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DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Parts 407 and 457

[Docket ID FCIC–20–0008]

RIN 0563–AC70

Area Risk Protection Insurance Regulations; Common Crop Insurance Policy Basic Provisions; Common Crop Insurance Regulations, Sunflower Seed Crop Insurance Provisions; and Common Crop Insurance Regulations, Dry Pea Crop Insurance Provisions

Correction

In rule document 2020–26036, beginning on page 76420 in the issue of Monday, November 30, 2020, make the following changes:

§ 457.108 [Corrected]

■ On page 76427, in § 457.108, in the third column, in the fourth and fifth lines from the bottom, ''■ 5. Cancellation and Termination Dates.'' should read ''4. Cancellation and Termination Dates.''

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

9 CFR Part 201

[Doc. No. AMS–FTPP–18–0101]

RIN 0581–AD81

Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule establishes a new regulation containing criteria the Secretary of Agriculture will consider when determining whether an undue or unreasonable preference or advantage has occurred in violation of the Packers and Stockyards Act, 1921 (Act). A provision of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) requires the Secretary to establish the criteria. The Act protects fair trade, financial integrity, and competitive marketing for livestock, meat, and poultry.

DATES: Effective January 11, 2021.

FOR FURTHER INFORMATION CONTACT: S. Brett Offutt, Chief Legal Officer/Policy Advisor; Packers and Stockyards Division, USDA, AMS Fair Trade Practices Program; phone: 202–690–4355 or email: *S.Brett.Offutt@usda.gov.*

SUPPLEMENTARY INFORMATION: The Act at 7 U.S.C. 202(b) specifies that it is unlawful for any packer, swine contractor, or live poultry dealer to either make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect. In administering this provision of the Act, the United States Secretary of Agriculture (Secretary) determines whether the conduct of regulated entities is considered a violation of the Act.

In the past, each determination was analyzed using general principles on a case-by-case basis, exercising the regulatory flexibility Congress provided when it passed the Act. Section 11006(1) of the 2008 Farm Bill (Pub. L. 110–234) requires the Secretary to promulgate regulations establishing criteria the Secretary will consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of the Act. At that time, the Secretary delegated responsibility for establishing the required criteria to the Grain Inspection, Packers and Stockyards Administration (GIPSA). In 2017, GIPSA merged with the Agricultural Marketing Service (AMS). AMS now administers the regulations under the Act and undertook this rulemaking to meet the statutory requirement. This rule adds a new § 201.211 to 9 CFR part 201—Regulations Under the Packers and Stockyards Act (P&S regulations). This rule retains a flexible framework for the Secretary's determinations, while providing criteria to support transparency in the Secretary's determinations. Accordingly, the regulated industry and the public now have a reference to the general framework that AMS will use to determine whether there is an unlawful preference or advantage under section 202(b) of the Act.

Newly added § 201.211 requires the Secretary to consider four specified criteria when determining whether any undue or unreasonable preference or advantage has been given or made to any particular person or locality in any respect in violation of the Act. The Secretary is not limited to considering only these four criteria but can also take other factors into consideration as appropriate on a case-by-case basis. We discuss each of the four criteria later in this document.

AMS published a proposed rule regarding this matter in the **Federal Register** on January 13, 2020 (85 FR 1771). The proposed rule invited public comments on the addition of the proposed criteria to the P&S regulations. AMS allowed a 60-day public comment period for interested parties to submit comments. The comment period ended March 13, 2020. AMS received 2,351 comments on the proposed rule, of which 235 were unique. The remaining comments represented 48 groupings of similar comments, each group having at least 80 percent matching text. Commenters represented numerous segments of the livestock and poultry industry, from individual poultry growers and livestock producers to trade organizations representing producers, poultry companies, the meat packing industry, and state and national level agriculture groups. After considering the comments received, AMS determined to adopt the proposed criteria with two modifications. Analysis of the comments and AMS's responses are included later in this document.

Background

As mentioned above, the 2008 Farm Bill directs the Secretary to establish criteria the Secretary will consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of the Act. At the time the 2008 Farm Bill was enacted, what is now the Packers and Stockyards Division (PSD) of AMS's Fair Trade Practices Program operated within GIPSA. GIPSA undertook the responsibility for developing criteria for consideration. In June 2010, GIPSA

published a proposed rule (75 FR 35338 (June 22, 2010)) that was never finalized, due to Congressional prohibitions included in the Consolidated Appropriations Acts for fiscal years 2012 through 2015, which disallowed any further work on the new criteria rulemaking. *See* Sec. 721, Public Law 112–55, November 18, 2011; Sec. 742, Public Law 113–6, March 26, 2013; Sec. 744, Public Law 113–76, January 17, 2014; and Sec. 731, Public Law 113–235, December 16, 2014. GIPSA resumed its efforts to promulgate the required criteria in December 2016 with publication of a second proposed rule (81 FR 92703 (December 20, 2016)), but decided to take no further action on that proposal (82 FR 48603 (October 18, 2017)). AMS accomplishes Congress's 2008 Farm Bill directive with the promulgation of this final rule that establishes the required criteria.

The PSD oversees day-to-day administration of the P&S regulations and is called upon to investigate alleged violations of section 202(b). Many of the alleged violations related to contractual dealings between regulated entities and the livestock producers, swine production contract growers, and poultry growers with whom they do business. Other entities, including retailers and the public, can also be harmed by violations of section 202(b). Difficulty lies in determining whether particular instances of preferences or advantages made or given to one or more persons or localities would be undue or unreasonable and violations of the Act.

New Provisions

Section 202(b) of the Act prohibits buyers to ''make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.'' It is not unusual for buyers or sellers of livestock or poultry to receive advantages. For example, between two competing sellers, one may receive a better price from a buyer. The Act only prohibits those preferences or advantages that are undue or unreasonable. It follows that there are legitimate reasons for the existence of preferences or advantages that are not undue or unreasonable. Reasonable differences in contract terms may result from negotiations over particular interests between the parties. Some courts have gone so far as to say it is not the purpose of the Act to interfere with contract negotiations or to upset the traditional principles of freedom of contract.[1] The Act does not create an entitlement to obtain the same type of contract offered to other producers or growers. However, greater clarity on the terms associated with grower contracts may increase transparency in the marketplace and reduce the number of claims of undue or unreasonable preference.

Under new § 202.211, the Secretary will consider four specific criteria when determining whether a packer, swine contractor, or live poultry dealer has made or given any undue or unreasonable preference or advantage to any particular person or locality in any respect. Section 201.211 lists the criteria for consideration and provides that the Secretary is not limited to those four. Because § 202(b) of the P&S Act prohibits any undue or unreasonable preferences or advantages, in addition to considering the specified criteria in § 201.221, the Secretary may also consider other factors relevant to each situation on a case-by-case basis.

Under § 201.211(a), the Secretary will consider whether the preference or advantage in question cannot be justified on the basis of a cost savings related to dealing with different producers, sellers, or growers. Under § 201.211(b), the Secretary will consider whether the preference or advantage in question cannot be justified on the basis of meeting a competitor's prices. Under § 201.211(c), the Secretary will consider whether the preference or advantage in question cannot be justified on the basis of meeting other terms offered by a competitor. Under § 201.211(d), the Secretary will consider whether the preference or advantage in question cannot be justified as a reasonable business decision.

Historically, the Secretary has considered criteria similar to these when determining whether to commence disciplinary or judicial actions under the Act. PSD made these decisions on a case-by-case basis, examining the facts of each complaint separately. AMS chose these new criteria, and retained the flexibility to consider other criteria, based on this past experience. In doing so, AMS strikes a balance between the interests of all segments of the industry while carrying out its enforcement responsibilities. On the one hand, the law charges AMS with protecting producers, growers, retailers, and the public from potential harm resulting from undue or unreasonable preferences or advantages. On the other hand, AMS recognizes that among the numerous complaints the Secretary has examined in the past, many preferences or advantages given to individuals or groups have been determined to be lawful, while relatively few preferences or advantages were found undue or unreasonable.

Disparate contract terms are not undue or unreasonable just because the terms are not identical. Some disparities in contract terms can be attributed to reasonable business negotiations between contracting parties. For example, price differences offered to different sellers may reflect differences in transportation costs to a slaughter facility or may reflect one producer's ability and willingness to supply livestock in the early morning hours. In the case of a live poultry dealer that pays a premium to a poultry grower who agrees to use experimental vaccines, the grower has increased risk of financial loss if the vaccine proves to be unsuccessful. Based on the criteria in § 201.211, the apparent preference or advantage might be justified on the basis of the company saving the expense of testing the vaccines through other means. The premium paid to the grower for providing the extra service of testing vaccines and for accepting greater financial risk might not be considered undue or unreasonable. In another example, a livestock packer pays higher prices later in the day or week after competitors have raised the market price. Based on the criteria in § 201.211, the apparent preference or advantage might be justified as necessary to meet competitors' prices, and the higher price might not be considered undue or unreasonable. Finally, where a live poultry dealer's competitors have offered long term contracts to their growers, the poultry dealer finds that he must offer comparable terms to his growers in the same locality. Based on the criteria in § 201.211, the apparent preference given to growers in that locality might not be considered undue or unreasonable because the difference in contract terms might be justified by the need to meet a competitor's other contract terms in that locality.

Some preferences or advantages, however, might be considered undue or unreasonable if they are so unfair that they would tend to restrain trade, creating such excessively favorable conditions for one or more persons that the competitors would have reduced chances of business success. In such a case, a higher price, referred to as a premium, offered to one person or locality but not offered to other persons or localities similarly situated could

[1] *Jackson* v. *Swift Eckrich, Inc.,* 53 F.3d 1452 (8th Cir. 1995), *IBP* v. *Glickman,* 187 F.3d 974 (8th Cir. 1999), *Griffin* v. *Smithfield Foods,* 183 F. Supp. 2d 824 (E.D.Va. 2002).

constitute a violation of the Act. A livestock packer negotiating preferential live basis prices with only one favored livestock supplier and not with similarly situated suppliers, may be in violation of the Act. After considering the criteria in § 201.211, the Secretary may conclude that the packer cannot justify its actions on the basis of cost savings, meeting a competitor's prices, meeting other terms offered by a competitor, or making a reasonable business decision.

Under § 201.211(a) through (c), the Secretary will consider whether preferences or advantages given to one or more persons are based on cost savings related to dealing with different producers, sellers, or growers or on the need to meet a competitor's prices or other contract terms. For example, a live poultry dealer offering a higher base price to a favored grower, but not to other growers in the same complex with the same housing types, may be in violation of the Act. The Secretary will consider all of the specified criteria. Under criterion (a), there would be no cost savings in a higher base price. Under criteria (b) and (c), the Secretary will consider whether the higher base price meets a competitor's price or other terms. If the reason for giving the favored grower the higher price cannot be justified by meeting a competitor's price or other terms, and if consideration of other factors particular to the situation does not suggest otherwise, the higher base price may be an undue or unreasonable preference or advantage.

Under § 201.211(d), the Secretary will consider whether the preference or advantage in question cannot be justified as a reasonable business decision. A packer, swine contractor, or live poultry dealer may have a reasonable business reason for treating some persons or groups more favorably than others. For example, in the cattle industry a packer may pay producers a premium for delivering cattle that meet an established certified beef program, such as ''Certified Angus Beef,'' because the packer can realize a greater profit from the sale of meat branded under those programs. Based on the criterion in § 201.211(d), it is likely that the apparent preference or advantage to sellers of cattle meeting certain specifications in that situation would be justified as a reasonable business decision and not considered undue or unreasonable. In another example, a live poultry dealer may pay a premium to growers who raise test flocks utilizing a new breed of chicken, as this provides the live poultry dealer with data from which it can make future business decisions. Based on the criterion in § 201.211(d), the premium might be justified as a reasonable business decision, so the Secretary might not determine the preference or advantage to be undue or unreasonable.

Live poultry dealers, packers, and swine contractors should enter into contracts that do not discriminate, unless the differences are due to cost savings or meeting competitors' prices and terms or are legitimate business decisions. Preferences that are not grounded in ordinary business considerations may be based upon reasons of unjust advantage.

It should be noted that an alleged preference or advantage being seemingly justified under one criterion does not automatically confer immunity against all other criteria. For example, a preference or advantage may still be deemed undue or unreasonable, even though it is apparently given to meet a competitor's offer, if the Secretary determines the preference or advantage was unreasonable based on another criterion. Thus, the criteria specified in § 201.211 are not safe harbors, as suggested by some comments on the proposed rule.

The flexibility in § 201.211 to consider criteria other than the four specified in the rule allows the Secretary to determine whether other pertinent factors may have influenced the business decisions of contracting parties. For example, one comment submitted on the proposed rule recommended the Secretary consider whether an apparent preference or advantage could be ascribed to an emergency situation, such as a government requisition for food after a natural disaster or during a military crisis. While AMS did not add this particular criterion to the four specified in the rule, it is nevertheless a good example of the type of additional criteria the Secretary may consider. The discretion to consider other criteria, however, is not boundless.

In addition to the criteria enumerated in § 201.211, the Secretary may consider the overall competitive effects of any particular agreement. In doing so, the Secretary should apply the antitrust ''rule of reason'' analysis, as used by courts and antitrust agencies. Section 1 of the Sherman Act of 1890, 15 U.S.C. 1–38, prohibits agreements in ''restraint of trade.'' The Supreme Court interpreted this prohibition to be limited to unreasonable restraints. *See Ohio* v. *American Express Co.,* 138 S.Ct. 2274, 2283 (2018) (citing *State Oil Co.* v. *Khan,* 522 U.S. 3, 10 (1997)). Certain types of agreements (such as price fixing) are so likely to harm competition and to have no significant procompetitive benefit that they are challenged as per se unlawful. *See FTC* v. *Superior Court Trial Lawyers Ass'n,* 493 U.S. 411, 432–36 (1990). All other agreements are evaluated under the rule of reason, which involves a factual inquiry into an agreement's overall competitive effect. As the Supreme Court has explained, rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances. *See California Dental Ass'n* v. *FTC,* 119 S. Ct. 1604, 1617–18 (1999); *FTC* v. *Indiana Fed'n of Dentists,* 476 U.S. 447, 459–61 (1986); *National Collegiate Athletic Ass'n* v. *Board of Regents of the Univ. of Okla.,* 468 U.S. 85, 104–13 (1984). The Supreme Court first applied this framework to antitrust cases under the Sherman Act in *United States* v. *Addyston Pipe & Steel Co.,* 85 F. 271, 282–283 (CA6 1898), aff'd, 175 U.S. 211 (1899). The rule of reason analysis focuses on the state of competition with, as compared to without, the relevant agreement. The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement. See ''U.S. Department of Justice & Federal Trade Commission, Antitrust Guidelines for Collaborations among Competitors U.S. Department of Justice & Federal Trade Commission, Antitrust Guidelines for Collaborations among Competitors the Licensing of Competitors the Licensing of Intellectual Property'' § 1.2 (April 2000). If the agreement raises competitive concerns, the analysis considers whether the agreement is necessary to achieve any procompetitive benefits that would offset competitive harm. *Id.* This rule provides the analytical framework for AMS to evaluate specific activity.

