DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

9 CFR Part 201

[Doc. No. AMS–FTPP–21–0045]

RIN 0581–AE05

Inclusive Competition and Market Integrity Under the Packers and Stockyards Act

AGENCY: Agricultural Marketing Service, Department of Agriculture (USDA).

ACTION: Proposed rule.

SUMMARY: The U.S. Department of Agriculture's (USDA) Agricultural Marketing Service (AMS) is soliciting comments on proposed revisions to the regulations under the Packers and Stockyards Act, 1921. The proposal would prohibit certain prejudices against market-vulnerable individuals that tend to exclude or disadvantage covered producers in those markets. The proposal would identify retaliatory practices that interfere with lawful communications, assertion of rights, and associational participation, among other protected activities, as unjust discrimination prohibited by the law. The proposal would also identify unlawfully deceptive practices that violate the Packers and Stockyards Act with respect to contract formation, contract performance, contract termination, and contract refusal. The purpose of the rule is to promote inclusive competition and market integrity in the livestock, meats, poultry, and live poultry markets.

DATES: Comments must be received by December 2, 2022.

ADDRESSES: Comments must be submitted through the Federal e-rulemaking portal at *https://www.regulations.gov* and should reference the document number and the date and page number of this issue of the **Federal Register**. AMS strongly prefers comments be submitted electronically. However, written comments may be submitted (*i.e.,* postmarked) via mail to S. Brett Offutt, Chief Legal Officer, Packers and Stockyards Division, USDA, AMS, FTPP; Room 2097–S, Mail Stop 3601, 1400 Independence Ave. SW, Washington, DC 20250–3601. All comments submitted in response to this proposed rule will be included in the record and will be made available to the public. Please be advised that the identity of individuals or entities submitting comments will be made public on the internet at the address provided above. Parties who wish to comment anonymously may do so by entering ''N/A'' in the fields that would identify the commenter.

FOR FURTHER INFORMATION CONTACT: S. Brett Offutt, Chief Legal Officer/Policy Advisor, Packers and Stockyards Division, USDA AMS Fair Trade Practices Program, 1400 Independence Ave. SW, Washington, DC 20250; Phone: (202) 690–4355; or email: *s.brett.offutt@usda.gov.*

SUPPLEMENTARY INFORMATION:

Outline of the Notice of Proposed Rulemaking

I. Introduction (Statutory Authority)
A. Background to This Rulemaking
B. Previous Rulemakings
II. Undue Prejudices or Disadvantages and Discriminatory Practices
A. Agency Interpretation of Undue or Unreasonable Prejudice or Disadvantage and Unjust Discriminatory Practices
B. Prohibited Undue Prejudices or Disadvantages and Unjust Discrimination—Proposed § 201.304(a)(1)—Generally
i. Authority Provided by the Act
ii. Economic Rationale
iii. Specific Proposed Protected Bases
C. Cooperatives—Proposed § 201.304(a)(2)
D. Enumerated Undue Prejudices
E. Retaliation
i. Retaliation as Discrimination Under the Act
ii. Economic Rationale
F. Prohibition on Retaliation—Proposed § 201.304(b)
G. Bases of Protected Activities—Proposed § 201.304(b).
i. Assertion of Rights
ii. Associational Participation
iii. Lawful Communications
H. Delineation of Protected Activities
I. Recordkeeping—Proposed § 201.304(c)
J. Request for Comments
III. Deceptive Practices
A. Scope of Deceptive Practices Regulated
B. Deceptive Practices in the Formation of Contract
C. Deceptive Practices in the Operation of Contract
D. Deceptive Practices in the Termination of Contract
E. Deceptive Practices in Refusal To Deal
F. Request for Comments
IV. Severability
V. Required Regulatory Analyses
VI. Request for Comments

I. Introduction and Regulatory Background

The rise of vertically integrated contract agriculture and highly concentrated local markets in livestock and poultry over the last four decades have increasingly left many producers and growers (hereinafter producers, unless otherwise noted) vulnerable to a range of practices that unjustly exclude them from and undermine their economic opportunities in the marketplace. The regulatory toolkit embodied in the Packers & Stockyards Act, as amended (P&S Act or Act) (7 U.S.C. 181 *et seq.*), has not been deployed to keep pace with these issues. AMS is proposing this regulation to enhance those basic protections that modern livestock and poultry producers need to promote inclusive competition and market integrity. We invite comment on a range of questions in this proposal.

Specifically, AMS is proposing to:

- Prohibit, as undue prejudices, disadvantages, and adverse actions against ''market vulnerable individuals'' who are at heightened risk in relevant markets;
- Prohibit, as unjust discrimination, retaliatory and adverse actions that interfere with lawful communications, assertion of rights, associational participation, and other protected activities;
- Prohibit, as deceptive practices, regulated entities employing pretexts, false or misleading statements, or omissions of material facts, in contract formation, contract performance, contract termination, and contract refusal; and
- Require recordkeeping to support USDA monitoring, evaluation, and enforcement of compliance with aspects of this rule.

AMS is proposing these modernized regulations under the Act's provisions prohibiting undue prejudice, unjust discrimination, and deception to provide for clearer, more effective standards to govern the modern marketplace and to better protect, through compliance and enforcement, individually harmed producers and growers. Enacted in 1921 ''to comprehensively regulate packers, stockyards, marketing agents and dealers,'' [1] the P&S Act, among other things, prohibits actions that hinder integrity and competition in the livestock and poultry markets. Section 202(a) of the Act states that it is unlawful for any packer, swine contractor, or live poultry dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device.[2] Section 202(b) of the Act states that it is unlawful for any packer, swine contractor, or live poultry dealer to make or give any undue or unreasonable preference or advantage to any particular person or locality, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect. The Secretary of Agriculture (Secretary) has

[1] *Hays Livestock Comm'n Co.* v. *Maly Livestock Comm'n Co.,* 498 F.2d 925, 927 (10th Cir. 1974).

