January 17, 2022

S. Brett Offutt
United States Department of Agriculture
Agricultural Marketing Service Fair Trade Practices Program
1400 Independence Ave. SW
Washington, DC 20250

RE: Dkt. No. AMS-FTPP-21-0045: "Inclusive Competition and Market Integrity Under the Packers and Stockyards Act," Proposed Rule

Mr. Offutt,

The National Turkey Federation (NTF) represents all segments of the turkey industry, including growers, processors, breeders, hatchery owners and allied companies. NTF is the only national trade association exclusively representing the turkey industry; our members account for more than 95 percent of all U.S. turkey production. We are pleased to submit comments on the proposed rule, "Inclusive Competition and Market Integrity Under the Packers and Stockyards Act," (the Proposed Rule).

NTF has longstanding policy – crafted by a committee comprised of turkey growers and processors – supporting regulations or legislation that ensures transactions between turkey growers and live turkey dealers (integrators) are fair. NTF supports the right for turkey growers to operate their business without fear of discrimination or retaliation.

NTF also supports clear and transparent regulations. Our overriding concern with the Proposed Rule is that, if finalized, it will lead to increased legal and regulatory uncertainty and make it difficult for the industry to transact business with growers.

While NTF supports the principles and goals of inclusive competition and preserving the integrity of the market, the Proposed Rule, as written, appears too vague to accomplish its stated goals. Without clearer boundaries, it is not readily apparent how a company could ensure they are in compliance. It also appears the Proposed Rule targets conduct that is already clearly prohibited by provisions of the Packers and Stockyards Act (the Act) and its implementing regulations.

The Proposed Rule Targets Conduct that is Already Prohibited under the Act and the Act's Regulations

The Proposed Rule should be withdrawn because the conduct AMS seeks to proscribe under the Proposed Rule is already prohibited under the Act and its implementing regulations. The addition of duplicative regulations is confusing and unnecessary.

In December 2020, AMS published a final rule, "Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act," which identified the criteria used to determine whether an action is an undue or unreasonable preference or advantage.[1] 9 CFR § 301.311 identifies factors that AMS will consider when determining if disparate treatment of similarly situated growers is justified (e.g., cost savings, meeting a competitor's price or terms, or business decisions). If a "covered individual" is treated differently from similarly situated individuals, and the disparate treatment is not justified by the factors identified in 9 CFR § 301.311, then the disparate treatment is likely deemed an "undue or unreasonable preference."

The Proposed Rule would prohibit several forms of disparate treatment of covered individuals. Although the Proposed Rule appears to emphasize the offending party's motivation (e.g., prejudice, retaliation), the Proposed Rule targets the same outcome as 9 CFR § 301.311 – disparate treatment of similarly situated covered individuals.

For instance, *Proposed* § 201.304(a)(2) would make it a violation for a regulated entity, such as a live poultry dealer, to "prejudice, disadvantage, inhibit market access or otherwise take adverse action" with respect to dealings with covered producers. Examples of "prejudice or disadvantage" include: (1) offering less favorable contract terms than are customarily offered, (2) refusing to deal, (3) differential contract performance or enforcement or (4) termination or non-renewal of a contract. Under, 9 CFR § 301.311, such actions are already prohibited because they are not justified based on cost savings, meeting a competitor's terms or as a business decision.

Similarly, retaliatory conduct in *Proposed* § 201.304(b) is likewise prohibited by 9 CFR § 301.311. 9 CFR § 301.311 identifies the criteria that is used to determine whether an action is an undue or unreasonable preference or advantage. If a covered producer receives disparate treatment based on retaliation for exercising rights under the Act or the First Amendment, it is not justified based on the criteria identified in 9 CFR § 201.211

Proposed § 201.306 would enumerate several deceptive practices by prohibiting the use of "a pretext, false or misleading statement, or omission of material fact necessary to make a statement not false or misleading" with respect to contracts (formation, performance, termination or refusal). All of these actions are already clearly prohibited by Section 202(a) of the Act, which prohibits live poultry dealers, packers and swine contractors from "engag[ing] in or use of any unfair, unjustly discriminatory, or deceptive practice or device."

[1] This final rule is codified at 9 CFR § 301.311.

To be clear, NTF opposes discrimination, retaliation and unfair dealing in poultry contracts. However, this conduct is already prohibited under the Act and existing regulations. We believe the Proposed Rule should be withdrawn because it would be duplicative, confusing and unnecessary.

Federal Courts Require a Showing of Competitive Harm to Prove Violations of Sections 202(a) and (b)

The provisions in the Proposed Rule are silent on whether a covered producer must demonstrate harm or a likelihood of harm to competition to prevail on a claim alleging a violation of Sections 202(a) and (b) of the Act. However, the preamble to the Proposed Rule makes clear that AMS desires to nullify the competitive harm requirement.

As AMS is aware, federal courts have consistently held that complainants alleging violations of Sections 202(a) and (b) must also demonstrate harm or a likelihood of to competition.[2] To the extent this Proposed Rule is intended to nullify this court precedent, AMS should acknowledge there has been no change in prevailing court precedent and that the Proposed Rule does not change the injury to competition requirement.