While the agency expects a short-term increase in the cost of review for livestock producers, poultry growers, and regulated entities in existing contracts, in the long-term, innovative contracts should be less costly to negotiate even when those contracts provide for preferences and advantages. Because this framework of criteria can be understood in the context of legitimate business decisions, regulated entities may more easily review contracts for compliance with the Act.

By following a framework of criteria that promote fair dealing based in rational decision-making, AMS promotes protection for producers and localities that might otherwise have

been unable to obtain preferential contract terms or price advantages. Therefore, this rule is expected to improve the negotiating position of growers and producers.

AMS expects adding the criteria in § 201.211 to the P&S regulations to provide a framework in which the Secretary will consider potential violations of the Act, help the industry understand what the Secretary will consider when evaluating violation claims, and fulfill the Congressional mandate to establish criteria for making determinations regarding potentially unacceptable conduct under the Act.

Changes From the Proposed Rule

As originally proposed, the regulation required the Secretary to consider one or more specific criteria listed in the regulation, and provided that the Secretary was not limited to considering those four criteria when determining whether an undue or unreasonable preference or advantage has been given in violation of the Act. One comment asked for clarification about whether the Secretary was required to consider at least one of the four specified criteria, in addition to being able to consider other criteria. The 2008 Farm Bill requires the Secretary to establish criteria that the Secretary will consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of the Act. Therefore, based on its original understanding of the statute and on the comment, AMS revised the introductory paragraph of § 201.211 to make it clear that the Secretary must consider all four specified criteria, and that the Secretary may also consider additional criteria, in determining whether an undue preference or advantage has occurred in violation of the Act.

As originally proposed, criterion (d) would have required the Secretary to consider whether the alleged preference or advantage cannot be justified as a reasonable business decision that would be customary in the industry. Almost unanimously, public comments submitted in response to the proposal objected to the clause regarding whether a business decision is customary in the industry. Comments otherwise supporting the proposal said what is ''customary in the industry'' is ambiguous and could be open to broad interpretation. Comments opposed to the proposal generally opposed this clause specifically, asserting that illegal discrimination, retaliation, and use of unfair marketing practices have become customary in the industry and that the wording of the proposed provision would offer packers, swine contractors, and live poultry dealers a convenient justification for unacceptable actions. Based on the comments, AMS determined to remove the words ''that would be customary in the industry'' from the language of criterion (d). Thus, § 201.211(d) provides that the Secretary will consider among other criteria whether the preference or advantage under consideration cannot be justified as a reasonable business decision.

Comment Analysis

AMS received 2,351 comments on the proposed rule, some with multiple signatories. Comments are summarized by topic below and include AMS's responses.

Comment Period Extension

Comment: AMS provided 60 days for public comment on the proposed rule. Twelve comments included requests that AMS extend the comment period by at least 90 days. Requesters said that the proposed rule and the issues it addressed are complex and important and that commenters needed more time to analyze their implications across the industry and provide meaningful comments. Requesters also noted the comment period overlapped with some states' legislative sessions and that commenters were dealing with ongoing stress created by continued low farm prices, both requiring commenters' focus at the time.

AMS response: AMS proposed this rule following litigation that concerned a prior proposed rule on this subject. In the course of that litigation, the USDA committed to initiate timely rulemaking on this subject. As part of the rulemaking, the agency chose a 60-day comment period as it believed this to be an adequate amount of time for interested persons to review the proposal and to provide comment that the agency should consider. Therefore, AMS decided against extending the comment period beyond the deadline of March 13, 2020.

Criteria Generally

AMS proposed four specific criteria the Secretary will consider when making determinations about whether an action could be considered a violation of the Act. Some comments addressed one or more criteria individually, while some addressed them generally. Here we address comments on the proposed criteria in general.

Comment: Several comments supported the proposed criteria generally, saying farmers and ranchers have long been at a disadvantage due to uncertainty about what actions violate the Act. Comments agreed that the proposed criteria would provide much needed clarity for the industry and should minimize or eliminate legal uncertainty in the marketplace.

On the other hand, numerous comments opposed the proposed criteria generally, saying they are inadequate, vague, ambiguous, and open to a wide variety of interpretations. These comments said the proposed criteria fail to address significant and harmful practices in the industry that are both anti-competitive and detrimental to farmer livelihoods. Comments also claimed that AMS had proposed specific conclusory criteria for determining when a violation has not occurred. These comments opposed the structure of the proposed regulation, saying that framing the criteria in negative terms (*e.g.,* ''cannot be justified'') fails to articulate what *would* be considered an undue or unreasonable preference or advantage and a violation of the Act, thus failing to comply with Congress's mandate. Commenters claim that this is the reverse of Congress's directive and renders the Act's express prohibitions meaningless.

Comments also criticized the criteria for being too general. They argued that different adjudicators may come to different conclusions when considering the same facts.

For these reasons, comments asserted the criteria should establish standards on which to base decisions about whether a packer has violated the Act. Commenters asked for standards that state what conduct constitutes a violation. Comments urged USDA to develop clear, specific criteria, so that the violations would be unequivocal.

AMS response: AMS attempted to balance the interests of all segments of the livestock, meat, and poultry industries. Producers and growers must be protected from potential harm resulting from undue or unreasonable preferences or advantages. At the same time, regulated entities may give preferences or advantages to individuals or groups for lawful reasons. AMS believes that the proposed criteria will provide a framework from which both producers and processors can benefit, while not harming consumers.

Regarding the comments that suggest the rule should prohibit specific conduct—rather than providing criteria that can be applied across a wide range of behaviors—the 2008 Farm Bill directed the Secretary to establish criteria to consider when determining whether conduct gives an undue or unreasonable preference or advantage. AMS has chosen general criteria in this rule. Further, the criteria are not

conclusory; just because an action may appear justified under one criterion does not mean that it cannot be determined to be undue or unreasonable.

The criteria comply with the promulgation requirement, whether they are written in positive or negative terms. The Farm Bill provides: ''As soon as practicable, but not later than 2 years after the date of the enactment of this Act, 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 (1) whether an undue or unreasonable preference or advantage has occurred in violation of such Act;'' Criteria are standards, rules, or tests on which a judgment or decision can be based. American Heritage Dictionary of the English Language (5th ed. 2020). Criteria are typically ''reference point[s] against which other things can be evaluated; a characterizing mark or trait.'' Black's Law Dictionary (11th ed. 2019). Nothing in the 2008 Farm Bill suggests that the Secretary was called upon to describe these criteria in a positive or negative form. All that is required is that the criteria provide traits and standards that the Secretary can use as a base for judgment. AMS considered drafting criteria in a positive form and determined that the negative form better represented Congressional intent. Criteria used to evaluate whether preferences or advantages ''cannot be justified . . .'' in some manner could establish that an undue preference or advantage has occurred. Conversely, if written in a positive form, the criteria would be presented as exceptions, for example, a criterion could state that a preference or advantage is undue or unreasonable, unless it ''can be justified . . .'' in some manner.

The Farm Bill does not require the Secretary to consider any specific factor or information in developing the criteria. AMS's criteria apply across a wide range of behaviors in multiple industries. This approach, rather than setting forth specific examples of unlawful conduct, provides the Secretary with the flexibility Congress intended when passing the Act. AMS made no changes to the rule as proposed based on these comments.

Comment: One comment asked AMS to clarify whether the Secretary would be required to consider at least one of the four criteria specified in the proposed regulation, in addition to considering any other criteria that may be relevant to the situation.

AMS response: AMS appreciates the comment requesting clarification of the proposed language. Our intention was to specify four criteria the Secretary is required to consider, and to provide flexibility for the consideration of additional criteria as appropriate for the situation. Accordingly, based on the comment, and to ensure that the meaning of the regulation is clear, we revised the introductory paragraph of proposed § 201.211 to clarify that the Secretary will consider each of the criteria specified in the regulation and may consider additional criteria.

Unlimited Criteria for Consideration

The proposed rule provides that the Secretary will consider certain criteria when determining whether a violation of section 202(b) of the Act has occurred. The proposed rule specifies four criteria for consideration but provides that the Secretary is not limited to considering those four.

Comment: Many comments supported including flexibility to consider additional criteria on a case-by-case basis, explaining that there can be many other relevant factors to consider in different situations. Other comments argued that the provision is too ambiguous, and that its application is unclear. Some comments recommended the Secretary be required to consider only one of the listed criteria, or that consideration of other criteria be limited to certain situations.

Some comments insisted the criteria list be exhaustive and not broad, as proposed. According to comments, no segment of the supply chain would know which practices are prohibited or permissible under the proposed language, making compliance with the Act nearly impossible, and exposing the contacting parties to unforeseeable liability and associated litigation and the cost of protecting their respective marketing arrangements.

One comment opposed to the provision said that AMS's approach is inconsistent with Congress's directive in the 2008 Farm Bill to establish criteria and with the agency's stated desire to provide transparency to the process of determining whether a violation of the Act has occurred. The comment asserted that giving the Secretary flexibility to consider other criteria would give both the Secretary and other right of action plaintiffs who believe they have been wronged the opportunity to file complaints based on unspecified criteria.

One comment supported the proposal not foreclosing the possibility that other activities could be violations of the Act. According to the comment, the four listed criteria identify the most familiar indications of unfair practices, but other non-competitive conduct might escape the scope of the identified criteria, or other criteria might be found to better capture predatory practices.

Another comment suggested AMS clarify in the final rule that the four criteria specified in the proposed rule are broadly encompassing of all potential scenarios and that the Secretary will rarely, if ever, need to consider other criteria.

AMS response: The final rule retains the provision allowing the Secretary to consider criteria other than the four set forth in § 201.211. The U.S. Supreme Court noted in 1922 in the case of *Stafford* v. *Wallace,* 258 U.S. 495, 521, that the Packers and Stockyards Act is ''remedial legislation.'' A remedial measure ''is to be construed liberally, and so as to effectuate the purpose of Congress and secure the relief which was designed'' (*U.S.* v. *Southern Pacific R. Co.,* 184 U.S. 49, 56 (1902); *Logan* v. *Davis,* 233 U.S. 613, 628 (1914)). ''It would be an 'unnatural construction' of a remedial statute to require an administrative agency 'to sit idly by and wink at practices' which are subversive of effective regulation.'' (quoting *American Trucking Assns.* v. *U.S.,* 344 U.S. 298, 311 (1953)).

AMS does not consider the criteria exhaustive; rather, the criteria provide notice to the industry of the types of conduct that may be found unlawful. It would be impossible to develop an exhaustive list of specific criteria that would remain relevant for very long in an evolving market environment. The criteria in this rule respond to a need for clarity among industry participants regarding practices that could be deemed unduly preferential. Although it is unlikely that all future litigation will be avoided, AMS believes contracting parties may be able to avoid some litigation by applying the criteria and the principles behind them when drafting—and contracting for—marketing arrangements.

Thus, this final rule allows the Secretary to consider other factors that may not be included among the four listed criteria, but are evidence of an undue preference or advantage, nonetheless. The rule gives the Secretary principles by which to analyze the conduct of regulated entities that may violate the Act, for the Secretary's investigations and administrative or judicial enforcement. The Secretary's analysis involves investigative methods currently in use, including examination of overall market conditions, competitors' pricing and practices, and individual entities' business records to substantiate and justify different pricing or other

differing treatment of suppliers or territories.

These criteria are for the Secretary's determination of whether preferences are undue or unreasonable; the rule does not apply to private plaintiffs filing suits for damages under section 308 of the Act. Accordingly, no changes were made to the rule as proposed based on these comments.

Criterion (a)—Cost Savings

The proposed rule requires the Secretary to consider certain criteria when determining whether a violation of the Act has occurred. The proposed rule lists four criteria for consideration but does not limit consideration to those four. The first of these, criterion (a), asks whether the preference or advantage under consideration cannot be justified on the basis of a cost savings related to dealing with different producers, sellers, or growers.

Comment: One comment said this criterion is subjective and does not incorporate clear standards for its application in relation to dealing with different producers, sellers, or growers. Another asserted that this criterion's vagueness could be interpreted to mean that if a packer, swine contractor, or live poultry dealer is using a business practice that saves themselves money, it can be justified under section 202(b) of the Act, no matter the impact on producers, sellers or growers.

AMS response: AMS intends this criterion to be broad and flexible for the Secretary to apply it across a wide range of conduct in the livestock, meat, and poultry industries. In applying the criteria generally, the Secretary will examine the facts of each case and apply those facts to the criteria. Costs are relevant to many preferential contracts. If a preference does not have a cost-based justification, then the absence of a cost-based justification could indicate an undue or unreasonable preference or advantage. Or the Secretary may find that cost savings justify a preference given to one producer over another. No changes were made to the rule as proposed based on the comments.

Comment: Several comments said that justifications under criterion (a) for costs savings based solely on volume should be prohibited to avoid discriminating against smaller livestock or poultry growers. Comments explained that an integrator can easily claim cost savings based on volume by contracting with a large-scale livestock or poultry grower over a smaller-scale livestock or poultry grower or an association of smaller growers. According to comments, this would result in small-to-medium sized growers routinely being unduly disadvantaged and undue preference being given to larger growers strictly based on size of operation. One comment said small farms are struggling to stay viable while larger farms are increasing in size. The comment argued that justifying a preference or advantage as a cost savings based solely on volume would only further contribute to the decline in sales and ultimately the viability of small and mid-sized poultry and livestock farms.

AMS response: The rule is not intended to set forth prohibitions but rather to establish criteria the Secretary will consider when determining whether a preference is undue or unreasonable. A packer's justification of a preference based solely on the size of the grower operation as the comment suggests does not automatically make the packer's conduct lawful. The criteria are broad and flexible for the Secretary to apply criteria across a wide range of conduct in the livestock, meat, and poultry industries. In applying these criteria, the Secretary will examine the facts of each case and apply those facts to each of the criteria. In the comment's example, resulting cost savings would need to be clearly demonstrated to the Secretary's satisfaction, and other criteria would have to be considered. AMS believes it is up to contracting parties to negotiate terms in marketing arrangements that make business sense for all. Accordingly, no changes were made to the rule as proposed based on these comments.

Comment: One comment said that criterion (a) should be revised to provide clear examples of when cost savings are or are not warranted. Other comments gave examples of when cost savings could be used as a justification for disparate treatment: When there are measurable and verifiable differences in carcass and meat quality, if those standards are applied to producers of all sizes; when there is a specified time of delivery or times of urgent need for delivery, if those criteria are offered to producers of all sizes; when there are volume-related savings that result from documented efficacies in the cost of procuring, transporting or handling livestock and conducting other transactions that occur outside of the plant.

AMS response: The purpose of the regulation is to provide criteria that are broad enough to cover a majority of the types of conduct that could be found in violation of the Act. AMS believes that narrow examples do not encompass all of the situations that might result in an undue or unreasonable preference or advantage. Therefore, it is not the intention of the agency to set forth a laundry list of examples, but rather to establish criteria the Secretary will consider when examining the facts of wide-ranging types of conduct within the livestock, meat, and poultry industries. The comment's proposed examples present the underlying factual situation that the agency would consider. For illustrative purposes, AMS suggests as one example where cost savings used as justification for disparate treatment could be unlawful, the use of consumer coupons for meat products. Where a packer offers a coupon discount on the price of bacon in a specific geographic region, for example, and the resulting price is below the packer's cost in order to undercut competition, the behavior could represent an undue preference in that geographic region. After consideration, no changes were made to the rule as proposed based on these comments.