[2] 7 U.S.C. 192(a).

delegated the responsibility for administering the P&S Act to AMS. Within AMS, the Packers, and Stockyards Division (PSD) of the Fair-Trade Practices Program has responsibility for the day-to-day administration of the P&S Act. The current regulations implementing the P&S Act are found in title 9, part 201 of the Code of Federal Regulations (CFR). Section 407 of the P&S Act (7 U.S.C. 228) provides that the Secretary ''may make such rules, regulations, and orders as may be necessary to carry out the provisions of this Act.'' This proposed rule, if finalized, would amend 9 CFR part 201.

A. Background to This Rulemaking

Congress enacted the P&S Act after many years of concern about farmers and ranchers being cheated and mistreated. At the time, Congress worried that the five very large meatpackers' control over the nation's food supply tended toward monopolization, which could put economic opportunity for producers and their communities at risk, destroying individual economic opportunity for producers and smaller food businesses and harming rural communities, among other harms.[3] Moreover, Congress believed that existing antitrust and market regulatory laws, including the Sherman Act and Federal Trade Commission Act, did not sufficiently protect farmers and ranchers.[4] Accordingly, in the P&S Act, Congress gave the Secretary of Agriculture broad authority to regulate the meatpacking industry. The House of Representatives' report on the P&S Act stated that it was the ''most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.'' [5] The Conference Report on the P&S Act stated that: ''Congress intends to exercise, in the bill, the fullest control of the packers and stockyards which the Constitution permits . . .'' [6]

In the early 1900s, meat packing in the United States was highly concentrated, with approximately 50 to 70 percent of the beef packing industry controlled by the industry's ''Big Five:'' Armour, Cudahy, Morris, Swift, and Wilson.[7] A 1918 Federal Trade Commission (FTC) meat industry investigation found that in 1916 the Big Five controlled the slaughter and processing of 82 percent of cattle, 79 percent of calves, 87 percent of sheep, and 63 percent of swine in the U.S.[8] Those five dominant operators also controlled an interlocking network of the feed mills, stockyards, and transportation infrastructure that supported the industry. As extensively documented in a report by the FTC, which set the stage for Congressional passage of the P&S Act, those five packers deployed from their positions in that market structure a range of practices to further entrench their dominance.[9]

At that same time, the Department of Justice (DOJ) brought enforcement cases under the Sherman Act against the packing industry, which resulted in a series of consent decrees (judicially overseen agreements) that restructured the market.[10] The consent decrees, together with the adoption of the P&S Act, reformed market practices by eliminating packer ownership of cattle and their means of transporting it, and reinforced market structures that—for a period of time in the 20th century—secured open, fair marketplaces for all, such as terminal auction yards regulated as stockyards by the Packers and Stockyards Administration of USDA.[11] By 1963, the four-firm concentration ratio (the standard economic tool used to evaluate the degree of concentration in markets) had fallen to 26 percent in beef and 33 percent in hogs.

Amidst slowing demand in the beef and hog sectors, the dramatic growth of demand in the poultry industry, technological advances and increased returns to scale in meat processing, and a decline in Federal antitrust and fair markets enforcement, concentration returned to the meat packing industry.[12] Between 1980 and 2020, the four-firm concentration ratio grew from 36 percent to 81 percent in beef packing (steers and heifers) and rose by 34 percent to 64 percent in hogs.[13] Between 1977 and 2020, the four-firm concentration ratio in the poultry broiler industry increased from 22 percent to 53 percent.[14]

The above data reflects the state of concentration nationally, but concentration in local markets that exceeds national averages has been observed in the poultry, hog and pig, and cattle industries. In the last available survey of local markets (2011), MacDonald and Key found that about one quarter of contract growers reported that there was just one live poultry dealer in their area; another quarter reported two; another quarter reported three; and the rest reported four or more.[15] Regional concentration is often higher than national concentration for hogs.[16] And in cattle, based on AMS's experience conducting investigations and monitoring markets, there are commonly only one or two buyers in some local geographic markets, and few sellers have the option of selling fed cattle to more than three or four packers.

The move towards heightened concentration was accompanied by a dramatic shift from the spot market towards various types of vertical contracts. In the early 20th century, farm-finished cattle and hogs were primarily shipped by rail and slaughtered in urban centers close to large consumer bases, and fresh meat was rail-shipped only by the largest packers. Prices for cattle and hog purchases were largely negotiated in spot, cash markets in person. In 1921, poultry consumption accounted for a small share of total U.S. meat consumption, and retail distribution outlets (*i.e.,* local food markets) were not centralized.

[3] *See* 61 Cong. Rec. 1860 (1921) (House Floor Debate).

[4] *See,* Shively, J. and Roberts, J., ''Competition Under the Packers and Stockyards Act: What Now?'' 15 Drake Journal of Agricultural Law 419, 422–423 (2010); and Current Legislation, 22 Columbia Law Review 68, 69 (1922).

[5] House Report No. 67–77, at 2 (1921).

[6] House Report No. 67–324, at 3 (1921).

[7] Mathews, K. H. Jr., W. F. Hahn, K. E. Nelson, L. A. Duewer, and R. A. Gustafson. April 1999. U.S. Beef Industry: Cattle Cycles, Price Spreads, and Packer Concentration. U.S. Department of Agriculture, Market and Trade Economics Division, Economic Research Service. Technical Bulletin No. 1874.

[8] Federal Trade Commission. 1918. Annual Report for 1918, p. 23., available at *ftc_ar_1918.pdf* (last accessed 8/9/2022).

[9] *Id.*

[10] *United States* v. *Swift & Co.,* Equity No. 37623, (Sup. Ct. of D.C. 1920).

[11] Harl, Agricultural Law, sec. 71.03 (1993).

[12] MacDonald, J.M., M. E. Ollinger, K. E. Nelson, and C. R. Handy. Consolidation in U.S. Meatpacking. Food and Rural Economics Division, Economic Research Service, U.S. Department of Agriculture. Agricultural Economic Report No. 785. Available at *https://www.ers.usda.gov/publications/pub-details/?pubid=41120,* accessed 9/19/22.

[13] U.S. Department of Agriculture, Agricultural Marketing Service., Packers and Stockyards Division, Annual Report. Various years.

