revenue uncertainty. Given assumptions about the level of risk aversion of the producer, the distribution of a contract grower's revenue, and the grower's utility function, it is possible to calculate a grower's benefits of decreased revenue uncertainty associated with greater transparency." However, the Agency fails to calculate these alleged benefits to any degree of economic certainty, and fails to establish that they would outweigh costs to the industry and ultimately to American consumers.

At the outset, the Agency appears to have erred in its discussion of risk aversion functions. Specifically, the Regulatory Impact Analysis states on page 35011 that "decreasing absolute risk aversion (DARA) assumes the grower's risk aversion increases as wealth *decreases*" (emphasis added). However, the Agency states in Appendix 2 at page 35027 that "decreasing absolute risk aversion (DARA) assumes that the grower's risk aversion increases as wealth *increases*" (emphasis added). We assume the Agency intended the latter definition, which is the standard economic function under the principles of utility theory, or the above mentioned "grower's utility function," and appears to be the approach ultimately that was taken in the cost-benefit analysis. Regardless, the benefit calculation simply attempts to quantify the reduction in revenue that growers would be willing accept in exchange for allegedly increased transparency under the Proposed Rule. It is non-pecuniary, yet the Agency presents it as a positive financial benefit offsetting live poultry dealer costs, which is a highly flawed and misleading presentation of the costs and benefits.

It is also interesting to note that, based on the economic theories employed in the Agency's analysis, the Proposed Rule would be of greater benefit to the already most profitable and likely largest poultry growers. This is because poultry growers with higher revenue have a decreasing marginal utility for money. That implies the greatest "benefits" of the presumed reduction in revenue uncertainty would accrue mostly to the most growers who already enjoy the highest incomes and would be willing to "trade" some of that income for any increased transparency that would come from the Proposed Rule. Poultry growers who are closer to the economic margins, whether through poor performance or poor farm and enterprise management, would benefit less as they likely would prefer more money to more transparency.

Second, risk aversion and utility functions are highly complex, largely theoretical, and difficult to quantify. Moreover, they are variable among poultry growers, and dynamic for individual growers. Again, the AMS analysis simply arbitrarily assigns a standard risk aversion profile for all growers based on a set of overreaching assumptions:

> AMS estimates benefits under two CARA (i.e., constant absolute risk aversion, where risk aversion does not change as wealth changes) scenarios, one where the growers have moderate risk aversion, with one with a RAP (i.e., Risk Aversion Premium) of 20 percent

> and a high RAP of 40 percent, using contract producer revenue data for 2020. The parameters used for the DARA scenario are chosen such that the grower has a RAP of 40 percent when wealth is zero, and a RAP of 20 percent at mean wealth.

Further, AMS acknowledges that they could "find only two papers that used either RRA (relative risk aversion) or ARA (absolute risk aversion) for examining North American poultry contract growers." Of those two papers, one "is an econometric exercise that does not provide sufficient information to obtain a risk aversion parameter for use in a scenario analysis" and the other "is simply a simulation exercise of a wide range of arbitrary parameter values for the absolute risk aversion parameters without referring them to a given range of risk aversion premium (RAP) levels to provide context."

Third, and most confusing, the economic theory of risk aversion is generally understood to be the decision to accept a lower return on a capital investment in return for a more certain outcome, or as stated above, "revenue uncertainty." Quantifying risk aversion would normally be expressed as an acceptable discount from an alternative potential higher return. Such a quantification is also termed in economic terminology as a "certainty equivalent" which is a product of the grower's utility function as mentioned above by AMS. This is confirmed in the Proposed Rule:

> A risk averse grower will be willing to accept lower mean net returns in exchange for lower variability in returns *w*. Let *U0* be the grower's current utility and *U1* be the grower's utility with the new contract rules and their associated lower variability of *w*. Assuming mean *w* is constant between states, for the risk averse grower, *U1 > U0*. The question then becomes how to translate the benefit *U1 - U0* into a dollar value. We define the Risk Premium (*RP*), or the dollar benefit to growers of decreased profit risk, **as the amount of mean profit they would be willing to give up** (emphasis added) such that *U1 = U0, i.e.,* such that they are indifferent between the two states (*e.g.,* Sproul *et al.* 2013; Schnitkey *et al.*, 2003).

The rule further explains that the AMS calculated risk premium:

> … may be considered a special case of the compensating variation concept in economics. With the proposed rule changes leading to greater transparency in returns, the grower would **be getting a decrease in revenue variability but would not have to pay to get this**. (emphasis added). Hence the Risk Premium is a measure of benefit to the grower of being under the new contract rules.