Comment: Comments requested that the regulation specifically prohibit justifications under criterion (a) based on so-called efficiencies that occur within a processing plant or from operating the plant at full capacity. Comments explained for example that hog producers who pool their hogs and deliver a truckload that is the size commonly handled by a processing plant should be on the same footing as a larger single producer who provides the same size truckload to the plant.

AMS response: The rule is not intended to set forth prohibitions but rather to establish criteria the Secretary will consider when determining whether a preference is undue or unreasonable. One of the criteria the Secretary will consider is whether there is a cost savings in dealing with one producer or grower over another. Based on the limited facts in the example provided by the commenter, plant operating efficiencies alone would not necessarily justify paying a single supplier more for hogs than several suppliers who pool hogs to provide similar volume. The general criteria still apply to the comment's example, even if there is no explicit ban on a particular preference or advantage. No changes were made to the rule as proposed based on these comments.

Criteria (b) and (c)—Meeting Competitors' Prices and Other Terms

Comments generally addressed jointly criteria (b) and (c). Under proposed criterion (b), the Secretary would consider whether the preference or advantage in question cannot be justified on the basis of meeting a competitor's prices. Under proposed

criterion (c), the Secretary would consider whether the preference or advantage cannot be justified on the basis of meeting other terms offered by a competitor. In general, comments said the two criteria are vague, favor packers and integrators, invite collusion, and conflict with confidentiality laws.

Comment: Comments expressed concern that criteria (b) and (c) would disadvantage farmers and growers, who have no voice in negotiations between other farmers and competing packers and integrators. According to comments, packers and integrators could individually, or could conspire to, set low prices or otherwise impractical terms agreeable to one farmer and use criteria (b) and (c) to justify applying the same prices and terms to other farmers for whom those prices or terms would be unacceptable, unworkable, or—as the comment implies—fail to reflect the ordinary forces of supply and demand.

AMS response: The criteria are neither requirements nor prohibitions. Nor are they justifications for unlawful behavior. In applying these criteria, the Secretary will carefully examine the facts of each case. In the example provided by commenters, low prices and other impractical terms given to one farmer for the purpose of justifying low prices and terms offered to other farmers would likely violate one or more of sections 202(c) through 202(g) of the Act. Price manipulation, for example, violates other sections of the Act. No changes were made to the rule as proposed based on these comments.

Comment: Comments suggested that in a fully functioning competitive market with transparent price discovery, applying criterion (b) might be rational, but in the livestock and poultry sector, where commenters say price discovery and price transparency are broken at best, and in the case of poultry, completely nonexistent, criterion (b) is extremely dangerous to farmers. According to comments, criterion (b) invites competitors to collude on pricing because justification under this criterion would insulate them from scrutiny under section 202(b) of the Act.

AMS response: Collusion to fix prices among packers, swine contractors, and live poultry dealers is prohibited under the Packers and Stockyards Act.[2] When the Secretary considers a regulated entity's justification for granting a preference based on meeting either the prices or other terms offered by a competitor, the Secretary may also consider if this behavior resulted in other violations of the Act. The rule does not justify, require, promote, or encourage price fixing conduct. Regulated entities, however, legitimately receive information—in the form of market reports, open bids, and contract negotiations with sellers—that may result in granting legitimate price preferences to meet a competitor's price. No changes were made to the rule as proposed based on these comments.

Comment: Comments cited USDA policy that protects the confidentiality of prices and terms of sale that packers pay for livestock under the Livestock Mandatory Reporting Act of 1999 (Pub. L. 106–78, Title IX; October 22, 1999). According to comments, the proposed rule would establish a standard involving prices and other terms of sale as defense for a packer's alleged violation of the Act while the public is simultaneously precluded from knowing the prices and terms of sale offered by any particular packer. Thus, according to comments, the proposed rule appears to facilitate and promote collusion among packers to share confidential pricing and terms of sale information with each other to ensure that the prices and terms they offer are similar, if not identical, to the prices and terms offered by competitors.

AMS response: This rule provides the Secretary with broad and flexible criteria to consider when determining if a preference is undue or unreasonable. The rule does not require, promote, or encourage regulated entities to agree to share prices and other contract terms between themselves. Nothing within this rule is intended to limit or conflict with the Livestock Mandatory Reporting Act of 1999 or any other Federal law. No changes were made to the rule as proposed based on these comments.

Comment: Comments claimed criteria (b) and (c) encourage collusion and conspiracy between regulated entities and are in direct conflict with the overall intent of the statute, as well as the specific price manipulation and control prohibitions in sections 202(d) through 202(g) of the Act. One comment suggested criteria (b) and (c) seemingly incentivize collusion between competitors and could decrease competition in the livestock and poultry industries. The comment said proposed criterion (b) should be withdrawn, and criterion (c) should be modified to require packers, swine contractors, and live poultry dealers to provide verifiable proof that the decision to meet a competitor's terms results in performance of efficiency gains. The comment said that the regulations should make it clear that collusive behavior between competing firms is unacceptable.

AMS response: This rule provides the Secretary with broad and flexible criteria to consider when determining if a preference is undue or unreasonable. The rule does not require, promote, or encourage collusion between packers, swine contractors or live poultry dealers. Other subsections of section 202 of the Act make clear that such conduct is prohibited. Subject entities are required by other sections of the P&S Act and regulations to keep adequate records of their business operations. Such records should provide adequate information for the Secretary to consider in making determinations under § 201.211. Accordingly, no changes were made to the rule as proposed based on these comments.

Comment: Comments suggested regulated entities should be required to maintain and provide when challenged contemporaneous and detailed records to prove that costs, prices, and terms offered to one farmer are justified on the basis of meeting those given to other similarly situated farmers.

AMS response: Entities regulated under the Packers and Stockyards Act are required to keep adequate records of their business operations.[3] The regulations do not specify which records entities should keep. Regulated entities have the flexibility to determine what type of records best meet the needs of their individual businesses. AMS expects that these records would include those necessary to justify preferential terms offered to a producer on the basis of any of the criteria within this rule. No changes were made to the rule as proposed based on these comments.

Criterion (d)—Reasonable Business Decisions

The fourth proposed criterion for the Secretary to consider is criterion (d)—whether the preference or advantage cannot be justified as a reasonable business decision that would be customary in the industry. Many comments addressed this particular proposal.

Comment: Several comments supported the inclusion of criterion (d) with the other proposed criteria, saying in general that they appear all-encompassing. Those comments recommended no changes to proposed criterion (d). Other comments recommended clarifying criterion (d) to indicate what would be considered a reasonable business decision that would be customary in the industry. Many comments asked further that AMS list the marketing arrangements and other

[2] 7 U.S.C. 192(d) & (f) (prohibiting conspiracies to manipulate or control prices).

[3] 7 U.S.C. 221; 9 CFR 201.94, 201.95.

business practices commonly expected to constitute legitimate business justifications. Some comments further recommended developing different lists for different industry sectors. Other comments asked that such lists not be considered finite, giving the industry room to adopt new types of acceptable arrangements in the future.

One comment suggested the term ''reasonable business decision'' could change over time and vary from individual to individual and from one USDA administration to the next. The comment explained contracting parties might be uncertain about how a contract provision that appears reasonable today might be viewed at some point in the future. Thus, the comment recommended USDA define what it considers to be ''reasonable'' in making business decisions or simply limit any interpretation of what was a ''reasonable business decision'' to the relative positions, beliefs, and understandings of the contracting parties at the time and place the contract was entered into.

AMS response: AMS has not defined or standardized the meaning of ''reasonable'' in the regulation because the word ''reasonable'' assumes the commonly understood meaning of an objective standard. That is, a reasonable decision is a decision that a reasonable person would make under similar circumstances. Further, we do not agree that the regulation should attempt to identify every possible industry business decision or marketing arrangement that might be reasonable now and in the future. Rather, the Secretary can apply the timeless standard of reasonableness to examine an alleged preference or advantage. Accordingly, AMS made no changes to the rule as proposed based on these comments.

Comment: Several comments asked AMS to clarify that just because an unfair practice may have become common within the industry, that does not mean it would be justified under proposed criterion (d) and not a violation of section 202(b) of the Act. Others said that the proposed criteria protected regulated entities from legal challenges to practices that are customary in the industry when a practice that is ''customary'' may violate the Act. Many comments described practices they say are unfair but have become commonplace within the industry, such as retaliation, racial discrimination, favoritism, use of tournament systems in the poultry sector, poultry pay systems where buyers control most grower quality inputs, and giving ''sweetheart deals'' to certain ranchers or feeders in the cattle industry. Comments said that these practices, although they might be called ''customary,'' should not be justified under proposed criterion (d). Some comments recommended using examples from this list to develop other criteria for determining whether a preference or advantage is undue or unreasonable. Other comments asked that the qualifier ''that would be customary in the industry'' be decoupled from ''reasonable business decision,'' leaving the latter to stand on its own as a criterion. One comment suggested AMS could develop another criterion to incorporate ''customary in the industry.''

AMS response: While the agency's intent is to establish a criterion that would allow preferences supported by reasonable business decisions, AMS does not intend to legitimize unlawfully discriminatory practices in the industry. As noted, some comments raised concerns that some ''customary practices in the industry'' may also be unlawful preferences or advantages. Thus, comments have raised concerns which, after careful consideration, justify modification of the rule. Accordingly, based on consideration of comments, AMS revised proposed criterion (d) by deleting the phrase, ''customary in the industry,'' and providing that criterion (d) read, ''whether the preference or advantage cannot be justified as a reasonable business decision.''

Comment: Many comments advocated removing criterion (d) entirely from the proposed regulation, arguing that both ''reasonable'' and ''customary'' are subjective. Comments claimed application of criterion (d) would allow the Secretary to permit anticompetitive behavior of the type the Act was intended to prevent. Comments said AMS should instead adopt stronger rules that would fulfill Congress's intent to curb anticompetitive practices.

AMS response: As explained above, AMS believes reasonableness is an objective measure with timeless application to the determination of whether a preference or advantage might be undue or unreasonable and a violation of the Act. Under this objective standard, what is reasonable does not rely on the intent of the individual. An objective legal standard ''is based on conduct and perceptions external to a particular person.'' [4] Thus a ''reasonable-person standard'' is objective because it does not require a determination of what the regulated entity thinks. We removed the phrase ''customary in the industry'' from the language of criterion (d), and believe that change is sufficient to make the criterion a useful tool for the Secretary's determinations. Accordingly, we made no further changes to the rule as proposed based on these comments.

Additional Criteria for Consideration

A few comments suggested additional criteria the Secretary should consider when determining whether certain actions are violations of section 202(b) of the Act.

Comment: One comment suggested the Secretary consider the relative bargaining power of the parties involved in a dispute about an alleged violation. The comment gave the example of a poultry grower with five-year-old chicken houses trying to negotiate a contract with a party who knows the grower has no other real options. The comment said this situation does not allow for true freedom of negotiation, and provisions should be developed to protect against the imbalance.

AMS response: The example the commenter provides appears to illustrate a possible undue or unreasonable disadvantage imposed on the poultry grower. That is, poultry growers lack the economic resources to demand higher value for their work, and they are at a disadvantage. When they negotiate, they may receive a lower price under their contract. The relative strength of their bargaining power is a distinct disadvantage, leading to unfavorable terms to the poultry grower. The relative strength of bargaining power may be an additional factor to consider for a given preference or advantage, but, as the commenter's example illustrates, preferences or advantages are unlikely to result from the bargaining disparities between poultry growers and live poultry dealers. This rule is limited in scope to addressing undue or unreasonable preferences or advantages. Accordingly, AMS is making no changes to the rule as proposed based on this comment.

Comment: Another comment recommended addition of a fifth criterion (e) and proposed the Secretary consider whether an apparent preference or advantage ''cannot be justified as needed to address a natural disaster or military necessity, such as but not limited to an emergency for which the Federal government has invoked its authority in relation to food supplies under the Stafford Act or the Defense Production Act.'' The comment explained that packers, swine contractors, and live poultry dealers might be required to award preferential contracts to certain farmers or localities

[4] STANDARD, Black's Law Dictionary (11th ed. 2019).

to address emergencies such as natural disasters or military necessities. The comment suggested that without the recommended language, entities might hesitate to forge such contracts, despite the proposed rule's provision that other factors besides the four listed criteria could be considered.

AMS response: The commenter's suggestion of a fifth criterion (e) is appreciated and provides an example of a situation in which the Secretary's consideration of criteria should not be limited only to the four criteria set forth in the rule. Natural disasters and other emergencies would likely create situations in which a packer, swine contractor, or live poultry dealer may give a lawful preference or advantage to one producer as compared to another. A preference given in response to an Executive Order may also apply in these situations. While these are instances in which the Secretary would carefully examine the facts to determine whether a preference is undue or unreasonable, it is not necessary to explicitly include a criterion for this conduct. Accordingly, AMS is making no changes to the rule as proposed based on the comment.

Comment: Some comments encouraged AMS to include as criteria for the Secretary's consideration whether the alleged preference or advantage given to certain farmers reflects retaliation or racial discrimination against others; reflects unreasonable reductions in payments based on tournament incentive systems or other payment arrangements where the company, rather than the farmer, controls inputs that factor into the farmer's pay; or reflects unreasonable ''sweetheart'' deals given by companies to some farmers and ranchers to the disadvantage of others.

AMS response: Existing law prohibits retaliation and racial discrimination.[5] Issues of retaliation and racial discrimination typically would arise in complaints of undue or unreasonable prejudices or disadvantages. This rule is limited in scope to addressing undue or unreasonable preferences or advantages. AMS acknowledges, however, that retaliation and racial discrimination can be factors in cases of preferential treatment. Such conduct would also be considered by the Secretary under the broad authority granted by the Act when determining whether a preference is undue or unreasonable but need not be explicitly set forth in the rule. Accordingly, AMS is making no changes to the rule as proposed based on these comments.

Comment: Several comments stated that there are important differences between the marketing arrangements and structures of the cattle, swine, and poultry industries and that, where appropriate, separate criteria should be developed to account for these differences.

AMS response: The prohibitions of section 202 of the P&S Act apply to packers, swine contractors and live poultry dealers. The law does not specify prohibitions that apply only to cattle, or swine, or poultry. AMS proposed broad criteria that can apply across all segments of the livestock and poultry industries. If a behavior specific to only one segment of the livestock or poultry industry is unlawful, it will likely fit within one of the criteria set forth in this final rule. Criteria describing specific behaviors were not proposed as they could be viewed as limiting the Secretary's ability to enforce this regulation. Maintaining broadly written criteria also provides sufficient flexibility to easily adapt to changing technology and business practices used across the industry. Accordingly, no changes were made to the proposed rule based on the comments.

Other Recommended Modifications to the Proposed Rule

A number of comments recommended modifications to the proposed rule. Many comments referred to USDA's previous rulemaking efforts to establish the mandated criteria for considering alleged violations of § 202(b) of the Act and recommended proposed provisions from earlier attempts be reintroduced. Several comments addressed perceived inadequacies in the current regulations and enforcement of the Act.