[14] U.S. Department of Agriculture, Agricultural Marketing Service, Packers and Stockyards Division, Annual Report, 2020. 2021 draft pending as of 07/11/22. United States Department of Agriculture Grain Inspection, Packers and Stockyards Administration. ''Assessment of the Livestock and Poultry Industries Fiscal Year 2007.'' May 2008.

[15] MacDonald, James M. ''Technology, Organization, and Financial Performance in U.S. Broiler Production,'' *EIB–126,* U.S. Department of Agriculture, Economic Research Service, June 2014.

[16] Wise, T. A., S. E. Trist. ''Buyer Power in U.S. Hog Markets: A Critical Review of the Literature,'' *Tufts University, Global Development and Environment Institute (GDAE)* Working Paper No. 10–04, August 2010, available at: *https://sites.tufts.edu/gdae/files/2020/03/10-04HogBuyerPower.pdf.TAbl* (last accessed 8/9/2022).

In successive decades, as concentration in the industry increased and as the size of plants increased, large packers needed to ensure constant and secure supplies of animals to keep these larger plants running at peak capacity.[17] Buying animals through contracts with producers was believed to facilitate their ability to do so. Vertical contracts took the form of production, marketing, and forward contracts.

Livestock and poultry production contracts are agreements between a producer and a contractor, where the livestock (generally hogs) or poultry are grown by a grower on behalf of the contractor under specific guidelines (production practices or target weight, for example) identified in the contract. The producer is generally paid a contract fee by the contractor for growing the livestock or poultry. Once the livestock or poultry reach a specific weight, they are often marketed to a packer or live poultry dealer under a marketing contract, though they could also be marketed on the spot market. Under a marketing contract, the ownership of the livestock or poultry (mostly livestock) remains with the producer until they are ready to be marketed to a packer or live poultry dealer. A marketing contract is an agreement between a producer and a packer or live poultry dealer that identifies a price (or a pricing formula), quantities/qualities, and a delivery schedule for the livestock or poultry to the packer or live poultry dealer. A forward contract is a specific type of marketing contract (generally for livestock) under which a specific group of livestock is negotiated for sale by a producer or contractor to a packer several months in advance of delivery of the livestock. The producer or contractor and packer agree to the delivery month and pricing method for the specific group of livestock to be delivered. The producer generally picks the day of delivery in the delivery month.

The growth of these vertical contract relationships, in the context of highly concentrated markets, has led to concerns that firms have greater control over producers and thus have more ability to abuse their market power, impede producer choices, exclude some market participants, and coerce producers unwittingly into inefficient farm decisions.[18] Many have expressed concern that the decline in the use of spot markets to market livestock has also led to harder-to-quantify losses of independent ways of life, adversely impacting rural economies and communities.[19]

Among the four major meat markets, chicken companies adopted production contracting earliest and most completely. Between 1950 and 1955, along with increased vertical integration through ownership of the flocks, the use of production contracts rose from 5 to 85 percent of the broiler industry's production to become nearly universal by 1975. The same switch was slower in turkey production, exceeding 80 percent in 1977.[20] The share of hogs sold through long-term marketing contracts increased from 10 to 72 percent between 1993 and 2001. Packer-owned hogs increased from 6.4 percent of U.S. hog production in 1994 to 24 percent in 2000.[21] Comparatively, in the cattle industry 32 percent of production was under contract in 2013—referring again to contractual agreements for growing cattle to a certain weight or under a certain production method.[22] [23] Marketing contracts have seen far greater adoption. Cattle being marketed through forward contracts and Alternative Marketing Arrangements (AMAs), where cattle are already dedicated to certain packers or end-buyers, have risen from about 35 percent in 2005 to 73 percent today.[24] As a result, since 2005, negotiated cash trades have declined from 65 percent to about 27 percent today.[25]

Some of these developments were driven in part by technological and marketing changes.[26] In cattle, for example, the development of boxed beef to ship standardized cuts allowed packers to move their slaughter facilities closer to producers. With cattle no longer shipped from terminal auction markets to the large cities, packers played a more dominant role in the procurement of cattle directly from producers within a surrounding area, and marketing practices shifted, for a time, towards bilateral cash negotiation and, then eventually, longer-term marketing contracts with pricing formulas.[27]

[17] MacDonald. J. M. and W. D. McBride. The Transformation of U.S. Livestock Agriculture: Scale, Efficiency, and Risks. January 2009. Economic Information Bulletin No. (EIB–43). Available at *https://www.ers.usda.gov/webdocs/publications/44292/10992_eib43.pdf?v=0,* accessed 9–20–2022.

[18] Hendrickson, M.K., and H.S. James, Jr. 2005. ''The Ethics of Constrained Choice: How the Industrialization of Agriculture Impacts Farming and Farmer Behavior.'' *Journal of Agricultural and Environmental Ethics,* 18: 269–291. In: Hendrickson, M., James, H., Heffernan, W.D. 2013. ''Vertical Integration and Concentration in U.S. Agriculture.'' In: Thompson, P., Kaplan, D. (eds) Encyclopedia of Food and Agricultural Ethics. Springer, Dordrecht, 7. See also Christopher Leonard, ''The Meat Racket'' (2015); C. Robert Taylor, ''Harvested Cattle, Slaughtered Markets,'' April 27, 2022, available at *https://www.antitrustinstitute.org/work-product/aai-advisor-robert-taylor-issues-new-analysis-on-the-market-power-problem-in-beef-lays-out-new-policy-framework-for-ensuring-competition-and-fairness-in-cattle-and-beef-markets/;* Peter Carstensen, ''Buyer Power and the Horizontal Merger Guidelines: Minor Progress on an Important Issue,'' 14 U. Pa. J. Bus. L. 775 (2012), available at *https://repository.law.wisc.edu/s/uwlaw/item/29746.*

[19] James, H.S. Jr., M.K. Hendrickson, and P.H. Howard. 2013. ''Networks, Power and Dependency in the Agrifood Industry.'' In H.S. James, Jr. (ed.), ''The Ethics and Economics of Agrifood Competition'' (pp. 99–126). Dordrecht, The Netherlands: Springer Publishers. In: Hendrickson, M., James, H., Heffernan, W.D. 2013. ''Vertical Integration and Concentration in US Agriculture.'' In: Thompson, P., Kaplan, D. (eds) Encyclopedia of Food and Agricultural Ethics. Springer, Dordrecht, 8.