Therefore, the benefit calculation simply quantifies the reduction in revenue that growers would be willing accept as a result of this rule. Again, this alleged benefit is non-pecuniary, yet the Agency attempts to use it to offset the economic costs of the Proposed Rule. This is a fundamentally flawed method for calculating cost-benefit and is patently arbitrary and capricious.

The Proposed Rule will come at significant quantifiable cost to live poultry dealers due to administrative burdens and reduced efficiency. The new requirements may require new, additional, or updated data systems for live poultry dealers, which would require significant

capital investments. Additional staffing would be necessary. That cost will manifest in the prices charged to customers and ultimately to American consumers during a time of historic food inflation, or by reduced payments to poultry growers. Such significant cost should be imposed only after demonstrating tangible and quantifiable benefits that exceed the cost. Enacting burdensome regulations because the Agency "believes" that growers "should" find some of the information "useful" is arbitrary and capricious.

IV. The Changes to Definitions Contained in §201.2 Should Be Reviewed for Overbreadth

The Agency should carefully review the definitional changes in Section 201.2 to ensure they do not have unintended consequences across other segments of the protein industry that do not use tournament pay systems. For example, the proposed definition of "Growout period" is the "period of time between placement of *livestock* or poultry at a grower's facility and the harvest or delivery of such animals for slaughter, during which the feeding and care of such *livestock* or poultry are under the control of the grower" (emphasis added). The definition of "livestock" in the PSA includes "cattle, sheep, swine, horses, mules, or goats." We are not aware of uses of the tournament system in the production of those species and the Agency has not provided any facts to suggest that those species have a "Growout period" as the term would be employed in the poultry industry. The Agency should revise this definition to eliminate "livestock" and review all definitions so as to avoid unintended consequences for other protein segments.

V. The Disclosure Requirements in §201.100 In Many Cases Exceed Statutory Authority, are Arbitrary and Capricious, and Threaten the Continued Existence of the Tournament System

Section 201.100 of the Proposed Rule would impose an obligation on live poultry dealers[4] to furnish certain information and documents to existing or new poultry growers. The Proposed Rule, in §§ 201.100(a) (1-3) sets forth three scenarios under which such information must be furnished:

1. Section 201.100(a)(1) of the Proposed Rule applies when a live poultry dealer seeks to "renew, revise, or replace an existing poultry growing arrangement, or to establish a new poultry growing arrangement that does not contemplate modifications to the existing housing specifications." Under this scenario, the live poultry dealer must provide the following documents at least seven days before the live poultry dealer executes the poultry growing arrangement:

[4] The definition of live poultry dealer under the Packers and Stockyards Act is broader than just entities who obtain live poultry for slaughter under a poultry growing arrangement. The Agency should state with specificity that these provisions apply only to live poultry dealers who contract with independent contract poultry farmers.

(i) A true, written copy of the renewed, revised, replacement, or new poultry growing arrangement; and

(ii) The Live Poultry Dealer Disclosure Document, (LPDDD) as described elsewhere in the Proposed Rule.

2. Section 201.100(a)(2) of the Proposed Rule applies when a live poultry dealer seeks to enter a poultry growing arrangement with a poultry grower or prospective poultry grower that will require an original capital investment. In that scenario, the live poultry dealer must provide a copy of the poultry growing arrangement that is affiliated with the current housing specifications, the LPDDD, and also adds to the list of requirements in §201.100(a)(1) a requirement that the live poultry dealer must provide the poultry grower or prospective poultry grower simultaneously with the housing specifications a letter of intent that can be relied upon to obtain financing for the additional capital investment.

3. Section §201.100(a)(3) of the Proposed Rule applies when a live poultry dealer seeks to offer or impose modifications to existing housing specifications that could reasonably require a poultry grower or prospective poultry grower to make an additional capital investment. In that scenario, the live poultry dealer must provide the poultry grower or prospective poultry grower simultaneously with the modified housing specifications a copy of the poultry growing arrangement that is affiliated with the modified housing specifications together with the LPDDD and letter of intent.

The provisions set forth above are arbitrary and capricious. The justification for these disclosure requirements, as explained in the Preamble to the Proposed Rule, is "to improve transparency and forestall deception in the use of poultry growing arrangements." As is a constant theme throughout the Proposed Rule, the Agency provides no credible evidence that the deception it seeks to forestall is actually occurring. Comments to specific disclosure requirements follow.

Live Poultry Dealer Disclosure Document

Section 201.100(b) contains the Proposed Rule's requirements for the LPDDD. The LPDDD must include a cover page including a list of eight elements in addition to a list of five categories of additional disclosures. The Meat Institute's comments on the specific requirements follow.