Comment: Numerous comments called for the addition of specific protections for farmers, including ranchers and growers, and provided examples of the types of protection they sought. Comments asked for protection that would allow farmers to file complaints, identify wrongdoing, speak with the media and elected officials, and form and join farmer associations without the threat of retaliation. Comments asked for protection against discrimination of any kind, including national origin, sex, race, religion, disability, political beliefs, marital or family status, or any other protected category. Comments said the proposed rule does not provide that protection, despite there being several documented cases of discrimination in the industry. Several comments asked that the rule include detailed, specific protections for contract poultry and livestock producers that apply to all forms of poultry and livestock, that are suitable for the future of the industry, are enforceable, and provide for real consequences for violations of section 202(b) of the Act.

AMS response: Congress directed the Secretary in the 2008 Farm Bill to establish criteria to guide the Secretary's consideration of facts in determining whether an apparent preference or advantage is undue or unreasonable and a violation of the Act. Protection against some of the unfair and discriminatory practices described by commenters is afforded under existing laws and under other provisions of the P&S regulations.[6] Farmers have the right to file complaints regarding wrongdoing, speak with media and elected officials, and form and join farmer associations. If retaliation occurs, there is likely discrimination, which may be unlawful under the P&S Act or other laws. While this rule cannot specify protections for every grievance suggested by comments, AMS believes the establishment of the criteria in this rule serves broadly as protection for industry members and others who may be subjected to undue or unreasonable preferences in violation of the Act. Accordingly, no changes were made to the proposed rule based on these comments.

Comment: Comments asked that the rule require contract prices to be based on clear, transparent, and predictable standards. Comments said prices should not be based on inputs the packing or processing company provides that may dictate the health of animals or the quality of feed. Comments also called for enforcement of fair pricing systems that don't involve price fixing or collusion. Other comments said that poultry integrators should be required to communicate clearly to all their contracted growers about actions that appear to be, but are not, undue preferences, such as the examples provided in the proposed rule's preamble. Comments further recommended that this communication be required at the time of signing contracts between growers and integrators and in routinely updated communications from the integrator to all the growers under contract with that integrator.

AMS response: Comments appear to suggest that live poultry dealers should

[5] *See, e.g.,* Agricultural Fair Practices Act of 1967, 7 U.S.C. 2301–2036; Civil Rights Act of 1964, 42 U.S.C. 2000e–2000e–17.

[6] *See, e.g.,* Packers and Stockyards Act, 9 U.S.C. 192(a)–(g); 7 CFR 201.216–201.218; 7 CFR 203.12 (policy statement); Agricultural Fair Practices Act of 1967, 7 U.S.C. 2301–2036; Civil Rights Act of 1964, 42 U.S.C. 2000e–2000e–17; Sherman Act, 15 U.S.C. 1–7; Clayton Antitrust Act, 15 U.S.C. 12–27, 29 U.S.C. 52–53.

be required to discuss with poultry growers information about the business of other poultry growers. This rule does not require that confidential business information of some poultry growers be shared with other poultry growers. P&S regulations currently require that live poultry dealers furnish growers with a copy of their contract and all applicable terms.[7] Live poultry dealers must also provide settlement sheets and all information and supporting documents needed to compute payment. This rule does not change these existing disclosure requirements. Accordingly, no changes were made to the rule as proposed based on these comments.

Comment: Some comments suggested the proposed rule could be improved by the addition of implementation and enforcement methods. One comment suggested that the proposed rule include a methodology for the determination process the Secretary would employ prior to considering whether the allegedly undue or unreasonable preference or advantage meets the proposed criteria. According to the commenter, establishing such a methodology would provide a more standardized structure and make the process less subjective. Other comments asked AMS to establish methods to continuously review and monitor industry practices to ensure new practices are not evolving that would circumvent the purposes of the Act.

AMS response: The suggestions to establish implementation and enforcement methods have merit, but do not address the establishment of criteria for the determination of whether and are therefore outside the scope of this rule. The Act sets forth the Secretary's investigative and enforcement authority over packers, swine contractors, and live poultry dealers. These powers and procedures establish the methodology to be followed in applying the criteria. Accordingly, no changes were made to the proposed rule based on these comments.

Comment: One comment suggested the rule could be improved by codifying the need to show competitive harm, and the comment provided regulatory applicability language for such a provision. The comment's recommended language would require the Secretary to find that the challenged conduct or action lacks a legitimate business justification *and* harms—or is likely to harm—competition to bring a claim under sections 202(a) and (b) of the Act.

AMS response: Several, but not all, U.S. Circuit Courts of Appeal have established case precedent requiring a showing of harm to competition.[8] For that reason, USDA previously withdrew the December 2016 interim final rule that would have codified that harm to competition is not required to prove a violation. Given the history and conflicting opinions on this topic, AMS does not believe that this rulemaking is the appropriate avenue for interpreting the statute's intent. Accordingly, AMS is making no changes to the rule as proposed based on this comment.

Comment: Another comment suggested the proposed rule could be improved by first distinguishing between preferences, advantages, prejudices, and disadvantages; and second by defining what would be considered undue or unreasonable versions of each.

AMS response: The terms ''preferences'' and ''advantages'' have already been defined by the Judicial Officer. Giving an advantage to any person and not to other similarly situated persons is making or giving a preference. Conferring a benefit on any person and not on all similarly situated persons is making or giving an advantage. (See *In Re: IBP, Inc.,* 57 Agric. Dec. 1353 (July 31, 1998)). Thus, AMS finds it unnecessary to codify those definitions in the rule. Accordingly, AMS is making no changes to the rule as proposed based on the comments.

Comment: Several comments said that AMS should not finalize this rule but should instead adopt provisions from prior rules. This included two rules GIPSA published in December 2016 (81 FR 92703 and 81 FR 92723, December 20, 2016). One comment characterized the 2016 rules as making progress toward an antitrust framework that would protect farmers. One comment recommended restoring provisions from the June 2010 proposed rule. Comments preferred provisions from all those rules that would have formally established that proof of actual or likely competitive harm is not needed for violations of section 202(b); created lists of ''per se'' and likely violations of the Act (such as attempted delays of payment and ''hold-up'' scenarios, respectively); established that any conduct which harms or likely harms competition is a violation of the Act; and provided more specific, grounded criteria for evaluating violations of section 202(b), including whether a grower is treated fairly as compared to other similarly situated growers who have engaged in lawful assertion of their rights, or is treated differently due to arbitrary reasons unrelated to the grower's livestock or poultry operation. Comments claim that the provisions of those rules would better address the current competitive imbalance in the market.

Comments asked that many different provisions of the prior rules be incorporated into this rule. Comments asked for explicit prohibition against the use of tournament incentive system. Some comments also urged a ban on packer ownership of livestock, which is currently permitted. Comments also said that certain cattle procurement agreements, when offered selectively to some cattle sellers and not others, should be identified as per se violations of section 202(b) of the Act. Other comments listed specific conduct that commenters believe should be considered per se violations of the Act and recommended they be added to the regulations.

One comment recommended USDA republish for public comment a petition submitted to GIPSA in 1996 calling for rules to restrict certain procurement practices in the meat packing industry.[9] According to the comment, the petition's proposal would better define undue preference in live cattle markets, facilitate reestablishing price discovery for domestic and import markets, and lessen the pending threat of beef plant closures and the corresponding loss of good paying jobs.

AMS response: The prior rulemakings referenced in these comments contained greater breadth of rulemaking and proposed a number of prohibited acts. This rule does not have the same breadth as those previous rules. Nor does this rule expand on earlier rulemaking. As explained in the proposed rule, this rule represents a fresh start at fulfilling the 2008 Farm Bill mandate to establish criteria to consider when determining whether conduct makes or gives an undue or unreasonable preference or advantage. The criteria established in this rule can be applied across a wide range of behaviors and meets the 2008 Farm Bill mandate.

Further, some of the examples of prohibited behaviors comments cited from abandoned rulemaking would be examples of undue or unreasonable prejudices or disadvantages, rather than preferences or advantages, and are therefore outside the scope of this rule.

[7] 9 CFR 201.100.

[8] For courts ruling that 202(b) cases require a showing of harm to competition for violations see *Wheeler* v. *Pilgrim's Pride Corp.,* 591 F.3d 355 (5th Cir. 2009)(sections 202(a) and (b) of the P&S Act) and *Terry* v. *Tyson Farms, Inc.,* 604 F.3d 272 (6th Cir. 2010)(sections 202(a) and (b) of the P&S Act).

[9] Filing of a Petition for Rulemaking: Packer Livestock Procurement Practices; 62 FR 1845, published January 14, 1997.

Accordingly, AMS is making no changes to the rule as proposed based on these comments.

Comment: Some comments recommended that the examples of potentially undue or unreasonable preferences or advantages given in the proposed rule's preamble be codified as explicit violations of section 202(b). Comments explained that doing so would help bring the proposed criteria into line with the purpose of the Act and the 2008 Farm Bill mandate from Congress. Comments cited examples of premiums offered to one person or locality but not offered to similarly situated other persons or localities, livestock packers negotiating preferential live basis prices with only one favored livestock supplier and not with similarly situated suppliers, and live poultry dealers offering a higher base price to a favored grower but not to other growers in the same complex with the same housing types.

AMS response: As explained in an earlier comment response, AMS has chosen not to codify a list of per se violations because we believe that narrow examples cannot possibly encompass all of the situations that might result in an undue or unreasonable preference or advantage. The purpose of the regulation is to provide criteria that are broad enough to cover a majority of the types of conduct that could be violations of the Act. Further, AMS believes the criteria established in this rule are aligned with the purposes of the Act and the 2008 Farm Bill mandate because they provide the framework the Secretary will use when examining the facts of wide-ranging types of conduct within the livestock, meat, and poultry industries. Accordingly, no changes were made to the proposed rule based on these comments.

Competitive Harm

Many comments addressed the notion of competitive harm and whether proof of such harm or likelihood of such harm is required to bring claims of violation of section 202(b) of the Act. Past findings in the Fifth, Sixth, Tenth, and Eleventh Circuits have held that under the Act plaintiffs must show competition, and not just an individual, is or is likely to be injured through preferences or advantages given to certain individuals or localities.[10] Other Circuits that are often cited for the proposition—in the Fourth, Seventh, Eighth, and Ninth Circuits—did not go so far. For example, courts in those circuits have agreed with USDA that certain violations of the Packers and Stockyards Act are ''unfair practices'' because those practices harm competition, or courts have opined on whether a specific practice would require harm to competition.[11] In past rulemaking efforts to establish the mandated criteria, USDA reiterated its position that harm to competition is not required in all cases under the Packers and Stockyards Act. AMS explained in the preamble of the current proposed rule that this rulemaking is independent of previous rulemaking efforts to establish the mandated criteria to guide determinations about undue and unreasonable preferences and advantages under the Act and did not make a policy statement about competitive harm.

Comments: Comments from the meat production, livestock production, and poultry segments of the industry expressed concern that AMS did not take a position on competitive harm in the proposed rule. Comments representing the interests of some livestock producers and poultry growers advocated clarifying that plaintiffs do not have to prove competitive harm to the entire industry to bring a case claiming undue and unreasonable practices. Comments said the burden of proof against large companies is too high for most farmers and that companies should not be allowed to continue unlawful practices just because a farmer cannot show harm to the entire industry.

One comment said it seems false to state in the proposed rule that AMS does not intend to create criteria that conflict with case precedent, when case precedent is mixed on the issue of the need to show competitive harm. The comment suggests AMS is apparently siding with the approach that requires demonstration of competitive harm to the entire industry. The comment perceived the proposed rule to be an unprecedented failure because it did not address the issue of competitive harm.

Comments asserted USDA has the authority and responsibility to issue rules for enforcing the Act that may conflict with court precedent under the Supreme Court doctrine of *Chevron* deference. According to comments, by not affirming in the proposed rule its historic position that a violation of section 202(b) may occur in some circumstances without a showing of competitive injury or likelihood of competitive injury, USDA could set a precedent that undermines its own policymaking power and codifies what commenters called judicial overreach and novel interpretation of the Act that contradicts the will of Congress. Thus, according to comments, the proposed rule leaves the Act largely unenforceable for individual farmers and ranchers.

One comment questioned AMS's refusal to adhere to its historic position on competitive harm and cited the October 2017 withdrawal of the December 2016 interim final rule on the Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, which said: ''Contrary to comments that GIPSA failed to show that USDA's interpretation was longstanding, USDA has adhered to this interpretation of the P&S Act for decades. DOJ has filed amicus briefs with several federal appellate courts arguing against the need to show the likelihood of competitive harm for all violations of 7 U.S.C. 192(a) and (b).'' One comment said Congress has not amended section 202(b), so there is no apparent justification for USDA's refusal to assert its longstanding interpretation regarding the statute. Another said by not affirming its historic policy on competitive harm AMS is dismissing the possibility of industry reform and violating the intent of the Act.

Comments representing packers, swine contractors, and live poultry dealers disagreed with farmer comments and said the proposed rule must clarify that plaintiffs should be required to prove competitive injury across the industry to bring a claim of undue or unreasonable preference or advantage and violation under the Act. Comments argued that failure to recognize case precedent on competitive harm, in conjunction with the ''plus other criteria'' approach in the proposed rule, could create uncertainty about whether certain preferences or advantages are justifiable under the law and subject the industry to needless, costly lawsuits.

[10] London v. Fieldale Farms Corp., 410 F.3d 1295 (11th Cir. 2005) (section 202(a) of the P&S Act); Been v. O.K. Indus., Inc., 495 F.3d 1217 (10th Cir. 2007) (section 202(a) of the P&S Act); Wheeler v. Pilgrim's Pride Corp., 591 F.3d 355 (5th Cir. 2009) (sections 202(a) and (b) of the P&S Act); Terry v. Tyson Farms, Inc., 604 F.3d 272 (6th Cir. 2010)(sections 202(a) and (b) of the P&S Act).

[11] De Jong Packing Co. v. U.S. Dep't of Agric., 618 F.2d 1329 (9th Cir. 1980) (agreeing with USDA that conspiracy to fix ''subject'' term in bidding is harmful to competition); IBP, Inc. v. Glickman, 187 F.3d 974 (8th Cir. 1999) (agreeing with USDA on rights of first refusal can harm to competition); Philson v. Goldsboro Mill Co., 164 F.3d 625, Nos. 96–2542, 96–2631, 1998 WL 709324 (4th Cir. Oct. 5, 1998) (finding retaliation requires a showing of likelihood of harm to competition); Jackson v. Swift Eckrich, Inc., 53 F.3d 1452 (8th Cir. 1995) (finding that while allegations disparate contracting requires a showing of harm to competition, breach of contract and fraud claims under the Packers and Stockyards Act did not require harm to competition).

Comments argued that while Congress intended with the Act to combat restraints on trade and promote healthy competition in the livestock industry, it did not intend to discourage what comments called regular, healthy business competition. Comments referenced findings under other antitrust laws to assert that under the Act, alleged violations of sections 202(a) and (b) must show antitrust injury, which requires proof that competition as a whole was harmed by the defendant's conduct. Comments urged AMS to interpret sections 202(a) and (b) as requiring proof of actual or likely harm to competition to reinforce the Act's purpose, which according to comments is to protect competition in the industry.

One comment recommended AMS address both sections 202 (a) and (b) when discussing injury to competition because, according to the comment, both are rooted in antitrust jurisprudence and both require injury to competition as a prerequisite to establishing a violation. According to the comment, addressing injury to competition in the context of only section 202(b) risks creating unnecessary confusion about the interpretation of section 202(a).