Congress has had many opportunities to amend the Act to clarify that a showing of competitive harm is not necessary to prove a violation of Sections 202(a) and (b). However, although Congress has amended Section 202 several times over the past 100 years, it has not rejected the decisions of the appellate courts. Under the recent U.S. Supreme Court decision, *West Virginia v. EPA*[3], the Court affirmed the "major questions doctrine," which requires that agency actions of significant economic import be based on "clear congressional authorization." In this case, Congress has repeatedly declined to broaden the scope of Sections 202(a) and (b).

NTF is aware AMS intends to propose a new rule detailing circumstances where the agency believes it is not necessary to require a showing of injury to competition to prevail on a claim for violations of Sections 202(a) or (b) of the Act. While NTF believes attempting to overturn longstanding federal precedent through regulation is an ill-considered, futile waste of taxpayer and private resources, it is more appropriate to address the issue in a standalone rulemaking.

The Definition of a "Market Vulnerable Individual" is Unworkable

NTF recommends that AMS withdraw the Proposed Rule because it prohibits conduct that is already deemed unlawful under the Act and 9 CFR 301.311. However, if AMS intends to move forward with this rulemaking, NTF urges AMS to re-propose the rule with a clear, unambiguous

[2] *See London v. Fieldale Farms Corp.*, 419 F.3d 1295, 1304 (11th Cir. 2005), *Been v. O.K. Industries*, 495 F.3d 1217, 1228 (10th Cir. 2007), *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 357 (5th Cir. 2009)(en banc), *Terry v. Tyson Farms*, 604 F.3d 272, 279 (6th Cir. 2010).
[3] 597 U.S. __ (2022).

definition of "market vulnerable individual." A clearer definition would permit AMS to ensure those it seeks to assist are included in any new protected class while providing processors with greater regulatory certainty and avoiding expensive litigation that could blunt the impact of the proposal for many years, if not permanently.

The federation and its members firmly believe growers should be treated with dignity and respect and that decisions affecting growers should be made on the merits of the grower's ability to perform. In principle, NTF does not object to the prohibitions against discrimination in *Proposed* § 201.304. However, the proposed definition of "market vulnerable individual" is vague to the extent it is impossible to determine whether an individual producer is a "market vulnerable individual."

The definition of "market vulnerable individual" appears to create protected classes akin to our federal civil rights and employment discrimination laws. However, those laws clearly define who is and is not protected. AMS does not attempt to draw any clear lines in terms of who is covered by the definition. The definition does not define "market vulnerable individuals" along the lines of familiar, determinable parameters, such as race, nationality, gender, religion, sexual identity, age or disability. The proposed definition could be interpreted to account for education, farm size or region. The vagueness of the definition could result in a situation where a grower has a plausible claim to being a market vulnerable individual without the integrator being aware – or without AMS ever having intended to extend protection to that individual.

Proposed § 201.304(a)(2) includes several actions that are prohibited if they are taken against market vulnerable individuals. NTF believes that growers should not face adverse actions that are rooted in prejudice. However, actions such as termination, non-renewal of contracts or scaling back placements of birds, are common business decisions that are made based on a grower's performance and the integrator's needs. If every grower can claim to be a market vulnerable individual, then every grower may be in a situation to assert claims under the Act when faced with an adverse action.

It is almost enough to create the impression that AMS does not want to define the class and is seeking to encourage litigation that might lead to a broader, more inclusive class that the agency feels is politically achievable. If this is the case, it is a highly questionable strategy. Litigation inherently is a process where outcomes are uncertain and unintended consequences occur. Those consequences could turn out to disadvantage some of the very individuals AMS is hoping to help. A court-ordered definition that is overly broad or extremely narrow could create a protected class that includes or excludes growers in ways AMS did not intend.

Any well-crafted rule should be drafted to provide clarity and certainty to all who it seeks to regulate. This proposal fails badly in that regard and should be re-proposed with a clearer definition of "market vulnerable individual" that is fair, reasonable, achievable and simple for both covered producers and integrators to understand.

The Proposed Rules Recordkeeping Requirements Are Vague

Proposed § 201.304(c)(1)'s recordkeeping requirements are vague and confusing. It requires integrators that keep records related to *Proposed* § 201.304(a-b) to maintain such records for five years. If the integrator does not keep any relevant records, then there is no such recordkeeping requirement.

Although *Proposed* § 201.304(c)(2) lists several examples of relevant documents, such as policies and procedures or training materials, the language of *Proposed* § 201.304(c)(1) could be interpreted to have a much larger scope. If an adverse action, such as termination of a contract, reduction in placements, or varied contract terms, serves as a basis for a claim, then it would seem that all documents relating to relationships with covered producers would be covered. AMS should clarify the scope of records that it considers relevant to compliance with *Proposed* § 201.304(a-b).

In addition, some documents relevant to compliance with *Proposed* § 201.304(a-b) may include legal advice or attorney work product. AMS should revise *Proposed* § 201.304(c)(1) to clarify that its scope does not extend to privileged communications or attorney work product.

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NTF and its membership appreciate AMS' consideration of these comments. If you have any questions, please do not hesitate to contact NTF to discuss this matter further.

Respectfully submitted,

Joel Brandenberger
President