[20] Martinez, S. W. (2002). ''Vertical Coordination of Marketing Systems: Lessons From the Poultry, Egg, and Pork Industries.'' (No. 1473–2016–120694) Economic Research Service, USDA, Washington, DC.

[21] Martinez, S. W. (2002). ''Vertical Coordination of Marketing Systems: Lessons From the Poultry, Egg, and Pork Industries'' (No. 1473–2016–120694) Economic Research Service, USDA, Washington, DC.

[22] Crespi, John, and Tina L. Saitone. (2018) ''Are Cattle Markets the Last Frontier? Vertical Coordination in Animal-Based Procurement Markets.'' *Annual Review of Resource Economics* 10(1): 207–227.

[23] Macdonald, James M. (2015) ''Trends in Agricultural Contracts.'' Choices 30(3):1–6.

[24] Packers and Stockyards Division, ''Annual Report'' (2020).

[25] U.S. Department of Agriculture, Agricultural Marketing Service, Market News, as of May 2022.

[26] Lonergan, S. M., and D. N. Marple. ''Historical perspectives of the meat and animal industry and their relationship to animal growth, body composition, and meat technology,'' ''The Science of Animal Growth and Meat Technology.'' Lonergan, S. M., D. N. Marple, Eds., Second Edition, Elsevier, (2019) 1–17, available at *The Science of Animal Growth and Meat Technology | ScienceDirect.*

[27] Lawrence, J.D., Schroeder, T.C. and Hayenga, M.L. (2001), ''Evolving Producer-Packer-Customer Linkages in the Beef and Pork Industries.'' *Applied Economic Perspectives and Policy,* 23: 370–385. Available at *https://doi.org/10.1111/1467-9353.00067.*

The increased use of long-term production and marketing contracts in livestock and poultry markets, can foster greater vertical coordination, and potentially allows certain production and marketing efficiencies related to scale and certain enhanced aspects of packer, or even retailer, control over product differentiation. The use of vertical contracts may be appealing to livestock or poultry producers for a range of reasons, including more secure access to markets. In poultry markets, for example, contracts shift some aspects of market risks from producers to live poultry dealers, such as grain prices or certain weather-related risks.[28] In the case of livestock, contracts can also reduce a producer's output price risk.[29]

On the other hand, as they facilitate packers and live poultry dealers' control across the supply chain, contracts can shift certain risks onto or between producers.[30] In particular, without robust open spot markets, cattle producers have complained of less ability to enter the markets and less competition between buyers for better prices.[31] As one notable commentator has termed them, these markets appear to be by ''invitation only.''[32]

Limited options for producers heighten the risks of prejudicial exclusion and retaliation. Over the years, these concerns have been reported to USDA, but the Department has not been able to effectively address complaints, in part owing to insufficient clarity around P&S Act rules and standards and related questions around the ability for individuals to bring cases based on specific instances of harm.

The rise of concentrated and vertically integrated markets also gives rise to certain abuses that may take the form of deception. For example, cattle producers have complained to USDA that they are provided with false pretexts as to why a packer would not accept cattle from a producer or would pay less for it. Similarly, poultry and swine growers have complained they have not been told the truth regarding why they were terminated from contracts or otherwise treated differently under them. These forms of deception may also be connected with efforts to discriminate, retaliate, or otherwise unjustly exclude certain producers or growers from the marketplace.[33]

Concerns with the rise of vertically integrated contracting across concentrated markets were highlighted in a series of workshops conducted by the U.S. Department of Justice (DOJ) and USDA in 2010.[34] And indeed, following the workshops, a number of producers reported to USDA that they suffered retaliation, and that racial and other exclusionary prejudices were problems. In 2010 and 2016, USDA proposed regulations seeking to address many of these concerns, given their pervasiveness in the marketplace and the longstanding challenges that USDA faced in addressing them. However, the relevant provisions of the proposed regulations were not finalized.[35]

Unfortunately, the concentrated nature of livestock and poultry markets exposes all producers to potential market abuses, but some may not be well positioned to protect themselves. Racial and ethnic minorities are arguably more exposed to market abuses, as evidenced by their participation in the agricultural sector having declined sharply over the last many decades. The most recent data from the 2017 Census of Agriculture (Figures 1 and 2) indicate that non-white racial and ethnic groups constitute a very small share of contracted livestock and poultry producers—a trend likely due in part to historical discrimination against these groups.

Undoubtedly, discrimination such as what has been experienced by these groups in the past continues in some form today, which is why additional protections are needed. Further, the same USDA Census of Agriculture data show that producers who identify as Black and Native Hawaiian are more likely to have lower gross revenue than their white counterparts, which makes these producers relatively more vulnerable to the market abuses observed in the sector today. These longstanding challenges have prompted Congress and USDA to promote more equitable market access. Section II.B.ii, below provides a more extensive discussion of AMS's concerns regarding the exclusion from, or disadvantages in, certain markets.

Retaliation remains a prevalent concern in today's concentrated and highly integrated markets. For example, as recently as April 2022, threats and fear of retaliation interfered with plans for invited witnesses to testify at each of the House and Senate Agriculture Committees' hearings on livestock competition practices. In his opening remarks, House Agriculture Committee Chair David Scott noted:

We were supposed to have a 4th witness, a rancher, on our panel, but due to intimidation and threats to this person's livelihood, to this person's reputation, they chose not to participate out of fear. Witness intimidation is unacceptable. . .

Only a day before, Senator Deborah Fischer had stated:

I wish we had a Nebraska producer here, but as is noted in their letter, none of our producer members we encouraged to testify were willing to put themselves out front for fear of possible retribution from other market participants, an unfortunate reality of today's cattle industry.[36]

[28] Knoeber, Charles R., and Walter N. Thurman. (1995) ''Don't Count Your Chickens. . . : Risk and Risk Shifting in the Broiler Industry.'' *American Journal of Agricultural Economics* 77(3): 486–496.