AMS response: Given the history and conflicting opinions on this topic, AMS does not believe this rulemaking on preferences and advantages is the appropriate avenue for interpreting the statute's intent with respect to all portions of sections 202(a) and (b) of the Act.

The 2008 Farm Bill requires the Secretary to establish criteria to consider when determining if conduct is an undue or unreasonable preference or advantage. The criteria the Secretary establishes through the rulemaking are not exclusive, and pertain only to part of section 202(b) of the Act, which also prohibits undue or unreasonable prejudices and disadvantages. 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) and is therefore outside the narrow scope of this rule. Accordingly, AMS is making no changes to the rule as proposed based on these comments.

Starting Over

Comment: Several comments urged AMS to abandon the proposed rule and start the rulemaking process all over. Comments claimed the proposed rule is inadequate and fails to meet the Congressional mandate to provide clear criteria for determining whether certain conduct or actions would be violations of section 202(b) of the Act. Other comments said the proposed rule failed to incorporate recommendations submitted in a June 2019 letter to AMS by associations representing farmers' interests and recommendations in a July 2019 letter to USDA from 17 members of Congress, both of which advocated stronger protections for farmers. Still other comments said the proposed rule does nothing more than fulfil a congressional mandate, while maintaining the status quo.

Some comments said AMS should start over because the proposed rule reduces and eliminates competition, facilitates corporate abuse of concentrated and predatory market power, invites collusion, and allows manipulation of live cattle prices.

One comment said the proposed rule was well intentioned, but does not accurately reflect needed modernization changes and improvements within the packers and stockyards industry. The comment urged USDA to withdraw the proposed rule and convene a livestock industry stakeholder summit to outline a course of action.

AMS response: The purpose of the rule is to provide criteria that are broad enough to cover a majority of the types of conduct that could be found in violation of the Act. It is not the intention of the agency to set forth a laundry list of examples, as many of the commenters suggest, but rather to establish criteria the Secretary will consider when examining the facts of wide-ranging types of conduct within the livestock, meat, and poultry industries. AMS is committed to finalizing the rule as required by the 2008 Farm Bill mandate to establish such criteria and fulfilling USDA's commitment to the Court to complete the rulemaking expeditiously. Therefore, AMS is neither withdrawing nor making changes to the rule as proposed based on these comments.

Additional Concerns Raised by Comments

Comment: Numerous comments expressed doubt that the proposed rule would remedy what they identified as serious problems in the livestock and poultry industry. Comments said farmers have little market power in dealings with large meat packing and poultry processing companies. Comments described what they called systematic discrimination and unchecked abusive treatment of farmers. Comments provided data demonstrating declines in farm prices that are not reflected in consumer prices, and they warned that the demise of small and family farms threatens U.S. food security, the economic health of rural communities, and the environment. Comments claimed finally that USDA does not act in the interest of small farmers.

AMS response: AMS appreciates the comments that expressed these concerns. Moreover, AMS understands the struggles farmers face across the U.S. Some of the concerns raised could be the result of preferences or advantages given by packers, swine contractors or live poultry dealers. Whether those preferences or advantages are undue or unreasonable is for the Secretary to determine utilizing the criteria set forth in this rule. The criteria are written broadly to cover wide ranging behaviors in the industry, including some of those identified by commenters, rather than narrowly addressing specific conduct. Some other concerns raised by the commenters are outside the scope of the Packers and Stockyards Act. AMS encourages commenters to continue the dialogue with USDA on these important issues so that together we can make improvements.

Regulatory and Economic Impact Analysis

Comment: Several comments addressed the regulatory impact analysis included (RIA) in the proposed rule. Most of those comments concerned statements in the analysis that some found contradictory. Comments asserted the RIA's cost-benefit analysis shows that the rule will have no meaningful impact on the anti-competitive and improper practices that are already in place. According to comments, the statement that AMS does not expect the proposed rule to result in a decrease in the use of alternative marketing agreements (AMAs), poultry tournament systems, or other incentive payment systems; or decreased economic efficiencies in the cattle, hog, and poultry industries shows that the proposed rule is essentially toothless. Comments argued that the Act was not intended to maximize economic efficiencies, but to provide for a fair, competitive marketplace by preventing abuses by large, supposedly ''efficient'' entities. One comment asserted that if AMS does not expect the proposed rule to change anything about the current state of the market nor give farmers any more protection than they currently have, the total cost to industry of this rule is effectively zero and the cost-benefit analysis in the final rule should reflect this.

AMS response: AMS believes the rule will have a meaningful impact on anti-competitive practices that may exist in the industry. Although the cost benefit

analysis in the proposed rule did not quantify projected benefits, it provided qualitative descriptions of the types of benefits expected from establishment of the proposed rule, such as improved parity of negotiating power between contracting parties with a clearer understand of what constitutes an undue or unreasonable preference or advantage under the Act.

The rule is not intended to dictate to industry the types of marketing arrangements employed. Understanding how the Secretary will evaluate allegations of violations of section 202(b) of the Act should induce packers, live poultry dealers, and swine contractors to reevaluate—and adjust if necessary—marketing agreements to make sure they comply with the law.

Even though the number and type of marketing agreements may not change because of the rule, this rule, like most rules, is expected to generate some costs. As explained in the RIA, most of the estimated costs for the final rule are associated with reviewing and, if necessary, adjusting contracts to make certain they comply with the rule.

Finally, AMS would like to distinguish operational efficiency of a firm from market efficiency. The operational efficiency of a firm improves when it can produce a good or service at a lower cost. A characteristic of market efficiency, on the other hand, is that the prices of goods or services represent unbiased indicators of their value to consumers and society, and contribute to the public benefit. The most efficient firm operations do not always lead to the most efficient markets. For example, industries in which unit costs continually decline with increased scale, such as water and electric utilities are considered natural monopolies. The firm that emerges as the monopolist in those industries will be the most operationally efficient, but if left unregulated, would be able to exploit its market power, for example by restricting output and charging a higher price. AMS believes this rule does not impede operational efficiency of the regulated firms, but does inhibit practices that could reduce market efficiency. Market efficiency, therefore, should be considered when evaluating the costs and benefits of this regulation.

AMS is making no changes to the rule or the RIA as proposed based on these comments.

Comment: One comment expressed concern with two statements in the regulatory impact analysis. The first projects that the proposed rule may lead to increased litigation costs to test case precedents regarding violations of the Act. The second states that AMS does not intend to create criteria that conflict with case precedent. The comment asked why, if the latter is true, did AMS not reduce confusion and the need for further litigation and affirmatively state the need to prove competitive harm in the regulation. Comments suggested that reinforcing the need to demonstrate injury or likely injury to competition would eliminate much of the precedent-confirming litigation that AMS anticipates flowing from the final rule, which in turn would significantly reduce the anticipated costs of the rule.

AMS response: This rule is intended to establish criteria the Secretary will consider when determining whether conduct is an undue or unreasonable preference or advantage. Whether competitive injury is required for a violation of sections 202(a) or 202(b) of the Act is beyond the narrow scope of this rule. Additionally, as explained earlier, the criteria in this rule pertain to the Secretary's evaluations of alleged misconduct and not to those of the courts. Even if AMS were to state a position on the need to show competitive harm, it would do little to limit litigation, as those opposing that position would likely challenge it in the courts. Thus, it is anticipated that litigation costs will increase initially as market participants—who choose to do so—test the provisions of the new regulation in court. Accordingly, AMS is making no changes to the rule as proposed based on the comment.

Comment: One comment questioned the claim in the RIA that the proposed rule would ''increase the amount of relevant information available to market participants and offset any potential abuse of buyer-side market power by clearly stating to all contracting parties'' the criteria for violations. The comment says it is not clear what basis AMS has to make this claim if all potential violations can be justified by cost savings, and no current customary practices across the industry will be considered a violation.

AMS response: AMS believes that establishment of the criteria in this rule will provide clearer information to market participants about how the Secretary will evaluate allegations of misconduct under section 202(b) of the Act. AMS anticipates that as producers and growers become aware of this information, they will be better able to negotiate fair contract terms with packers, contractors, and integrators considered to wield greater market power. AMS disagrees with the comment's conclusion that all potential violations can be justified by cost savings and that no currently customary practices will be considered violations. In fact, this rule gives the Secretary flexibility to consider multiple factors other than cost savings to determine whether a preference or advantage is undue or unreasonable. Removal of the ''customary in the industry'' clause from proposed criterion (d) also clarifies that the Secretary can make determinations about industry decisions and practices based on their reasonableness and not on whether they are widely adopted. AMS is making no changes to the rule as proposed based on this comment.

Miscellaneous Comments

Comment: One comment argued that the Secretary of Agriculture and those appointed by the Secretary should not act as judges in matters of law and that allegations of violations of the Act should only be tried in courts of law.

AMS response: The Act clearly establishes that the Secretary has authority to enforce administratively violations of section 202(b) against packers and swine contractors. Congress granted the Secretary authority to investigate persons subject to the Act and provided for administrative enforcement of violations. Changing these authorities is beyond the scope of this rule. Accordingly, AMS is making no changes to the rule as proposed based on the comment.

Comment: Once comment interpreted the RIA's statement that it is not the purpose of the Act to interfere with contract negotiations or to upset the traditional principles of freedom of contract to mean that the proposed rule is not expected to decrease the use of differing contracting structures, such as the incentive-based contracting arrangements often used in the poultry industry. The comment said it is crucial that the proposed rule not disrupt the existing contracting structures commonly used by the industry, and that any preferences or advantages arising from the use of these types of arrangements be evaluated first on whether they cause injury or likely injury to competition, and second based on the four criteria in the proposed rule.

AMS response: As explained in earlier comment responses, AMS does not intend the rule to promote or prohibit any particular types of contracting arrangements. This rule is intended only to establish criteria the Secretary will consider when determining if a preference or advantage is undue or unreasonable. Whether competitive injury is required to prove a violation is a concept broader than the narrow focus of this rule. Accordingly, AMS is making no changes to the rule as proposed based on the comment.

Required Impact Analyses

Executive Orders 12866, 13563, and 13771 and the Regulatory Impact Analysis

AMS is issuing this rule in conformance with Executive Orders 12866 and 13563, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

In the development of this rule, AMS determined to take a different approach to developing the necessary criteria than had been taken in previous rulemaking efforts. AMS determined that including the criteria as part of the framework for consideration of preferences and advantages in buyer-seller contracts would best serve the needs of the industry and fulfill the 2008 Farm Bill mandate. AMS expects the new regulation to bring transparency to considerations of potential violations of sections 202(b) of the Act and certainty to industry members forging contracts related to the buying and selling of poultry and livestock. The rule is not expected to provide any environmental, public health, or safety benefits.

This rule has been determined to be significant for the purposes of Executive Order 12866 and therefore has been reviewed by OMB. This rule has also been determined to be an Executive Order 13771 regulatory action. Details on the estimated costs of this final rule can be found in the rule's economic analysis.

AMS is adding a new § 201.211, which provides four criteria in response to requirements of the 2008 Farm Bill for the Secretary of Agriculture to consider in determining whether a packer, swine contractor, or live poultry dealer has engaged in conduct resulting in an undue preference or advantage to any particular person or locality in any respect in violation of section 202(b) of the Act. Based on its familiarity with the industry, PSD prepared an economic analysis of new § 201.211 as part of the regulatory process. The economic analysis presents the cost-benefit analysis of implementing § 201.211. PSD then discusses the impact on small businesses.

This rule is independent of previous rulemaking. PSD reviewed certain cost projections developed in conjunction with previous rulemaking in analyzing the regulatory impact of this final rule. All costs and benefits described in this economic analysis pertain to the language in this final rule.

Regulatory Impact Analysis

The 2008 Farm Bill requires the Secretary of Agriculture to promulgate a regulation establishing criteria that the Secretary will consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of section 202(b) of the Act. This rulemaking fulfills that requirement.

Responsibility for establishing the required criteria was originally delegated to the Grain Inspection, Packers and Stockyards Administration (GIPSA), which subsequently merged with AMS. AMS now administers the regulations under the Act and has undertaken this rulemaking.

For this economic analysis, PSD considered the impact of three alternatives for this rule. PSD considered the impact of maintaining the status quo, the impact of adopting regulatory language that had been proposed in 2016, and the impact of adopting the language in this final rule.

PSD considered the impact of taking no further action on a previous version of § 201.211 GIPSA [12] had proposed on December 20, 2016.[13] GIPSA subsequently provided notice in the **Federal Register** on October 18, 2017,[14] that it would take no further action on the 2016 proposed rule. Taking no further action would result in no additional out-of-pocket costs to businesses in the livestock and poultry industries but that action would not fulfill the requirements of the 2008 Farm Bill.

AMS could have proposed the same regulatory language as in the 2016 proposed rule. The 2016 proposed rule contained six criteria the Secretary would consider in determining whether conduct or action constitutes an undue or unreasonable preference or advantage and a violation of section 202(b) of the Act. To determine the impact of adopting the 2016 proposed rule, PSD looked to the estimated costs of the 2016 rule as described in that rule's economic analysis, which was provided in the 2016 notice of proposed rulemaking. The total first year costs of the 2016 proposed rule were projected to be $15.37 million.

This current rulemaking represents a different approach than used in previous rulemakings and establishes an analytical framework for considering whether a violation of section 202(b) of the Act has occurred. The final rule includes new criteria to bring transparency to the determination process for the industry. PSD estimates that the total first year costs of this rule are $9.67 million.

Introduction

As required by the 2008 Farm Bill, § 201.211 specifies criteria the Secretary will consider when determining whether an undue or unreasonable preference or advantage has occurred in violation of section 202(b) of the Act. The criteria provide a framework to analyze whether a particular person or locality receives an undue or unreasonable preference or advantage as compared to other similarly situated persons or localities. AMS expects the four criteria to clarify the legal standard for the public, promote honest competition and fair dealing, and improve the negotiating position of growers and producers.

Cost-Benefit Analysis

PSD estimated the costs and benefits of the final rule assuming its publication and effectuation in May 2020. The costs and benefits of the final rule are discussed in order below.

A. Cost Estimation

PSD believes that the costs of § 201.211 would mostly consist of the direct costs of reviewing and, if necessary, re-writing marketing and production contracts to ensure that packers, swine contractors, and live poultry dealers are not providing an undue or unreasonable preference or advantage to any livestock producer, swine production contract grower, or poultry grower compared to other similarly situated person or localities. PSD believes some in the industry may initiate litigation to test the new regulations, resulting in additional costs.

Section 201.211 does not impose any new requirements on regulated entities, but it serves as guidance for their compliance with section 202(b) of the Act. Since the rule clarifies the Secretary's consideration of unlawful undue or unreasonable preferences or advantages, regulated entities should face less risk of violating the Act. The rule does not prohibit the use of

[12] On November 14, 2017, Secretary of Agriculture, Sonny Perdue, issued a memorandum eliminating GIPSA as a standalone agency and transferred the regulatory authority for the Act to AMS. PSD has day-to-day oversight of the Packers and Stockyards activities in AMS.

[13] **Federal Register**, Volume 81, No. 244, pages 92703–92723.

[14] **Federal Register**, Volume 82, No. 200, pages 48603–48604.

alternative marketing agreements [15] (AMAs), poultry tournament systems, or other incentive payment systems, and is not expected to decrease economic efficiencies in the cattle, hog, and poultry industries. Additionally, PSD does not expect this rule to inhibit the ability of regulated entities and producers and growers to develop and enter into mutually advantageous contracts.