Proposed Rule §§ 201.100(b)(1-3): The Proposed Rule states that the order, form, and content of the cover page shall be and include: (1) The title ''LIVE POULTRY DEALER DISCLOSURE DOCUMENT'' in capital letters and bold type; (2) The live poultry dealer's name, type of business organization, principal business address, telephone number, email

address, and, if applicable, primary internet web page address; (3) The length of the term of the poultry growing arrangement.

The Meat Institute does not anticipate that live poultry dealers will object to providing this basic information, but disputes the necessity of including it in a separate "disclosure statement." This information should already be included in live poultry dealers' contracts. There is a regulation in place regarding the length of the term of the poultry growing arrangement as §201.100 already requires contracts to disclose the duration of the contract. Put simply, this requirement is a solution in search of a problem. It imposes additional administrative burdens on live poultry dealers with no explanation as to why simply providing this information in the poultry growing arrangement, which the Proposed Rule also requires be provided at the same time as the LPDDD, is not sufficient.

Proposed Rule § 201.100(b)(4): Section 201.100(b)(4) would require the following statement: ‘‘The income from your poultry farm may be significantly affected by the number of flocks the poultry company places on your farm each year, the density or number of birds placed with each flock, and the target weight at which poultry is caught. The poultry company may have full discretion and control over these and other factors. Please carefully review the information in this document.’’

The Meat Institute agrees that live poultry dealers can and should have full discretion and control over factors such as density or number of birds placed with each flock and target weight. It would be simply impossible for live poultry dealers to respond to fluctuating market and customer demands without that ability. However, the language in the proposed statement potentially conflicts with the requirements in Proposed §201.100(b)(5) below. The Proposed Rule should be clarified to establish that the Agency has no authority to compel a certain number of minimum placements or a minimum stocking density.

Proposed Rule § 201.100(b)(5): Section 201.100(b)(5) would require disclosure of the following:

(i) The minimum number of placements on the poultry grower’s farm annually under the terms of the poultry growing arrangement, and

(ii) The minimum stocking density for each flock to be placed on the poultry grower’s farm under the terms of the poultry growing arrangement.

As stated above, it is critical that live poultry dealers maintain the flexibility to respond to changing market, consumer or customer demands. As AMS noted in the preamble to the Proposed Rule, the live poultry dealer bears all of the risk of marketing and selling the finished poultry product. Requiring a live poultry dealer to commit to a minimum number of flocks or a minimum stocking density for each flock at the outset of a contract may hamstring that ability. Both of these requirements are likely to lead to the unintended consequence of live poultry dealers offering "minimums" that are low by historical or likely future standards to reduce the risk of litigation if circumstances beyond the live poultry dealer's control result in reduced placements. This will inhibit transparency and reduce the quality of information available to existing or potential poultry growers.

An additional unintended consequence may be a reduction in the duration of live poultry arrangements. The clear trend in the industry for years now has been toward longer-term contracts. The Proposed Rule cites data from 2015, however, the most recent update to the FarmEcon industry survey found that the percent of flock-to-flock contracts has decreased by 10 percent in 2022 compared to the 2015 baseline. Longer duration contracts have increased correspondingly. Companies also report that long term contracts are typically required for new construction – whether for new farms or farm expansions – and are thus granted to growers, in most cases for 10 to 15 years or more based on the requirement of lenders.

Also, per the survey, respondents reported on the length of time that their current growers have been contracted with the same integrator. More than half (52 percent) have been under contract with the same integrator for 10 years, and nearly three-quarters (74 percent) have been under contract for 5 years or more.

Broiler Grower Tenure				
More than 20 years	10-20 years	5-10 years	1-5 years	Less than 1 year
24%	28%	22%	20%	6%

Source: FarmEcon, Live Chicken Production Trends, 2022 Revision

Further, per the survey, in 2021, 94.1 percent of growers were retained by live poultry dealers. Among those growers not retained; 1.7 percent retired, 1.3 percent were for financial reasons, and 0.7 percent did not have their contracts renewed.

Live Poultry Dealers will be incentivized to move back to shorter term agreements to reduce the litigation risks inherent in a requirement of a long-term commitment to a particular number of flocks per year or density. The Meat Institute believes this requirement should be eliminated altogether; or, at a minimum, amended to allow for the provision of historical average placements and densities as opposed to commitments to future conditions that are likely to be influenced by factors beyond the live poultry dealer's control.

Proposed Rule § 201.100(b)(7): Section 201.100(b)(7) requires this statement: ‘‘Even if the poultry growing arrangement contains a confidentiality provision, by law you still retain the right to discuss the terms of the poultry growing arrangement and the Live Poultry Dealer Disclosure Document with a Federal or State agency, your financial advisor or lender, your legal advisor, your accounting services representative, other growers for the same live poultry dealer, and your immediate family or business associates. A business associate is a person not employed by you, but with whom you have a valid business reason for consulting when entering into or operating under a poultry growing arrangement.’’