[29] Key, N. and MacDonald, J.M. (2006) ''Agricultural Contracting: Trading Autonomy for Risk Reduction'' Amber Waves, U.S. Department of Agriculture Economic Research Service. *https://www.ers.usda.gov/amber-waves/2006/february/agricultural-contracting-trading-autonomy-for-risk-reduction/*

[30] See, *e.g.,* Michael Kades, ''Protecting Livestock Producers and Chicken Growers,'' *Washington Center for Equitable Growth* (May 5, 2022), available at *https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/;* Mary K. Hendrickson, et al., ''The Food System: Concentration and Its Impacts,'' A Special Report for Farm Family Action Alliance, May 2021, available at *https://farmaction.us/concentrationreport/;* C. Robert Taylor, ''Harvested Cattle, Slaughtered Markets,'' April 27, 2022, available at *https://www.antitrustinstitute.org/work-product/aai-advisor-robert-taylor-issues-new-analysis-on-the-market-power-problem-in-beef-lays-out-new-policy-framework-for-ensuring-competition-and-fairness-in-cattle-and-beef-markets/;* Peter Carstensen, ''Buyer Power and the Horizontal Merger Guidelines: Minor Progress on an Important Issue,'' 14 U. Pa. J. Bus. L. 775 (2012), available at *https://repository.law.wisc.edu/s/uwlaw/item/29746.*

[31] See, *e.g.,* Bill Bullard, ''Chronically Besieged: The U.S. Live Cattle Industry,'' Presentation to Thurman Arnold Project at Yale and Law, Ethics, & Animals Program at Yale Law School, ''Big Ag & Antitrust Conference,'' Jan. 2021, available at *https://www.r-calfusa.com/wp-content/uploads/2021/01/210116-Chronically-Beseiged-The-U.S.-Live-Cattle-Industry-Final.pdf;* see also Nathan Miller et al., ''Buyer Power in the Beef Packing Industry: An Update on Research in Progress,'' April 2022, available at *http://www.nathanhmiller.org/cattlemarkets.pdf.*

[32] C. Robert Taylor, ''The Many Faces of Corporate Power in the Food System.'' Presented at DOJ/FTC Workshop on Merger Enforcement, February 2004, available at *https://www.justice.gov/atr/many-faces-power-food-system.*

[33] See, *e.g.,* ''Transition Recommendations: On Issues Related to Agricultural Concentration and Competition,'' Campaign for Contract Agriculture Reform . . . Western Organization of Resource Councils, *et al.,* Nov. 9, 2020.

[34] Department of Justice. ''Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy and Thoughts on the Way Forward.'' May 2012. Available at *https://www.justice.gov/sites/default/files/atr/legacy/2012/05/16/283291.pdf.*

[35] Poultry Grower Ranking Systems; Withdrawal of Proposed Rule, 86 FR 60779 (November 4, 2021).

[36] House Chair David Scott D–GA, Opening remarks, U.S. House, Committee on Agriculture,

Continued

Producer organizations have also recently reported to USDA concerns relating to possible coercion in the rulemaking comment process.[37] Section II, and in particular II.E.ii, below, provide a more fulsome discussion of concerns regarding retaliation for engaging in protected activities.

Deception in various forms and guises also remains a concern in the marketplace, including during the COVID–19 pandemic, where producers had dramatically reduced access to markets.[38] We discuss these concerns extensively in Section III, below.

The historic Executive order issued by the Biden-Harris administration, Executive Order (E.O.) 14036—Promoting Competition in the American Economy (86 FR 36987; July 9, 2021), directs the Secretary of Agriculture to address unfair treatment of farmers and improve conditions of competition in their markets by considering rulemaking to address, among other things, certain practices related to market abuses and enhanced competition in the livestock, poultry, and related markets, including unjustly discriminatory, unduly prejudicial, and deceptive practices, in particular retaliation. E.O. 14036 also underscored that an individual should not have to show market-wide harm to secure relief under the Act. AMS has considered that direction in undertaking this rulemaking.

The P&S Act is a remedial statute enacted to address problems faced by farmers, producers, and other participants in certain livestock, poultry, and related agricultural markets; to protect the public from predatory practices; and to help ensure a stable food supply. Thus, as academics and courts have noted, the Act has ''tort-like provisions that are concerned with unfair practices and discrimination'' that fulfill a ''market facilitating function,'' which Congress designed to prevent ''market abuse.'' [39] AMS interprets and implements the Act to affect its core statutory purposes.[40] AMS is concerned that the current regulations do not adequately address many unduly prejudicial, unjustly discriminatory, and deceptive practices, which are exacerbated by increased horizontal concentration and vertical contracting. This proposed rule aims to address those concerns.

B. Previous Rulemakings

At the direction of Congress, through the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) (Pub. L. 110–246), USDA's then Grain Inspection, Packers, and Stockyards Administration (GIPSA), which administered the Packers and Stockyards Act, published a proposed rule (75 FR 35338; June 22, 2010) (2010 Proposed Rule).[41] The 2010 Proposed Rule, among other things, banned retaliation as an ''unfair, unjustly discriminatory, and deceptive practice,'' and clarified when certain conduct in the livestock and poultry industries represents the making or giving of an undue or unreasonable preference or advantage or subjects a person or locality to an undue or unreasonable prejudice or disadvantage. Congress then prohibited finalization of portions of the 2010 Proposed Rule through appropriations acts for fiscal years 2012 through 2015.