To estimate costs, PSD divided costs into two major categories, direct and indirect costs. In addition, PSD expects there are two direct costs: administrative costs and litigation costs.

With respect to direct costs, administrative costs for regulated entities would include items such as review of marketing and production contracts, additional record keeping,[16] and all other associated administrative office work to demonstrate that they do not provide an undue or unreasonable preference or advantage to any livestock producer, swine production contract grower, or poultry grower compared to other similarly situated person or localities.

Litigation costs for the livestock and poultry industries will initially increase until there is a body of case law interpreting the regulations. Once the courts establish precedent, PSD expects additional litigation to decline.

With respect to indirect costs, those costs include costs caused by changes in supply and/or demand and any resulting efficiency losses in the national markets for beef, pork, and chicken and the related input markets for cattle, hogs, and poultry resulting from the direct costs of the rule.

1. Direct Costs—Administrative Costs

To estimate administrative costs of the rule, PSD relied on its experience reviewing contracts and other business records commonly maintained in the livestock and poultry industries for compliance with the Act and regulations. PSD has data on the number of production contracts between swine production contract growers and swine contractors and poultry growers and live poultry dealers. PSD estimated the number of cattle marketing contracts between producers and packers based on the number of feedlots and the percentage of livestock procured under AMAs. PSD then multiplied hourly estimates of the administrative functions of reviewing and revising contracts by average hourly labor costs for administrative, management, and legal personnel to arrive at the total estimated administrative costs. PSD measured all costs in constant 2016 dollars in accordance with guidance on complying with E.O. 13771.[17]

Since packers, swine contractors, and live poultry dealers will likely choose to review their contracts as a precautionary measure to ensure that they are not engaging in conduct or action that in any way gives an undue or unreasonable preference or advantage to any livestock producer, swine production contract grower, or poultry grower, PSD estimates that the regulated entities will review each contract or each contract type once and will renegotiate any contracts that contain language that could be considered a violation of section 202(b) of the Act.

One may view this estimate as an upper bound to the direct cost of the rule, as not every packer, swine contractor, or live poultry dealer will choose to conduct such a review. Some may choose to ''wait and see'' what effect, if any, the rule has on the industry, and whether courts rule on it in any way that would warrant such a review of their contracts.

Based on PSD's experience, it developed estimates for regulated entities of the number of hours for attorneys and company managers to review and revise marketing and production contracts and for administrative staff to make changes, copy, and obtain signed copies of the contracts. For poultry contracts, PSD estimates that each unique contract type would require one hour of attorney time to review and rewrite a contract, two hours of company management time, and for each individual contract, one hour of administrative time, and one hour of additional record keeping time.[18] PSD estimates that each of the 93 live poultry dealers who report to PSD rely on 10 unique contract types on average. PSD data indicates that there are 24,101 individual poultry growing contracts. PSD estimates that each of the 237 hog packers has 10 marketing agreements. The 2017 Census of Agriculture (Ag. Census) [19] indicates that the universe of swine production contracts in the U.S. is 8,557. For hog production and marketing contracts, PSD estimates that each production contract and marketing agreement would require one-half hour of attorney time to review and rewrite a contract, one hour of company management time, one hour of administrative time, and one hour of additional record keeping time. For cattle processors, PSD estimates that each of the estimated 1,099 marketing agreements would require one hour of attorney time to review and rewrite a contract, two hours of company management time, one hour of administrative time, and one hour of additional record keeping time.[20]

PSD multiplied estimated hours to conduct these administrative tasks by the average hourly wages for managers at $62/hour, attorneys at $84/hour, and administrative assistants at $36/hour as reported by the U.S. Bureau of Labor Statistics in its Occupational Employment Statistics to arrive at its estimate of contract review costs for regulated entities.[21]

PSD recognizes that contract review costs will also be borne by livestock producers, swine production contract growers, and poultry growers. PSD estimates that each livestock producer, swine production contract grower, and poultry grower will, in its due course of business, spend one hour of time reviewing a contract or marketing agreement and will spend one-half hour of its attorney's time to review the contract. As with the regulated entities, one may view this estimate as an upper bound to the direct cost of the rule, as not every producer or grower will choose to conduct such a review. Some may choose to ''wait and see'' what effect, if any, the rule has on the industry, and whether courts rule on it in any way that would warrant such a review of their contracts.

[15] AMAs are marketing contracts, where producers market their livestock to a packer under a verbal or written agreement. Pricing mechanisms vary across AMAs. Some rely on a spot market for at least one aspect of their prices, while others involve complicated pricing formulas with premiums and discounts based on carcass merits. The livestock seller and packer agree on a pricing mechanism under AMAs, but usually not on a specific price.

[16] There are no additional mandatory record keeping requirements in the final rule. PSD expects that regulated entities may opt to keep additional records to justify advantages or preferences to demonstrate compliance with the final rule in case of a PSD investigation or private litigation action.

[17] *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf*

[18] Again, there are no additional mandatory record keeping requirements in the final rule.

[19] *https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.*

[20] Ibid.

[21] All salary costs are based on mean annual salaries for May 2018, adjusted for benefit costs, set to an hourly basis, and converted in to constant 2016 dollars. *http://www.bls.gov/oes/.* Accessed on April 9, 2019.

PSD multiplied one hour of livestock producer, swine production contract grower, and poultry grower management time and one-half hour of attorney time to conduct the marketing and production contract review by the average hourly wages for attorneys at $84/hour and managers at $62/hour as reported by the U.S. Bureau of Labor Statistics in its Occupational Employment Statistics to arrive at its estimate of contract review costs for livestock producers, swine contract growers, and poultry growers. PSD then applied this cost to the estimated 1,099 cattle marketing contracts, 2,370 hog marketing contracts, 8,557 hog production contracts, and 24,101 poultry growing contracts that have been reported to PSD.

After determining the administrative costs to both the regulated entities and those they contract with, PSD added the administrative costs of the regulated entities and the livestock producers, swine production contract growers, and poultry growers together to arrive at the first-year total estimated administrative costs attributable to the regulation. A summary of the first-year total estimated administrative costs for § 201.211 appear in the following table:

TABLE 1—FIRST-YEAR ADMINISTRATIVE COSTS

Regulation	Cattle ($ millions)	Hogs ($ millions)	Poultry ($ millions)	Total ($ millions)
201.211	$0.42	$3.05	$4.42	$7.89

The first-year total administrative costs are $7.89 million for § 201.211, and include costs for cattle, hogs, and poultry because packers, swine contractors, live poultry dealers, livestock producers, swine production contract growers, and poultry growers would conduct administrative functions of contract review and record keeping in response to the regulation. The administrative costs are the highest for poultry, followed by hogs and cattle. This is due to the greater prevalence of contract growing arrangements in the poultry industry.

Based on comments received to the proposed rule, AMS abbreviated criterion (d) in the final rule by removing the ''customary in the industry'' clause from proposed criterion. Since all contracts will likely be reviewed in their entirety for potential violations of the Packers and Stockyards Act, AMS does not expect the removal of this clause to appreciably reduce the amount of time for the administrative functions of contract review and additional record keeping. Thus, AMS expects the costs in the final rule to be unchanged from the proposed rule.

2. Direct Costs—Litigation Costs

In considering the costs of the rules it proposed in 2016, GIPSA performed an in-depth analysis of litigation costs expected as a result of the package of four proposed new regulations.[22] GIPSA estimated the total costs of litigating a case alleging violations of the Act. The main costs are attorney fees to litigate a case in a court of law. The cost of litigating a case includes the costs to all parties including the respondent and the USDA in a case brought by the USDA and the costs of the plaintiff and the defendant in the case of private litigation.

To estimate litigation costs for the 2016 proposed rules, GIPSA examined the actual cases decided under the Act from 1926 to 2014 as reported by the National Agricultural Law Center at the University of Arkansas.[23] The litigation costs estimated in the 2016 proposed rules are measured in constant 2016 dollars and are for regulated entities, producers, and growers. The 2016 analysis of litigation costs estimated that the interim final rule at § 201.3(a) was the primary source of litigation costs and that the litigation costs for all four proposed rules were counted under § 201.3(a).[24] The 2016 analysis split out the estimated litigation costs between sections 202(a) and 202(b).

The National Agricultural Law Center at the University of Arkansas has not reported any additional cases decided under the P&S Act since 2015. Since new § 201.211 establishes criteria for violations of section 202(b) and there has not been any recent litigation reported by the National Agricultural Law Center at the University of Arkansas, PSD used the estimated litigation costs associated with section 202(b) from the 2016 proposed rules as the starting point for this analysis.

The section 202(b) estimated litigation costs serve as an upper boundary of estimated costs since the estimates assumed that § 201.3(a) and § 201.211 would both be promulgated. PSD estimates that there would be additional litigation when § 201.211 becomes effective, even in the absence of § 201.3(a). Therefore, PSD uses the following section 202(b) litigation costs estimates in Table 14 from the 2016 proposed rule as the estimated first-year litigation costs assuming the rule becomes effective in May 2020.[25]

[22] The four proposed rules were published on December 20, 2016, in Volume 81, No. 244 of the **Federal Register**.

[23] *http://nationalaglawcenter.org/aglaw-reporter/case-law-index/packers-and-stockyards.*

[24] The USDA withdrew Section 201.3(a) on October 18, 2017, in Volume 82, No. 200 of the **Federal Register**.

[25] **Federal Register**, Volume 81, No. 244, page 92580.

TABLE 2—PROJECTED FIRST-YEAR LITIGATION COSTS

Section 202(b) of the act	Cattle ($ millions)	Hog ($ millions)	Poultry ($ millions)	Total ($ millions)
Total	$0.24	$0.04	$1.49	$1.77

PSD expects § 201.211 will result in an additional $1.77 million in litigation costs in the first full year after the rule becomes effective. Using the number of complaints PSD has received from industry participants as an indicator, PSD estimates that the majority of the litigation will be in the poultry industry. Most of the complaints concerning undue or unreasonable preferences that PSD has received since 2009 have come from the poultry industry.

3. Total Direct Costs

The total first-year direct costs of § 201.211 are the sum of administrative and litigation costs from above and are summarized in the following table.

TABLE 3—FIRST YEAR DIRECT COSTS [26]

Cost type	Cattle ($ millions)	Hogs ($ millions)	Poultry ($ millions)	Total ($ millions)
Admin Costs	$0.42	$3.05	$4.42	$7.89
Litigation Costs	0.24	0.04	1.49	1.77
Total Direct Costs	0.66	3.09	5.91	9.67

PSD estimates the total direct costs of § 201.211 to be $9.67 million. As the above table shows, the costs are highest for the poultry industry, followed by the hog and cattle industries. The primary reason is the high utilization of growing contracts and the corresponding higher estimated administrative costs in the poultry industry. To put this direct cost in perspective, the actual impact on retail prices from these direct costs would be less than one one-hundredth of a cent.

4. Indirect Costs

PSD estimates that the indirect costs of § 201.211 on the cattle, hog, and poultry industries are near zero. For the purposes of this analysis, indirect costs are social welfare losses due to any potential price and output changes from the direct costs of the rule and are in addition to the direct costs (administrative and litigation costs) on regulated entities, producers, and growers who are directly impacted by the rule. The economy will experience indirect costs, for example, if the rule causes packers and live poultry dealers to reduce production, increasing the price of meat products and reducing the amount of meat consumed by consumers.

As previously discussed, the regulation clarifies the Secretary's consideration of whether a conduct or action constitutes an undue or unreasonable preference or advantage. PSD does not expect, therefore, that § 201.211 will result in a decreased use of AMAs, use of poultry grower ranking systems or other incentive pay, reduced capital formation, inhibit development of new contracts, or decreased economic efficiencies in the livestock, meat, and poultry industries. Accordingly, PSD does not project indirect costs resulting from decreased use of AMAs, reduced capital, efficiency losses, or lost consumer and producer surplus. Indirect costs that could theoretically be anticipated are due to shifts in industry demand and supply curves resulting from the increases in industry direct costs attributable to the final rule. These shifts may result in quantity and price changes in the retail markets for beef, pork, and poultry, and the related input markets for cattle, hogs, and poultry. However, litigation costs are unrelated to the quantity of production—in other words, they are not marginal costs—so it is not appropriate to include them in the amount of a supply curve shift. Contract reviews and revisions are somewhat related to production quantity, but even they are less than fully compelling as a component of marginal cost. Litigation and administrative costs, however, are part of fixed costs of regulated entities. If the increase in fixed costs is significant enough, it could lead some firms to exit the industry in the long run. These nuances are not reflected in the assessment that follows, and thus it should be interpreted as a bounding exercise.

To calculate an upper bound on this type of indirect costs based on supply curves shifting, PSD modeled the impact of the increase in direct costs of implementing § 201.211 in a Marketing Margins Model (MMM) framework.[27] The MMM allows for the estimation of changes in consumer and producer prices and quantities produced caused by changes in supply and demand in the retail markets for beef, pork, and poultry and the input markets for cattle, hogs, and poultry.

PSD modeled—again, as a bounding exercise—the indirect costs as an inward (or upward) shift in the supply curves for beef, pork, and poultry. This has the effect of increasing the equilibrium prices and reducing the equilibrium quantity produced. This also has the effect of reducing the derived demand for cattle, hogs, and poultry, which causes a reduction in the equilibrium prices and quantity produced. Economic theory suggests that these shifts in the supply curves and derived demand curves will result in price and quantity impacts and potential dead weight losses to society.[28]

To estimate the output and input supply and demand curves for the MMM, PSD constructed linear supply and demand curves around equilibrium price and quantity points using price elasticities of supply and demand from the GIPSA Livestock Meat and Marketing Study and from USDA's

[26] The detail in this table and other tables in this analysis may not add to the totals due to rounding.

[27] The framework is explained in detail in Tomek, W.G. and K.L. Robinson ''Agricultural Product Prices,'' third edition, 1990, Cornell University Press.

[28] A dead weight loss is the cost to society of an inefficient allocation of resources in a market. Causes of deadweight losses can include market failures, such as market power or externalities, or an intervention by a non-market force, such as government regulation or taxation.

Economic Research Service.[29] With the supply curves established from this data, PSD then shifted the supply curves for beef, pork, and chicken up by the amount of the increase in direct costs for each industry. PSD calculated the new equilibrium prices and quantities in the input markets resulting from the decreases in derived demand that result from higher direct costs. This allows for the calculation of the indirect cost from the lower relative quantity produced at the relatively higher price when the industry's direct costs increase.

The calculation of an upper bound on the price impacts from the increases in direct costs from § 201.211 resulted in price increases of less than one one-hundredth of a cent per pound in retail prices for beef, pork, and poultry. This is because the increase in direct costs is very small in relation to total industry costs.[30] The result is that the price and quantity effects from the increases in direct costs are indistinguishable from zero and, therefore, PSD concludes that the indirect costs of § 201.211 for each industry are also zero.

5. Total Costs

PSD added all direct costs to the indirect costs (near zero), to arrive at the estimated total first-year costs of § 201.211. The total first-year costs are summarized in Table 4.