This requirement provides no benefit because existing regulations on this issue are adequate. In fact, the proposal raises new concerns because the LPDDD contains much broader and potentially confidential or business proprietary information than previously provided. It is common in commercial transactions for parties to execute a non-disclosure agreement when providing confidential information to each other in contemplation of a potential transaction or business relationship. Our member companies have been operating under existing regulations regarding the right of poultry growers to discuss contract terms regardless of confidentiality

provisions. However, those terms are much narrower in scope than what would be provided under the Proposed Rule. Enhanced confidentiality protections may be necessary for LPDDD, and the Proposed Rule should be modified to consider that business proprietary and confidential information would be provided to potential growers who may not end up with any business relationship with the live poultry dealer.

Proposed Rule § 201.100(c)(1): Section 201.100(c)(1) would require the live poultry dealer to disclose a "summary of litigation over the prior six years between the live poultry dealer and any poultry grower; including the nature of the litigation, its location, the initiating party, a brief description of the controversy, and any resolution.

The Meat Institute can discern no utility for this requirement other than to provide fodder for *more* potential litigation. First, the requirement is too broad in scope. Large live poultry dealers tend to have several locations in diverse geographical locations with their own local management. A summary of a six-year old lawsuit filed at a complex that has no nexus with the relevant poultry grower will provide no useful information or benefit to that live poultry grower. It will not better inform a decision whether to do business with a live poultry operator and will be of no benefit in a poultry grower's day to day farm operations or management of the farm enterprise. Second, rather than endure the expense and risk of litigation, companies often settle lawsuits out of court. Some of those settlements occur if a case has merit, but many occur where a case has no merit, but the company makes a cost-benefit decision that settlement is a favorable option to protracted and costly litigation. Terms of settlements are typically private. A company would, in most or all instances, be prevented from discussing the resolution of a settled case other than to confirm publicly available facts. Providing a summary and information on resolution would result in a breach of a settlement agreement. The only benefit of this provision the Agency identifies is that it "would help growers identify conflict origins and better assess potential risk of conflict." This nebulous potential benefit is not, and cannot, be quantified. This provision simply has no demonstrable benefit that would outweigh its costs and should be withdrawn.

Proposed Rule § 201.100(c)(2): Section 201.100(c)(2) requires a "summary of all bankruptcy filings in the prior six years by the live poultry dealer and any parent, subsidiary, or related entity of the live poultry dealer."

Like much of what AMS has proposed, this is a solution in search of a problem. Bankruptcy filings are public and exceedingly rare among live poultry dealers. Interested parties can obtain this information without the assistance of new federal regulations. There is simply no benefit to this proposal to justify any level of cost and it should be withdrawn.

Proposed Rule § 201.100(c)(3): Section 201.100(c)(3) requires "a statement that describes the live poultry dealer’s policies and procedures regarding the potential sale of the poultry grower’s facility or assignment of the poultry growing arrangement to another party, including the circumstances under which the live poultry dealer will offer the successive buyer a poultry growing agreement."

This requirement simply is not practically feasible. Live poultry dealers entrust potential growers with birds, feed and medication that remain the property of the company. This is a huge

financial investment that is placed in the hands of poultry growers. Live poultry dealers depend on those growers to use best management practices to raise those birds in the most humane and cost-efficient manner possible. Because those poultry growers typically are identified in the eyes of the media, customers, consumers and the general public with the live poultry dealer with whom they contract, their actions or inactions can potentially expose the live poultry dealer to legal risk related to all aspects of the poultry grower's operation, including proper environmental management, animal well-being practices, and a litany of other concerns. The live poultry dealer can suffer reputational damage and potential loss of customers and market share if the live poultry dealer contracts with the poultry growers who do not conduct business in an appropriate manner. To manage that risk, live poultry dealers must be able to consider numerous and sometimes subjective factors such as the experience level or aptitude of the potential new grower, or the potential new grower's commitment to follow legal requirements or the live poultry dealer's policies and requirements. It is simply impossible for a live poultry dealer in advance to put forth a prescriptive policy on " the circumstances under which the live poultry dealer will offer the successive buyer a poultry growing agreement." This provision is unduly burdensome, impossible to comply with, and should be withdrawn.