In 2015, after increased public awareness of issues that the 2010 Proposed Rule attempted to address,[42] Congress ceased including the prohibition in appropriations bills, and GIPSA undertook another rulemaking to address these issues. In 2016, the agency published another proposed rule (81 FR 92703; December 20, 2016) (2016 Proposed Rule) attempting to establish what constituted unfair practices and undue preferences, along with a related interim final rule (81 FR 92566) (2016 IFR). Following the change of administration, the agency decided to take no further action on the rule. In a notification of no further action published in the **Federal Register** (82 FR 48603; October 18, 2017) (2017 No Further Action Notification), GIPSA acknowledged that some producers, growers, and farm trade groups generally supported the proposed rule, and many commenters had raised concerns about growing power imbalances, discrimination, and retaliation. GIPSA, however, decided not to finalize the 2016 Proposed Rule, in part on the grounds that it raised the stakes for regulated entities in ways that could suppress innovation, and contained ambiguous terms that were likely to increase and prolong litigation between producers and regulated entities and between regulated entities and AMS. The 2016 Proposed Rule listed six non-exclusive criteria for the Secretary to consider when determining whether conduct constituted an unfair practice or preference. In contrast, the current proposed rule focuses on discrimination, deception, and retaliation.

In 2020, AMS issued a proposed rule (85 FR 1771; January. 13, 2020) (2020 Proposed Rule), which was finalized later that year (85 FR 79779; December. 11, 2020) (2020 Final Rule), which that set out several (nonexclusive) criteria the Secretary would consider concerning undue or unreasonable preferences or advantages: whether the preference or advantage cannot be justified on the basis of a cost savings related to dealing with different producers, sellers, or growers; cannot be justified on the basis of meeting a

''An Examination of Price Discrepancies, Transparency, and Alleged Unfair Practices in Cattle Markets,'' April 27, 2022, (14 min: 24 sec), available at *https://anchor.fm/houseagdems/episodes/An-Examination-of-Price-Discrepancies-Transparency-and-Alleged-Unfair-Practices-in-Cattle-Markets-e1hpvo8/a-a7r40dk.* U.S. Senate Committee on Agriculture, Nutrition, and Forestry, ''Legislative hearing to review S. 4030, the Cattle Price Discovery and Transparency Act of 2022, and S. 3870, the Meat and Poultry Special Investigator Act of 2022,'' April 26, 2022 (1 hour 39 min), available at *https://www.agriculture.senate.gov/hearings/legislative-hearing-to-review-s-4030-the-cattle-price-discovery-and-transparency-act-of-2022-and-s3870-the-meat-and-poultry-special-investigator-act-of-2022.*

[37] *See, e.g.,* U.S. Department of Agriculture, ''USDA Extends Public Comment Period to August 23 and Posts Public Webinar for the Proposed Rule to Promote Transparency in Poultry Grower Contracting and Tournaments,'' Aug. 5, 2022, available at *https://www.usda.gov/media/press-releases/2022/08/05/usda-extends-public-comment-period-august-23-and-posts-public* (last accessed Aug. 2022).

[38] On limits to market access in the pandemic, see U.S. Department of Agriculture, Agricultural Marketing Service, ''Agricultural Competition: A Plan in Support of Fair and Competitive Markets,'' May 2022, available at *https://www.ams.usda.gov/reports/agricultural-competition-plan-support-fair-and-competitive-markets* (last accessed Aug. 2022).

[39] Herbert Hovenkamp, ''Does the Packers and Stockyards Act Require Antitrust Harm?'' (2011). Faculty Scholarship at Penn Carey Law. 1862. *https://scholarship.law.upenn.edu/faculty_scholarship/1862* (''subsections (a) and (b) appear to be tort-like provisions that are concerned with unfair practices and discrimination, but not with restraint of trade or monopoly as such''); Peter Carstensen, *The Packers and Stockyards Act: A History of Failure to Date,* CPI Antitrust Journal 2–7 (April 2010) (''Congress sought to ensure that the practices of buyers and sellers in livestock (and later poultry) markets were fair, reasonable, and transparent. This goal can best be described as market facilitating regulation.''); Michael C. Stumo & Douglas J. O'Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships,* 8 Drake J. Agric. L. 91 (2003); Michael Kades, ''Protecting livestock producers and chicken growers,'' Washington Center for Equitable Growth (May 2022), *https://equitablegrowth.org/wp-content/uploads/2022/05/050522-packers-stockyards-report.pdf* (''Section 202's prohibitions on unjust discrimination and undue preference are not limited to conduct that destroys or limits competition or creates a monopoly. These provisions address conduct that impedes a well-functioning market and deprives livestock and poultry producers of the true value of their animals. Taken together, these provisions seek to prevent market abuses.'').

[40] *See Bowman* v. *U.S. Dep't of Agric.,* 363 F.2d 81 at 85 (5th Cir. 1966).

[41] 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.

[42] ''Chickens: Last Week Tonight with John Oliver,'' HBO, May 17, 2015, available at *https://www.youtube.com/watch?v=X9wHzt6gBgI;* see also Nathaniel Haas, ''John Oliver v. *chicken,*'' *Politico,* June 1, 2015, available at *https://www.politico.com/story/2015/06/john-oliver-vs-chicken-118510.*

competitor's prices; cannot be justified on the basis of meeting other terms offered by a competitor; and cannot be justified as a reasonable business decision. In response to the 2020 Proposed Rule, AMS received numerous comments raising concerns regarding discriminatory and retaliatory practices; however, AMS stated that the 2020 Final Rule was intended for the narrower purpose of establishing criteria to consider.[43] Specifically, the 2020 Proposed Rule's preamble noted that discrimination on the basis of race, gender, and other such protected bases was unlawful and would be addressed as potential violations of the Act's prohibition against undue prejudices. In August 2021, AMS reiterated this policy in a series of Frequently Asked Questions (FAQs).[44] AMS's FAQs also underscored that the rule's criteria were ''not exhaustive and not determinative.''

In the context of each of these rulemakings spanning the last decade, GIPSA, and later AMS, received comments regarding the power imbalances in the livestock and poultry industries and highlighting the need for regulations that adequately protect farmers against recurrent retaliation, deception, and discrimination. Given the consistency of these assertions, as well as the concerns further brought to light during the COVID–19 pandemic regarding today's increasingly concentrated livestock and poultry markets,[45] AMS believes this proposed rule is needed to effectuate its responsibility to protect producers against unlawful practices that exclude, disadvantage, discriminate against, retaliate against, or deceive them, and that the rulemaking would promote markets with integrity that are competitive and inclusive to all.