TABLE 4—TOTAL FIRST YEAR COSTS

Cost type	Cattle ($ millions)	Hogs ($ millions)	Poultry ($ millions)	Total ($ millions)
Admin Costs	$0.42	$3.05	$4.42	$7.89
Litigation Costs	0.24	0.04	1.49	1.77
Total Direct Costs	0.66	3.09	5.91	9.67
Total Indirect Costs	0.00	0.00	0.00	0.00
Total Costs	0.66	3.09	5.91	9.67

PSD estimates that the total costs will be $9.67 million in the first year of implementation.

6. Ten-Year Total Costs

To arrive at the estimated ten-year administrative costs of § 201.211, PSD estimates that in each of the first five years, 20 percent of all contracts will either expire and need to be renewed each year or new marketing and production contracts will be put in place each year. While PSD expects the costs of reviewing and revising, if necessary, each contract will remain constant in the first five years, it expects the administrative costs will be lower after the first year because the direct administrative costs of reviewing and revising contracts would only apply to the 20 percent of expiring contracts or new contracts. PSD estimates that in the second five years, the direct administrative costs of reviewing and revising contracts will decrease by 50 percent per year as the contracts would already reflect language modifications, if any, necessitated by implementation of the regulation. PSD estimates that after ten years, the direct administrative costs will return to where they would have been absent the rule, and the additional administrative costs associated with the rule will remain at $0 after ten years.

In estimating the estimated ten-year litigation costs of § 201.211, PSD expects the litigation costs to be constant for the first five years while courts are setting precedents for the interpretation of § 201.211. PSD expects that case law with respect to the regulation would be settled after five years and by then, industry participants will know how PSD would enforce the regulation and how courts would interpret the regulation. The effect of courts establishing precedents is that litigation costs would decline after five years as the livestock and poultry industries understand how the courts interpret the regulation.

To arrive at the estimated ten-year litigation costs of § 201.211, PSD estimates that litigation costs for the first five years will occur at the same rate and at the same cost as in the first full year of the rule ending in May 2021. In the sixth through tenth years, PSD estimates that additional litigation costs will decrease each year and return to where they would have been absent the rule in the tenth year after the rule is effective and remain at $0 after 10 years. PSD estimates this decrease in litigation costs to be linear, with the same decrease in costs each year.

The ten-year total costs of § 201.211 appear in the table below.[31]

TABLE 5—TEN-YEAR TOTAL COSTS—YEARS ENDED MAY [32]

Year	Administrative ($ millions)	Litigation ($ millions)	Total direct ($ millions)
2021	$7.89	$1.77	$9.67
2022	1.58	1.77	3.35
2023	1.58	1.77	3.35
2024	1.58	1.77	3.35
2025	1.58	1.77	3.35
2026	0.79	1.48	2.27
2027	0.39	1.18	1.58
2028	0.20	0.89	1.08
2029	0.10	0.59	0.69

[29] RTI International ''GIPSA Livestock Meat and Marketing Study'' prepared for Grain Inspection, Packers and Stockyards Administration, 2007. ERS Price Elasticities: *http://www.ers.usda.gov/data-products/commodity-and-food-elasticities/demand-elasticities-from-literature.aspx.*

[30] The $9.67 million increase in total industry costs from § 201.211 is only 0.0043 percent of direct industry costs of approximately $223 billion for the beef, pork, and poultry industries.

[31] As discussed above, PSD expects total administrative and litigation costs to return to where they would have been absent the rule and the additional costs associated with the rule will remain at $0 after ten years.

TABLE 5—TEN-YEAR TOTAL COSTS—YEARS ENDED MAY [32]—Continued

Year	Administrative ($ millions)	Litigation ($ millions)	Total direct ($ millions)
2030	0.05	0.30	0.35
Totals	15.74	13.31	29.05

Based on the analysis, PSD expects the ten-year total costs will be $29.05 million.

7. Present Value of Ten-Year Total Costs

The total costs of § 201.211 in the table above show that the costs are highest in the first year, decline to a constant and significantly lower level over the next four years, and then gradually decrease again over the subsequent five years. Costs to be incurred in the future are less expensive than the same costs to be incurred today. This is because the money that would be used to pay the costs in the future could be invested today and earn interest until the time period in which the costs are incurred.

To account for the time value of money, the costs of the regulation to be incurred in the future are discounted back to today's dollars using a discount rate. The sum of all costs discounted back to the present is called the present value (PV) of total costs. PSD relied on both a 3 percent and 7 percent discount rate as discussed in Circular A–4.[33] PSD measured all costs using constant 2016 dollars.

PSD calculated the PV of the ten-year total costs of the regulation using both a 3 percent and 7 percent discount rate and the PVs appear in the following table.

TABLE 6—PV OF TEN-YEAR TOTAL COSTS

Discount rate (percent)	($ millions)
3	$26.31
7	23.33

PSD expects the PV of the ten-year total costs would be $26.31 million at a 3 percent discount rate and $23.33 million at a 7 percent discount rate.

8. Annualized Costs

PSD annualized the PV of the ten-year total costs (referred to as annualized costs) of § 201.211 using both a 3 percent and 7 percent discount rate as required by Circular A–4 and the results appear in the following table.[34]

TABLE 7—TEN-YEAR ANNUALIZED COSTS

Discount rate (percent)	($ millions)
3	$3.08
7	3.32

PSD expects the annualized costs of § 201.211 would be $3.08 million at a 3 percent discount rate and $3.32 million at a 7 percent discount rate.

PSD also annualized the PV of the ten-year total costs into perpetuity of § 201.211 using both a 3 percent and 7 percent discount rate following the guidance on complying with E.O. 13771. The results appear in the following table.[35]

TABLE 8—ANNUALIZED COSTS INTO PERPETUITY

Discount rate (percent)	($ millions)
3	$0.69
7	1.21

PSD expects the costs of § 201.211 annualized into perpetuity would be $0.69 million at a 3 percent discount rate and $1.21 million at a 7 percent discount rate. Based on the costs in Table 8, and in accordance with guidance on complying with E.O. 13771, the single primary estimate of the costs of this final rule is $1.21 million, the total costs annualized in perpetuity using a 7 percent discount rate.

B. Benefits

PSD was unable to quantify the benefits of § 201.211. However, the rule contains several provisions that PSD expects to improve economic efficiencies in the regulated markets for cattle, hogs, and poultry and reduce market failures. Regulations that increase the amount of relevant information available to market participants, protect private property rights, and foster competition can improve economic efficiencies and generate benefits for consumers and producers.

Section 201.211 will increase the amount of relevant information available to market participants and offset any potential abuse of buyer-side market power by clearly stating to all contracting parties the criteria that the Secretary will consider in determining whether conduct or action constitutes an undue or unreasonable preference or advantage in violation of section 202(b) of the Act.

The regulation will also reduce the risk of violating section 202(b) because it clarifies the criteria the Secretary will consider in determining whether the conduct or action in the livestock and poultry industries constitutes an undue or unreasonable preference or advantage and a violation of section 202(b) of the Act. Other benefits of clarifying the criteria may include reducing litigation risk; decreasing contracting costs; promoting competitiveness and fairness in contracting; and providing protections for livestock producers, swine production contract growers, and poultry growers.

Benefits to the livestock and poultry industries and the cattle, hog, and poultry markets also arise from improving parity of negotiating power between packers, swine contractors, and live poultry dealers and livestock producers, swine production contract growers, and poultry growers. The improvement in parity comes when contracting parties negotiate new contracts and when they review and renegotiate any existing contract terms that contain language that could be considered a violation of section 202(b) of the Act.

Since the regulation increases the amount of relevant information by clarifying what might be considered an undue or unreasonable preference, it increases parity in negotiating contracts, and thereby reduces the ability to abuse buyer-side market power with the

[32] PSD uses May 2021 as the end of the first year after the rule is in effect for analytical purposes only. The date the rule becomes final was not known at the time of the analysis.

[33] *https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf.*

[34] Ibid.

[35] *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf.*

resulting welfare losses.[36] Establishing parity of negotiating power in contracts promotes fairness and equity and is consistent with PSD's mission to protect fair trade practices, financial integrity, and competitive markets for livestock, meats, and poultry.[37]

C. Cost-Benefit Summary

PSD expects the ten-year annualized costs of § 201.211 to be $3.08 million at a 3 percent discount rate and $3.32 million at a 7 percent discount rate and the costs annualized into perpetuity to be $0.69 million at a 3 percent discount rate and $1.21 million at a 7 percent discount rate. PSD expects the costs will be highest for the poultry industry due to its extensive use of poultry growing contracts, followed by the hog industry and the cattle industry, respectively.

PSD was unable to quantify the benefits of the new regulation, but they explained numerous qualitative benefits that would protect livestock producers, swine production contract growers, and poultry growers; promote fairness and equity in contracting; increase economic efficiencies; and reduce the negative effects of market failures throughout the entire livestock and poultry value chain. The primary benefit of § 201.211 is expected to be reduced occurrences of undue or unreasonable preferences or advantages and increased economic efficiencies in the marketplace. This benefit of additional enforcement of the Act accrues to all segments of the value chain in the production of livestock and poultry, and ultimately to consumers.

Regulatory Flexibility Analysis

The Small Business Administration (SBA) defines small businesses by their North American Industry Classification System Codes (NAICS).[38] SBA considers broiler and turkey producers/growers and swine contractors, NAICS codes 112320, 112330, and 112210 respectively, to be small businesses if sales are less than $1,000,000 per year. Cattle feeders are considered small if they have less than $8 million in sales per year. Beef and pork packers, NAICS 311611, are small businesses if they have fewer than 1,000 employees.

The Packers and Stockyards Act regulates live poultry dealers, which is a group similar but not identical to the NAICS category for poultry processors. Poultry processors, NAICS 311611, are considered small business if they have fewer than 1,250 employees. PSD applied SBA's definition for small poultry processors to live poultry dealers as the best standard available, and it considers live poultry dealers with fewer than 1,250 employees to be small businesses.

PSD maintains data on live poultry dealers from the annual reports these firms file with PSD. Currently, 93 live poultry dealers would be subject to the new regulation. Seventy-Four of the live poultry dealers would be small businesses according to the SBA standard. Although there were many more small businesses than large, small businesses produced only about 6.5 percent of the poultry in the United States in 2017.

Live poultry dealers classified as large businesses are responsible for about 93.5 percent of the poultry contracts. Assuming that small businesses would bear 6.5 percent of the costs, in the first year the regulation is effective, $222,687[39] would fall on live poultry dealers classified as small businesses. This amounts to average estimated costs for each small live poultry dealer of $3,009.

As of February 2019, PSD records identified 381 beef and pork packers actively purchasing cattle or hogs for slaughter. Many firms slaughtered more than one species of livestock. Of the 381 beef and pork packers, 172 processed both cattle and hogs, 144 processed cattle but not hogs, and 65 processed hogs but not cattle.

PSD estimates that small businesses accounted for 23.1 percent of the cattle and 19.2 percent of the hogs slaughtered in 2017. If the costs of implementing § 201.211 are proportional to the number of head processed, then in the first full year the regulation is effective, PSD estimates that $126,501[40] in additional costs would fall on beef packers classified as small businesses. This amounts to estimated costs of $407 for each small beef packer.

In total, $81,603[41] in additional first-year costs would be expected to fall on pork packers classified as small businesses, and $30,863[42] would fall on swine contractors classified as small businesses. This amounts to average estimated costs for each small pork packer of $356, and average estimated costs for each small swine contractor of $286 in the first year the regulation is effective. To the extent that smaller beef and pork packers rely on AMA purchases less than large packers, the estimates might tend to overstate costs.

PSD then annualized the present value of ten-year total costs of the proposed rule on regulated entities, multiplied by the percent of small business. Ten-year annualized costs discounted at a 3 percent rate would be $61,097 for the cattle and beef industry, $32,463 for the hog and pork industry, and $119,271 for the poultry industry. This amounts to annualized costs of $196 for each beef packer, $103 for each pork packer, $82 for each swine contractor, and $1,612 for each live poultry dealer that is a small business. The total annualized costs for regulated small businesses would be $212,830.

Ten-year annualized costs at a 7 percent discount rate would be $64,458 for the regulated cattle and beef industry, $35,416 for the regulated hog and pork industry, and $125,696 for the poultry industry. This amounts to ten-year annualized costs of $207 for each beef packer, $112 for each pork packer, $90 for each swine contractor, and $1,699 for each live poultry dealer that is a small business. The total ten-year annualized costs at 7 percent for regulated small businesses would be $225,570.

The table below lists the estimated additional costs associated with the regulation in the first year. It also lists annualized costs discounted at 3 percent and 7 percent discount rates, and annualized PV of costs extended into perpetuity discounted at 3 and 7 percent.

[36] Nigel Key and Jim M. MacDonald discuss evidence for the effect of concentration on grower compensation in ''Local Monopsony Power in the Market for Broilers? Evidence from a Farm Survey'' selected paper American Agri. Economics Assn. meeting Orlando, Florida, July 27–29, 2008.

[37] See additional discussion in Steven Y. Wu and James MacDonald (2015) ''Economics of Agricultural Contract Grower Protection Legislation,'' *Choices* 30(3): 1–6.

[38] U.S. Small Business Administration. *Table of Small Business Size Standards Matched to North American Industry Classification System Codes. Effective August 19, 2019. https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019.pdf.*

[39] Estimated cost to live poultry dealers of $3,412,301 × 6.52 percent of firms that are small businesses = $222,687.

[40] Estimated cost to beef packers of $547,643 × 23.1 percent of firms that are small businesses = $126,501.

[41] Estimated cost to hogs and pork of $1,959,550 × 19.2 percent of slaughter in small businesses × 21.7 percent of costs attributed to packers = $81,603.

[42] Estimated cost to hogs and pork of $1,959,550 × 2.01 percent of contracted hogs produced by swine contractors that are small businesses × 78.3 percent of costs attributed to contractors = $30,863.

TABLE 9—ESTIMATED INDUSTRY TOTAL COSTS TO REGULATED SMALL BUSINESSES

Estimate type	Beef packers ($)	Pork packers and swine contractors ($)	Poultry processors ($)	Total ($)
First-Year Costs	$126,501	$112,466	$222,687	$461,653
10 years Annualized at 3%	61,097	32,463	119,271	212,830
10 years Annualized at 7%	64,458	35,416	125,696	225,570
Annualized Total Cost into Perpetuity Discounted at 3%	13,720	7,290	26,784	47,794
Annualized Total Cost into Perpetuity Discounted at 7%	23,492	12,907	45,810	82,209

In considering the impact on small businesses, PSD considered the average costs and revenues of each regulated small business impacted by § 201.211. The number of small businesses impacted, by NAICS code, as well as the costs per entity in the first-year, ten-year annualized costs per entity at both the 3 percent and 7 percent discount rates, and annualized PV of the total costs extended into perpetuity discounted at 3 and 7 percent appear in the following table.

TABLE 10—PER ENTITY COSTS TO REGULATED SMALL BUSINESSES

NAICS	Number of small businesses	First year ($)	Ten-year annualized costs-3% ($)	Ten-year annualized costs-7% ($)	Perpetuity 3% ($)	Perpetuity 7% ($)
112210—Swine Contractor	108	$286	$82	$90	$19	$33
311615—Poultry Processor	74	3,009	1,612	1,699	362	619
311611—Beef Packer	311	407	196	207	44	76
311611—Pork Packer	229	356	103	112	23	41

The following table compares the average per entity first-year and annualized costs of § 201.211 to the average revenue per establishment for all regulated small businesses in the same NAICS code. The annualized costs are slightly higher at the 7 percent rate than at the 3 percent rate, so only the 7 percent rate is included in the table as the more conservative estimate.