Proposed Rule §201.100(d). Section 201.100(d) requires inclusion of the following information:

> (1) A table showing average annual gross payments to poultry growers for the previous calendar year for all complexes owned or operated by the live poultry dealer, organized by housing specification, and expressing average payments on the basis of U.S. dollars per farm facility square foot.
> (2) Tables showing average annual gross payments to poultry growers at the local complex for each of the five previous years. The tables should express average payments on the basis of U.S. dollars per farm facility square foot. The tables should be organized by year, housing specification tier (lowest to highest), and quintile (lowest to highest).
> (3) If poultry housing specifications for poultry growers under contract with the complex are modified such that an additional capital investment may be required, or if the five-year averages provided under paragraph (2) do not accurately represent projected grower gross annual payments under the terms of the applicable poultry growing arrangement for any reason, the live poultry dealer must provide the following additional information:
>
> > (i) Tables providing projections of average annual gross payments to growers under contract with the complex with the same housing specifications for the term of the poultry growing arrangement at five quintile levels expressed as dollars per farm facility square foot, and
> > (ii) An explanation of why the annual gross payment averages for the previous five years, as provided under (2), do not provide an accurate representation of projected future payments, including the basic assumptions underlying the projections provided under (i) of this paragraph.

First, the Agency lacks statutory authority to compel disclosure of this potentially confidential, proprietary and competitively sensitive information. The Proposed Rule makes it

clear that confidentiality does not apply to information provided in the LPDDD. Companies should not be required to produce for consumption by the public, trial lawyers, competitors, *etc*. sensitive information about both local and national grower pay. The Agency's justification is that "this information would allow growers to better assess housing specifications and related payment variability elsewhere in relation to what is offered at the local complex." First, the claimed benefit of this provision is so scant that it is incapable of justifying virtually any administrative cost. The Agency's justification essentially amounts to "some growers might find it interesting" with no explanation as to how it provides actual, tangible, material benefit. Second, national grower pay data is potentially irrelevant and confusing. There can be significant differences in the product mix, end markets, regional costs of living, local labor markets and numerous other factors from complex to complex. Growers cannot pick up a farm and move it to what they might think is a more favorable location. Finally, Companies should not be required to provide pay "projections" under any context. As found by the Agency's Chief Administrative Law Judge, the most significant variable in a grower's pay is that grower's own skill in management. There is simply no way for a live poultry dealer to project into the future how a grower will perform. Providing data regarding future payments could be misleading to potential growers and could cause them to either over or under estimate their potential revenue.

Proposed Rule §201(d)(4): Section 201(d)(4) requires the production of "a summary of information the live poultry dealer collects or maintains relating to grower variable costs inherent in poultry production."

In the preamble, the Agency states these costs would include things such as utilities, fuel, water, labor, repairs and maintenance, and liability insurance. The Agency states that "based on discussions with integrators and others in the industry, AMS has found that many integrators collect this data to inform grower pay rates. Thus, AMS believes that live poultry dealers routinely collect and maintain this data." Essentially, the Agency's rationale, based on conjecture, is that the information must exist and some growers might find it interesting, so the live poultry dealers should be compelled to routinely disclose it. The Agency lacks statutory authority to require live poultry dealers to produce this information, to the extent it even exists in a "collected and maintained" state. First, the proposal is arbitrary and capricious because it lacks cost-benefit justification. Second, the Meat Institute has confidentiality concerns related to this information. To the extent a live poultry dealer does "collect and maintain" this information, the live poultry dealer might consider the information, or more specifically the extent to which the live poultry dealer has or uses the information, as confidential and proprietary business information. In addition, these types of costs are local in nature. There would be great variation not only from company to company but within companies from location to location regarding practices around this type of data. The reason for that is apparent. Live poultry dealers, by definition, do not directly experience those costs. Poultry companies are not the best source of data for costs they do not experience. Any data along these lines would likely be sporadic, fragmented, anecdotal and potentially misleading to potential growers while being an undue burden on live poultry dealers. This provision should be withdrawn.

Proposed Rule §201.100(d)(5): Section 201.100(d)(5) requires the disclosure of current contact information for the State university extension service office or the county farm advisor’s office that can provide relevant information about poultry grower costs and poultry farm financial management in the poultry grower’s geographic area.

The Agency lacks statutory authority to impose this requirement on live poultry dealers. Moreover, potential growers could acquire this information in numerous less formal ways than making in the subject of a federal regulation. This requirement is simply unnecessary and not within the Agency's authority.

Proposed Rule §201.100(e): Section 201.100 (e) states that a live poultry dealer, including all parent and subsidiary companies, slaughtering fewer than 2 million live pounds of poultry weekly (104 million pounds annually) is exempt from the requirements in paragraph (a)(1) of this section.