[43] Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act, 85 FR 79779 (January 11, 2021), 9 CFR part 201. Comments available at *https://www.regulations.gov/document/AMS-FTPP-18-0101-0001/comment.*

[44] 85 FR 79779; U.S. Department of Agriculture, Agricultural Marketing Service, ''Frequently Asked Questions on the Enforcement of Undue and Unreasonable Preferences under the Packers and Stockyards Act,'' August 2021, available at *https://www.ams.usda.gov/rules-regulations/packers-and-stockyards-act/faq* (last accessed June 2022).

[45] U.S. Department of Agriculture, ''Agri-Food Supply Chain Assessment: Program and Policy Options for Strengthening Resilience,'' 12–17, February 2021, available at *https://www.ams.usda.gov/supply-chain* (last accessed Aug. 2022); see also Agricultural Marketing Service, U.S. Department of Agriculture, ''Agricultural Competition: A Plan in Support of Fair and Competitive Markets,'' May 2022, available at *https://www.ams.usda.gov/reports/agricultural-competition-plan-support-fair-and-competitive-markets* (last accessed Aug. 2022).

II. Undue Prejudices or Disadvantages and Unjust Discriminatory Practices

A. Agency Interpretation of Undue or Unreasonable Prejudice or Disadvantage and Unjust Discriminatory Practices

This proposed rule addresses concerns related to undue prejudices or disadvantages and unjust discrimination. First, proposed § 201.304(a) would establish clearer duties on packers, swine contractors, and live poultry dealers to ensure full and non-discriminatory market access for market vulnerable individuals. This section would also prohibit undue prejudices and disadvantages against cooperatives.

Second, proposed § 201.304(b) would address retaliation by setting out protected activities that a covered producer may engage in but that a regulated entity may not use as grounds for unjust discrimination or undue prejudice or disadvantage. The proposed regulations would prohibit regulated entities from retaliating against a covered producer for participating in a protected activity by terminating a contract, refusing to renew a contract, offering more unfavorable contract terms than those generally or ordinarily offered, refusing to deal, interfering with third-party contracts, and other actions with a an adverse impact to covered producers. These acts of retaliation would be unjustly discriminatory and unduly prejudicial and disadvantageous.

Section 202(b) of the P&S Act (7 U.S.C. 192(b)) prohibits regulated entities from ''subjecting any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect[.]'' Though not defined by the Act, in 1921, legal definitions of prejudice included anything that ''places the person affected in a more unfavorable or disadvantageous position than he would otherwise have occupied.''[46] *Merriam-Webster.com* defines prejudice to include ''injury or damage resulting from some judgment or action of another in disregard of one's rights'' and ''an irrational attitude of hostility directed against an individual, a group, a race, or their supposed characteristics.''[47] USDA's Judicial Officer has defined prejudice in an administrative adjudication as ''subjecting any person to any injury or damage and not subjecting all similarly situated persons to the same injury or damage [.]''[48]

Likewise, sec. 202(a) of the P&S Act (7 U.S.C. 192(a)) prohibits ''unjust discrimination.'' but does not expressly define the term. *Merriam-Webster.com* defines ''unjust'' as: ''characterized by injustice: unfair.''[49] The common meaning of the word ''discrimination'' means ''differential treatment; especially a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored.''[50] While the meaning of the word ''discriminatory'' varies depending on the context, the common definition includes ''applying or favoring discrimination in treatment.''[51] Therefore, under sec. 202(a) of the Act, a regulated entity treating similar entities differently with respect to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry based on certain conditions is an unjustly discriminatory practice.[52]

The terms ''unjust discrimination'' and ''undue or unreasonable prejudice or disadvantage'' in the P&S Act do not follow the precise language of any law that preceded it. This is not without reason. The P&S Act ''would never have been adopted by the Congress if the marketing of livestock and the distribution of meat products did not present problems [that] were insufficiently met by the [then existing] antitrust laws[.]''[53] There were two laws, however, that preceded the passage of the P&S Act that influenced the inclusions of ''unjust discrimination'' and ''undue or unreasonable prejudice or disadvantage'' in the P&S Act: the Clayton Act, and the Interstate Commerce Act. While both the Clayton Act and the Interstate Commerce Act informed the P&S Act's prohibition on unfair and discriminatory practices, the P&S Act has a broader application.

The Clayton Act, passed in 1914, used the language of discrimination specifically with respect to discriminatory pricing, prohibiting anyone from ''either directly or

[46] *Roberto* v. *Catino,* 140 Md. 38, 116 A. 873, 875 (1922).

[47] Merriam-Webster online dictionary, *https://www.merriam-webster.com/dictionary/prejudice* (accessed June 15, 2022).

[48] *In Re: IBP, Inc.,* 57 Agric. Dec. 1353 (U.S. Department of Agriculture July 31, 1998).

[49] Merriam-Webster online dictionary, *https://www.merriam-webster.com/dictionary/unjust* (accessed June 15, 2022).

[50] Black's Law Dictionary, p. 586 (11th ed. 2019).

[51] Merriam-Webster online dictionary, *https://www.merriam-webster.com/dictionary/discriminatory* (accessed June 15, 2022).

[52] *See, also In Re: IBP, Inc.,* 57 Agric. Dec. 1353 (1998), rev'd on other grounds by *Excel Corp.* v. *United States Dep't of Agri.,* 397 F.3d 1285 (10th Cir. 2005).