TABLE 11—COMPARISON OF PER ENTITY COST TO REVENUES FOR REGULATED SMALL BUSINESSES

NAICS	Average revenue per establishment ($)	First-year cost as percentage of revenue	Ten-year annualized cost as percentage of revenue	Annualized cost to perpetuity as percentage of revenue
112210—Swine Contractor	$485,860	$0.06	$0.02	$0.007
311615—Poultry Processor	13,842,548	0.02	0.01	0.004
311611—Beef Packer	6,882,205	0.01	0.00	0.001
311611—Pork Packer	6,882,205	0.01	0.00	0.001

The revenue figures in the above table come from U.S. Census data for live poultry dealers and cattle and hog slaughterers, NAICS codes 311615 and 311611, respectively.[43] Ag. Census data have the number of head sold by size classes for farms that sold their own hogs and pigs in 2017 and that identified themselves as contractors or integrators, but not the value of sales nor the number of head sold from the farms of the contracted production. To estimate average revenue per establishment, PSD used the estimated average value per head for sales of all swine operations and the production values for firms in the Ag. Census size classes for swine contractors. The results in Table 11 demonstrate, the costs of § 201.211 as a percent of revenue are less than 1 percent.[44]

Although the Packers and Stockyards Act does not regulate livestock producers or poultry growers, PSD recognizes that they will also incur contract review costs. PSD estimates that each livestock producer and poultry grower will, in its due course of business, spend one hour of time reviewing a contract or marketing agreement and will spend one-half hour of its attorney's time to review the contract. As with the regulated entities, one may view this estimate as an upper bound to the direct cost of the rule, as not every producer or grower will choose to conduct such a review. Some may choose to ''wait and see'' what effect, if any, the rule has on the industry, and whether courts rule on it in any way that would warrant such a review of their contracts.

[43] *https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US.*

[44] There are significant differences in average revenues between swine contractors and cattle, hog, and poultry processors, resulting from the difference in SBA thresholds.

PSD multiplied one hour of livestock producer, swine production contract grower, and poultry grower management time and one-half hour of attorney time to conduct the marketing and production contract review by the average hourly wages for attorneys at $84/hour and managers at $62/hour, as reported by the U.S. Bureau of Labor Statistics in its Occupational Employment Statistics, to arrive at its estimate of contract review costs for livestock producers, swine contract growers, and poultry growers. The result is that each small livestock producer and each small poultry that sells livestock or raises poultry on a contract is expected to bear $104 in first year costs, $23 in ten-year annualized costs discounted at 3 percent, $25 in ten-year annualized costs discounted at 7 percent, and $9 discounted into perpetuity at 7 percent. Table 12 lists expected costs to livestock producers and poultry growers that are small businesses.

TABLE 12—TOTAL COSTS TO UNREGULATED SMALL BUSINESSES

Estimate type	Cattle feeders ($)	Hog producers ($)	Poultry growers ($)	Total ($)
First-Year Costs	$111,866	$459,707	$2,501,106	$3,072,679
10 years Annualized at 3%	24,274	99,754	542,727	666,755
10 years Annualized at 7%	26,917	110,614	601,812	739,342
Annualized Total Cost into Perpetuity Discounted at 3%	$5,451	$22,401	$121,876	$149,728
Annualized Total Cost into Perpetuity Discounted at 7%	9,810	40,313	219,329	269,452

The Ag. Census indicates there were 575 farms that sold hogs or pigs in 2017 and identified themselves as contractors or integrators. About 19 percent of swine contractors had sales of less than $1,000,000 in 2017 and would have been classified as small businesses. These small businesses accounted for only 2 percent of the hogs produced under production contracts.

Additionally, there were 8,557 swine producers in 2017 with swine contracts, and about 41 percent of these producers would have been classified as small businesses. PSD estimated an additional 2,370 pork producers had marketing agreements with pork packers. If 41 percent are small businesses, then 4,480 hog producers could incur contract review costs. PSD estimated as many as 1,099 cattle feeders had marketing agreements or contracts that could need adjustment due to the new rule. If 98 percent are small businesses, 1,078 could bear costs of reviewing contracts. Table 13 compares cost to revenues for producer unregulated producers that are small businesses.

PSD records indicated poultry processors had 24,101 poultry production contracts in effect in 2017. The 24,101 poultry growers holding the other end of the contracts are almost all small businesses by SBA's definitions.

TABLE 13—COMPARISON OF TOTAL COST TO REVENUES FOR UNREGULATED SMALL BUSINESSES

NAICS	Number of small businesses	Average revenue ($)	First-year cost as percentage of revenue	Ten-year annualized cost as percentage of revenue	Annualized cost to perpetuity as percentage of revenue
112212—Cattle Feeders	1,078	$305,229	0.03	0.01	0.003
112210—Hog Producers	4,480	333,607	0.03	0.01	0.003
112320—Poultry Growers	24,101	181,545	0.06	0.01	0.005

Ten-year annualized cost savings of exempting small businesses would be $212,830 using a 3 percent discount rate and $225,570 using a 7 percent discount rate. The cost savings annualized into perpetuity of exempting small businesses would be $47,794 using a 3 percent discount rate and $82,209 using a 7 percent discount rate. However, one purpose of § 201.211 is to protect all livestock producers, swine production contract growers, and poultry growers from unfair and unreasonable preferences or advantages, regardless of whether the producer or grower and the packer, swine contractor, or live poultry dealer to which they sell or contract is a large or small business. PSD believes that the benefits of § 201.211 will be captured by all livestock producers, swine production contract growers, and poultry growers. For this reason, AMS did not consider exempting small business from this final rule.

The number of regulated entities that could experience a cost increase is substantial. Most regulated packers and live poultry dealers are small businesses. However, the expected cost increases for each entity are not significant. For all four groups of regulated entities—beef packers, pork packers, live poultry dealers, and swine contractors—average first year costs are expected to amount to less than one tenth of one percent of annual revenue. Ten-year annualized costs discounted at 7 percent are highest for swine contractors at two one hundredths of one percent of revenue. Annualized expected costs of $90 and $112 for swine contractors and pork packers, respectively, are near the cost of one hog. An annualized expected cost of $207 for beef packers is much less than the cost of one fed steer. Expected costs for live poultry dealers are higher, but as a percent of revenue, expected costs to live poultry dealers are very low. AMS expects that the additional costs to small packers, live poultry dealers, and swine contractors will not change their ability to continue operations or place any of them at a competitive disadvantage.

The number of unregulated entities that could experience a cost increase is also substantial. Most affected livestock producers and poultry growers are small businesses. Again, expected costs for individual entities are not significant. The expected first year cost for each unregulated livestock producer or poultry grower is $104. Annualized expected 10-year costs discounted at 3

percent are $23. Costs as a percent of revenue are expected to be well below 1 percent. AMS expects that $23 per year will not change any producer's or poultry grower's ability to continue operations or place any livestock producer or poultry grower at a competitive disadvantage.

As discussed in the Regulatory Impact Analysis, AMS does not expect welfare transfers among market segments or within segments. Estimated changes in prices and quantities are indistinguishable from zero. AMS does not expect § 201.211 to cause changes in production or marketing for small businesses, and the increase in direct costs is very small in relation to total costs.

Comments on the Regulatory Flexibility Analysis

In the proposed rule, AMS solicited public comment on whether § 201.211 as proposed would have a significant economic impact on a substantial number of small business entities. None of the public comments specifically addressed the Regulatory Flexibility Analysis in the proposed rule. However, several comments were submitted by small farmers who said they find it increasingly difficult to compete in the consolidated livestock and poultry industries. Many comments expected the proposed rule, particularly proposed criterion (d), to legitimize what they characterized as unfair, but customary, business arrangements in which they feel powerless to affect more favorable contract terms for themselves.

In response to comments, AMS revised the language of criterion (d) to provide that the Secretary can determine whether a preference or advantage is undue or unreasonable and a violation of the Act by considering whether the action is the result of a reasonable business decision. AMS removed the proposed language that examined whether the action was also customary in the industry, thus addressing some of the concerns expressed by comments. AMS does not expect revision of criterion (d) to impact the conclusions of this analysis.

Based on the above analyses and the comments received, AMS does not expect § 201.211 to have a significant economic impact on a substantial number of small business entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Civil Rights Review

AMS has considered the potential civil rights implications of this rule on members of protected groups to ensure that no person or group would be adversely or disproportionately at risk or discriminated against on the basis of race, color, national origin, gender, religion, age, disability, sexual orientation, marital or family status, political beliefs, parental status, or protected genetic information. This rule does not contain any requirements related to eligibility, benefits, or services that would have the purpose or effect of excluding, limiting, or otherwise disadvantaging any individual, group, or class of persons on one or more prohibited bases. AMS has developed an outreach program to ensure information about the regulation is made available to socially and economically disadvantaged or limited resource farmers, producers, growers, and members of racial and ethnic minority groups.

In its review, AMS conducted a disparate impact analysis, using the required calculations, which resulted in a finding that Asian Americans, Pacific Islanders, and Native Hawaiians met the condition for adverse impacts. The regulation itself would provide benefits to all farmers and ranchers equally. AMS will institute enhanced efforts to notify the groups found to be adversely impacted of the regulation and its benefits. It is of particular importance that impacted individuals and groups be made aware of the benefits the new regulation may provide them. AMS will specifically target seven organizations representing the interests of these impacted groups for outreach.

Paperwork Reduction Act

This rule does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). It does not involve collection of new or additional information by the Federal Government. According to PSD records, there were approximately 312 bonded packers; 1,326 market agencies selling on commission; 4,582 livestock dealers and commission buyers; and 95 live poultry dealers regulated under the Act in 2018. The 2017 Census of Agriculture indicated that there were 575 swine contractors in 2017. The 2017 Census of Agriculture also indicated that there were 826,733 livestock producers and poultry growers. None of these entities are required to submit forms or other information to AMS or to keep additional records in consequence of this rule.

E-Government Act

USDA is committed to complying with the E-Government Act by promoting the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Executive Order 13175

This rule has been reviewed in accordance with the requirements of Executive Order 13175—Consultation and Coordination with Indian Tribal Governments. Executive Order 13175 requires Federal agencies to consult with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

The USDA's Office of Tribal Relations (OTR) has assessed the impact of this rule on Indian Tribes and determined that this rule may have Tribal implications that require continued outreach efforts to determine if Tribal consultation under Executive Order 13175 is required, but OTR does not believe that consultation is required at this time.

If a Tribe requests consultation, AMS will work with the OTR to ensure meaningful consultation is provided where changes, additions, and modifications identified herein are not expressly mandated by Congress.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule as defined by 5 U.S.C. 804(2).

Executive Order 12988

This rule has been reviewed under Executive Order 12988—Civil Justice Reform. This rule is not intended to have retroactive effect. This rule does not preempt state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this rule. Nothing in this rule is intended to interfere with a person's right to enforce liability against any person subject to the Act under authority granted in section 308 of the Act.

List of Subjects in 9 CFR Part 201

Confidential business information, Reporting and recordkeeping

requirements, Stockyards, Surety bonds, Trade practices.

For the reasons set forth in the preamble, USDA amends 9 CFR part 201 as follows:

PART 201—REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 7 U.S.C. 181—229c.

■ 2. Section 201.211 is added to read as follows:

§ 201.211 Undue or unreasonable preferences or advantages.

The Secretary will consider the following criteria, and may consider additional criteria, when determining whether a packer, swine contractor, or live poultry dealer has made or given any undue or unreasonable preference or advantage to any particular person or locality in any respect in violation of section 202(b) of the Act. The criteria include whether the preference or advantage under consideration:

(a) Cannot be justified on the basis of a cost savings related to dealing with different producers, sellers, or growers;

(b) Cannot be justified on the basis of meeting a competitor's prices;

(c) Cannot be justified on the basis of meeting other terms offered by a competitor; and

(d) Cannot be justified as a reasonable business decision.

Bruce Summers,

Administrator, Agricultural Marketing Service.

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DEPARTMENT OF ENERGY

10 CFR Parts 430 and 431

[EERE–2019–BT–NOA–0011]

RIN 1904–AE24

Test Procedure Interim Waiver Process

AGENCY: Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy.

ACTION: Final rule.

SUMMARY: In this final rule, the U.S. Department of Energy (''DOE'') has adopted a streamlined approach to its test procedure waiver decision-making process that requires the Department to notify, in writing, an applicant for an interim waiver of the disposition of the request within 45 business days of receipt of the application. An interim waiver will remain in effect until a final waiver decision is published in the **Federal Register** or until DOE publishes a new or amended test procedure that addresses the issues presented in the application, whichever is earlier. DOE's regulations continue to specify that DOE will take either of these actions within 1 year of issuance of an interim waiver. This final rule addresses delays in DOE's current process for considering requests for interim waivers and waivers from the DOE test method, which in turn can result in significant delays for manufacturers in bringing new and innovative products to market. This final rule requires the Department to process interim waiver requests within the 45 business day window and clarifies the process by which interested stakeholders provide input into the development of an appropriate test procedure waiver.

DATES: The effective date of this rule is January 11, 2021.

ADDRESSES: The docket, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at *http://www.regulations.gov.* All documents in the docket are listed in the *http://www.regulations.gov* index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

A link to the docket web page can be found at: *http://www.regulations.gov/docket?D=EERE-2019-BT-NOA-0011.* The *http://www.regulations.gov* web page contains instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Ms. Francine Pinto, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–7432. Email: *Francine.Pinto@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Legal Authority and Background

A. Legal Authority

The Energy Policy and Conservation Act (''EPCA'' or ''the Act''),[1] Public Law 94–163 (42 U.S.C. 6291–6317) authorizes the United States Department of Energy (DOE or, in context, the Department) to regulate the energy efficiency of a number of consumer products and industrial equipment types. Title III, Part B [2] of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles. Title III, Part C [3] of EPCA established the Energy Conservation Program for Certain Industrial Equipment. Under EPCA, DOE's energy conservation program consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures.

The Federal testing requirements consist of test procedures that manufacturers of covered products and equipment must use as the basis for: (1) Certifying to DOE that their products or equipment complies with the applicable energy conservation standards adopted pursuant to EPCA (42 U.S.C. 6295(s); 42 U.S.C. 6316(a)), and (2) making representations about the efficiency of those products or equipment (42 U.S.C. 6293(c); 42 U.S.C. 6314(d)). Similarly, DOE must use these test procedures to determine whether the product or equipment complies with relevant standards promulgated under EPCA. (42 U.S.C. 6295(s); 42 U.S.C. 6316 (a))

Under 42 U.S.C. 6293 and 42 U.S.C. 6314, EPCA sets forth the criteria and procedures DOE is required to follow when prescribing or amending test procedures for covered products and equipment. Specifically, test procedures must be reasonably designed to produce

[1] All references to EPCA in this document refer to the statute as amended through the America's Water Infrastructure Act of 2018, Public Law 115–270 (October 23, 2018).

[2] For editorial reasons, Part B was redesignated as Part A upon codification in the U.S. Code.

[3] For editorial reasons, Part C was redesignated as Part A–1 upon codification in the U.S. Code.