Exempting smaller live poultry companies from these regulations is patently arbitrary and capricious. According to the Agency, of the 89 live poultry dealers who file annual reports with AMS, 47 could be exempt under this provision. There is no justification for having an unlevel regulatory playing field based on size of the live poultry dealer. AMS states it "believes the risk and impact of deception is reduced in this context and may not justify the effort and expense to develop the Disclosure Document required of larger business entities." The Meat Institute agrees that the effort and expense of developing the Disclosure Document is not justified by the risk of deception to poultry growers. However, that statement is true regardless of the size of the live poultry dealer. If the justifications for the Proposed Rule are sufficient to allow it to apply to larger companies, it should apply equally to live poultry dealers of all sizes. This provision is arbitrary and capricious and should be withdrawn.

Proposed Rule § 201.100(f): Section 201.100(f), "Governance and Certification," requires that: (1) The live poultry dealer must establish, maintain, and enforce a governance framework that is reasonably designed to— (i) audit the accuracy and completeness of the disclosures required under (a), which shall include audits and testing, and which shall include reviews of an appropriate sampling of Live Poultry Dealer Disclosure Documents by the principal executive officer or officers; (ii) ensure compliance with all obligations under the Packers and Stockyards Act and regulations thereunder. (2) The principal executive officer or officers, or persons performing similar functions, shall certify in the Live Poultry Dealer Disclosure Document **t**hat the live poultry dealer has established, maintains, and enforces the governance framework and that based on the officer's knowledge, the Live Poultry Dealer Disclosure Document does not contain any untrue statement of a material fact or omit to state a material fact which would render it misleading.

This provision is outside the Agency's statutory authority and out of step with the reality of how live poultry dealers are organized and managed. Nowhere in the Packers and Stockyards Act can the Agency point to authority for imposing a burdensome and unnecessary governance and audit framework on live poultry dealers, especially one that relates to a list of disclosures required not by the statute but by regulations *also* promulgated largely in the absence of statutory authority. In addition, the proposal is arbitrary and capricious in that it reflects a fundamental lack of factual understanding of the management structure and governance of live poultry dealers. The "principle executive officer or officers" of many companies have responsibility for not just live poultry, but multiple species, further processing, and in some cases products that do not involve poultry or animal protein at all. Even within the narrower confines of poultry production, many live poultry dealers contract with thousands of growers and would be required

to provide data not only to those thousands of growers but to thousands of potential growers. Much of the information produced in conjunction with a LPDDD would be maintained, if at all, at the local poultry complex level. In most instances, there would be multiple layers of management between the "principle executive" and any member of management with direct, day-to-day responsibilities related to the information envisioned by the LPDDD. It is patently unreasonable to require an apex executive of a live poultry dealer to "certify" this type of information. Finally, live poultry dealers already have ample incentive to ensure that any information they provide potential or current poultry growers is accurate. First, the Agency has not, and cannot, demonstrate how live poultry dealers benefit from providing inaccurate information to poultry growers upon whom the live poultry dealers depend for the care of their birds. Second, as the Agency has noted elsewhere, the supplying of fraudulent information could be a violation of federal or state law. Poultry growers already have the ability to pursue legal causes of action if they are provided with inaccurate and material information. This proposal lacks statutory authority, is arbitrary and capricious, and should be withdrawn.

Proposed Rule §201.100(g): Section 201.100 (g) requires that: (1) The Live Poultry Dealer Disclosure Document must include a poultry grower's signature page that contains the following statement: ''If the live poultry dealer does not deliver this disclosure document within the time frame specified herein, or if this disclosure document contains any false or misleading statement or a material omission (including any discrepancy with other oral or written statements made in connection with the poultry growing arrangement), a violation of federal and state law may have occurred. Violations of federal and state laws may be determined to be unfair, unjustly discriminatory, or deceptive and unlawful under the Packers and Stockyards Act, as amended. Allegations of such violations may be reported to the Packers and Stockyards Division of USDA's Agricultural Marketing Service.'' (2) The live poultry dealer must obtain the poultry grower's or prospective poultry grower's dated signature on the poultry grower's signature page in paragraph (1) as evidence of receipt. The live poultry dealer must provide a copy of the dated signature page to the poultry grower or prospective poultry grower and must retain a copy of the dated signature page in the dealer's records for three years following expiration, termination, or non-renewal of the poultry growing arrangement.

If the Agency is taking the position that live poultry dealers can violate §§202(a) and 202(b) of the PSA even if they do not harm competition, the Agency is acting without statutory authority. Many provisions in the Proposed Rule address perceived issues that poultry growers may feel are "unfair," but that are actually pro-competitive or do not affect competition. Congress enacted the PSA to curb monopolies, and courts have consistently held that the statute only prohibits anticompetitive practices. To the extent this proposal is intended to imply otherwise, it should be withdrawn and replaced with language consistent with the "tidal wave" of court decisions that have considered the issue and upheld the competitive injury requirement.

B. Transparency in Poultry Grower Ranking Pay Systems

Section 201.214 requires that if a live poultry dealer uses a poultry grower ranking system to calculate grower payments, the live poultry dealer must produce a list of certain records and maintain such records for a period of five years. Specific requirements and comments to them are discussed below.

Proposed Rule §201.14(b). Section 201.214(b) states that within 24 hours of flock delivery to a poultry grower's facility, a live poultry dealer must provide the following information to the grower regarding the placement:

> (1) The stocking density of the placement;
> (2) Names and all ratios of breeds of the poultry delivered;
> (3) If the live poultry dealer has determined the sex of the birds, all ratios of male and female poultry delivered;
> (4) The breeder facility identifier;
> (5) The breeder flock age;
> (6) Information regarding any known health impairments of the breeder flock or of the poultry delivered; and
> (7) Adjustments, if any, that the live poultry dealer may make to the calculation of the grower's pay based on the inputs in (1) through (6) of this paragraph.

This proposal will result in significant administrative burden to live poultry dealers while being of little utility to poultry growers. The preamble's discussion of this issue highlights the ongoing theme of the Agency relying on anecdotal reports instead of actual data or evidence. The Agency acknowledges in the preamble that "input distribution has not been studied extensively." The Agency then justifies the imposition of the administrative burdens of the Proposed Rule in part on the statement that "growers have repeatedly complained in public forums and to USDA of retaliation, discrimination, and other disputes arising in connection with distributions of inputs, including in ways that result in significant economic harm to growers." However, the Agency concedes that they **"have not identified research regarding whether variability in inputs between tournament growers affects grower outcomes"** (emphasis added). The Agency then baldly states that "we believe growers' assertions have merit." The Agency, in that statement, establishes that the Proposed Rule is arbitrary and capricious. The Agency could not even find, much less cite to, data or evidence that would justify the Proposed Rule. So, in the absence of actual facts, the Agency chose to "believe" anecdotal reports, including many shared at a workshop a dozen years ago.

Paragraph (1) would require providing the stocking density of the placement. The Agency states that variability in stocking densities likely result in farm weight and feed conversion disparities. The Agency goes on to raise the potential of different growers in a tournament receiving flocks with "fewer birds than what would be optimal." What the Agency does not explain is why a live poultry dealer would place birds at a density other than what the live poultry dealer considers optimal, taking into account a variety of factors from climate to housing to market conditions. The live poultry dealer depends on pounds of poultry for revenue. The largest single cost item in the production of live poultry is poultry feed. It would simply be against the live poultry dealer's best economic interest to place at "sub optimal" stocking densities.

Paragraph (2) likewise provides no meaningful benefit to outweigh its cost and is thus arbitrary and capricious. The Agency has provided no factual support for the notion that a poultry grower would benefit in the day to day management of his or her farm by knowing the breeds and ratios of poultry delivered or that the poultry grower. The previously referenced

decision by the Chief Administrative Law Judge of the Agency is directly on point as that case involved different breed types competing in the same tournament. The same is true of paragraphs (3) through (6). With regard to paragraph (3), most live poultry dealers, as acknowledged by the Agency in the preamble, use straight-run flocks that are not sorted by gender. For live poultry dealers who do sex birds, the Agency has failed to produce any actual evidence or data that would establish that a poultry grower's performance would improve based on knowing the gender of the bird, or that any incremental benefit would be worth the administrative cost of the proposal. The disclosure of a "breeder facility identifier" as envisioned by paragraph (4) would be of no demonstrable management benefit to a poultry grower, and certainly not enough benefit to outweigh its administrative cost. With respect to breeder flock age as mentioned in paragraph (5) and breeder flock "health" as mentioned in paragraph (6), the Agency again fails to furnish any actual data or proof that breeder flock age makes a material difference in the performance of a live poultry dealer. Moreover, the data may not even be available to the live poultry dealer depending on whether that live poultry dealer sources birds from a third party. At a minimum, this provision should include an "if available" qualifier.

With respect to paragraph (6), first, the Agency should clarify what constitutes a "health impairment" requiring disclosure. As proposed, this requirement is overly broad and unduly burdensome, particularly when expanded upstream to include potential "health impairments" of the breeder flock that may not have any expected impact on the broiler flock. The proposal should also be clarified to establish that "health impairments" caused or likely caused by conditions on the poultry grower's farm require no advance disclosure by the live poultry dealer. The example the Agency provides in the preamble illustrates why the proposed regulation is a solution in search of a problem. The example involves a "salmonella infected broiler flock," which the Agency says will result in "loose, runny stools" and other symptoms. The Agency then provides examples of how a grower could manage the symptoms if provide information about the underlying cause. First, the management practices mentioned, migration fences and increased ventilation, would be used to mitigate the symptoms of the illness or any illness resulting in similar symptoms and would be equally applicable regardless of the specific pathogen. Wet floors would benefit from optimal ventilation regardless of the cause. Second, and more importantly, the Agency's proposal assumes that live poultry dealers would not voluntarily provide the poultry grower with whatever information might help that poultry grower provide the best care for the company's birds. Employees of live poultry dealers visit farms regularly precisely to advise growers on these issues. Those employees may include service technicians or veterinarians who can provide the best advice possible. Live poultry dealers are already economically incentivized to provide health information about flocks to poultry growers if that information would require different or modified management practices by the live poultry grower. There is simply no justification or statutory authority for a federal regulation to compel this information, and live poultry dealers are in a better position than AMS to determine case-by-case what information might be useful to a poultry grower's farm management.

Paragraph (7) requires disclosing at essentially the same time as placement any adjustments the live poultry dealer intends to make due to the factors in paragraphs (1-6). Live poultry dealers would rarely if ever be in a position to provide that information at the beginning of a flock. Poultry flocks consist of live animals. It is simply impossible to predict in advance what financial impact the issues listed above might have, if at all. Pay adjustments are typically made after a flock settles based on comparisons with historical data such as complex averages or

poultry grower multi-flock historical averages. Allowing live poultry dealers the opportunity to make any adjustments after the birds have settled will result in more fair adjustments for both the live poultry dealers and poultry growers than requiring companies to guess at impacts contemporaneously with flock placement.

Proposed Rule §201.214(c). Section 201.214(c) states that a live poultry dealer must provide ranking system settlement documents that include the following information:

> (1) Grouping, ranking, or comparison sheets. The live poultry dealer must furnish the poultry grower, at the time of settlement, a copy of a grouping or ranking sheet that shows the grower's precise position in the grouping, ranking, or comparison sheet for that period. The grouping or ranking sheet need not show the names of other growers, but must show their housing specification and the actual figures upon which the grouping or ranking is based for each grower grouped or ranked during the specified period.
>
> (2) Distribution of inputs. The distribution of inputs among participants must be reported to all poultry grower ranking system participants. The grouping or ranking sheets required in paragraph (1) must disclose the following information relating to live poultry dealer-controlled inputs provided to each grower participant:
>
> > (i) The stocking density for each placement;
> > (ii) The names and all ratios of breeds of the poultry delivered to each poultry grower's facility;
> > (iii) If the live poultry dealer has determined the sex of the birds, all ratios of male and female poultry delivered to each poultry grower's facility;
> > (iv) All breeder facility identifiers;
> > (v) The breeder flock age(s); and
> > (vi) The number of feed disruptions each poultry grower endured during the growout period, where the grower was completely out of feed for 12 hours or more.

The Meat Institute's comments regarding the requirements of paragraphs (i) through (v) are the same as its comments regarding Section 201.214(a). Regarding paragraph (vi), this information is simply of limited or no utility to a poultry grower. First, the Agency should clarify what constitutes a "feed outage." For example, a poultry house could have no visible feed in the feed bin but still have hours of feed left in the feed lines. The Agency also makes no attempt to differentiate between feed outages caused by the poultry grower's failure to notify the live poultry dealer, feed outages caused by a failure of the live poultry dealer, or feed outages caused by a force majeure event out of the control of either party. The implication of the Proposed Rule is that feed outages are always the fault of the live poultry dealer. That implication defies reality and is counter to the economic self-interests of the live poultry dealer, which are always better served by having ample feed available to its birds. Finally, the Agency has not established that feed disruptions on other farms have a material financial impact on poultry growers. In fact, if anything, if those disruptions resulted in poor performance on a competing farm, they might benefit a poultry grower compensated under a relative performance system.

V. Conclusion

The Proposed Rule is the latest in a series of attempts by the Agency, going back more than a decade, to restructure the tournament system. Those past attempts were rightly withdrawn or blocked by Congressional action. Nonetheless, the Agency is taking another bite at the apple of fixing a system that is not broken. The tournament system, as it has evolved over many decades of use virtually industry-wide, has served the interests of live poultry dealers, poultry growers (particularly the most efficient and hard-working) and ultimately customers and the American consumer. It is a pro-competitive system and consistent with the Congressional intent of the Packers and Stockyards Act. The Agency's latest solution in search of a problem is arbitrary and capricious, promulgated absent statutory authority, and violative of the major questions doctrine as explained by the Supreme Court only a few weeks ago. The Meat Institute respectfully requests that the Proposed Rule be withdrawn.

Respectfully submitted,

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