[53] *Crosse & Blackwell Co.* v. *F.T.C.,* 262 F.2d 600, 604 (4th Cir. 1959).

indirectly [discriminating] in price between different purchasers of commodities . . . where the effect of such discrimination may be to substantially lessen competition or create a monopoly in any line of commerce.'' [54] The Clayton Act was careful to expressly prohibit discriminatory pricing in particular. In contrast, the P&S Act does not include this textual limitation. In addition, the Clayton Act requires that the discrimination ''may be to substantially effect competition or create a monopoly.'' The P&S Act, again, is broader:

[T]he prohibitions of [the Act] go further than the prohibitions in the Clayton Act. For instance, one of the sections of the Clayton Act prohibits discrimination in prices as between localities, and then contains a sort of nullification clause, to the effect that it shall not prevent anybody from choosing his own customers or making discriminations in prices where there is a difference in quality or a difference in transportation charges, and so forth, while this bill makes any undue or unreasonable discrimination as between localities or between persons unlawful.[55]

Likewise, the Interstate Commerce Act was an important template for the P&S Act. The P&S Act's statutory history is replete with references and comparisons, in general terms, to the Interstate Commerce Act. Passed in 1887, the Interstate Commerce Act forbade common carriers—primarily meaning railroads—from undue preferences, prejudices, and discrimination in their rates and charges between connecting lines.[56] As the Supreme Court explained the Interstate Commerce Act in 1934: ''The purpose . . . was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there is an unjust discrimination against interstate commerce.'' [57]

With respect to the courts' interpretation of unjustly discriminatory practices under the P&S Act, there are few Federal cases that explore the difference between unjust discrimination and the other provisions of the Act. Because of the P&S Act's similarity to the Clayton Act, the Seventh Circuit holds that unjust discrimination has included below-cost sales which injure sellers or primary line competition, even if the buyers or secondary-line competition are not affected. *See Wilson & Co.* v. *Benson,* 286 F.2d 891, 895 (7th Cir. 1961). Likewise, that circuit holds that price discrimination in favor of a larger grocery store chain, and higher prices to its competitors, are another type of unjust discrimination that the Act has prevented. *Swift & Co.* v. *United States,* 317 F.2d 53, 55–56 (7th Cir. 1963). Moreover, the Supreme Court has held that when discrimination is used as an attempt to limit competition, it is a monopoly practice. *See Denver Union Stock Yard Co.* v. *Producers Livestock Mktg.,* 356 U.S. 282, 289 (1958) (interpreting sec. 312 of the Act and finding that regulations aimed at preventing market agencies registered at one stockyard from doing business for producers at any other market within a normal marketing area to be a monopoly practice).

AMS proposes this regulation to protect the integrity of the market as a competitive, price-clearing, economically open commercial endeavor by eliminating or restraining prejudicial discrimination. This includes prejudicial discriminatory behaviors such as those that adversely impact open access by competitors and market participants (through certain exclusionary prejudices, such as denying or disadvantaging an individual's access to market on grounds which could include race, gender, religion, or other bases; or retaliatory discrimination for engaging in certain basic protected activities closely tied to the basic requirements of being in the business of livestock, poultry, and related markets covered under the Act), and otherwise exert forms of control or dependency that limit the economic freedom of those participating in the market.[58] The harms these proposed regulations aim to prevent are the kinds of discrimination (and, as discussed below, deceptive) practices that dominant firms can use to limit competition and interfere with the operation of the market, including across the entire supply chain with respect to livestock, meats, meat food products, livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry.

B. Prohibited Undue Prejudices or Disadvantages and Unjust Discrimination—Proposed § 201.304(a)(1)

Section 201.301 of the proposed regulations would protect the integrity of the market, promoting fairness and competition by prohibiting undue prejudices and disadvantages and unjust discrimination that inhibit inclusive market access and treatment. Specifically, proposed § 201.304(a)(1) would prohibit prejudice, disadvantage, or the denial or reduction of market access by regulated entities against covered producers based on their status, as defined in the regulation, of being ''market vulnerable'' producers. This term is defined as membership in a group that has been subjected to, or is at heightened risk of, adversely differential treatment in the marketplace. AMS seeks comments on whether specific groups should be named in the definition of a market vulnerable individual as examples of market vulnerable individuals and, if so, requests supporting evidence on the historical treatment of such groups. AMS also seeks comment on whether, alternatively, prohibitions on undue prejudice or disadvantage or unjust discrimination would best be addressed by identifying defined protected classes, and if so, which protected classes. The intent of the proposed regulation is to help break down barriers that may serve to exclude or disadvantage certain covered producers, while leaving room for differential treatment based on legitimate business purposes.

This proposal defines a *covered producer* as a livestock producer (as defined in the regulation at proposed § 201.302) or swine production contract grower or poultry grower as defined in sec. 2(a) of the Act. While swine contract producers and poultry growers are defined in the Act, AMS believes the Act is properly read to protect livestock producers from unjustly prejudicial and discriminatory practices. To effectuate this purpose, this proposed rule defines *livestock producer* as any person engaged in the raising and caring for livestock by the producer or another person, whether the livestock is owned by the producer or by another person, but not an employee of the owner of the livestock. This definition is designed to

[54] The Clayton Act, sec. 2, Public Law No. 63–212, 38 Stat. 730 (1914).

[55] 61 Cong. Rec. 1888 (1921) (statement of Rep. Anderson).

[56] Act of February 4, 1887 (Interstate Commerce Act), sec. 3, Public Law 49–41, February 4, 1887; Enrolled Acts and Resolutions of Congress, 1789; General Records of the United States Government, 1778—1992; Record Group 11; National Archives.

[57] *State of Fla.* v. *United States,* 292 U.S. 1, 12, 54 S. Ct. 603, 608, 78 L. Ed. 1077 (1934) (citing *United States* v. *Louisville & Nashville R.R. Co.,* 235 U.S. 314, 320 (1914)).''[F]rom the beginning the very purpose for which the Commission was created was to . . . decide whether from facts, disputed or undisputed [whether a] preference or discrimination existed.'' *Louisville and Nashville R.R. Co.,* 235 U.S. at 320.

[58] Michael Kades, ''Protecting Livestock Producers and Chicken Growers,'' *Washington Center for Equitable Growth* (May 5, 2022), available at *https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/.*

capture the vast majority of market participants who are dependent on regulated entities to engage in the livestock business. AMS seeks comment on whether to limit the definition to persons engaging in the raising and caring for livestock *in the chain of slaughter,* or whether such limitation is unnecessary or improperly limits the coverage of the Act.

The principal purpose of this proposed approach is to address prejudices in the marketplace against producers that are more vulnerable to such treatment and to stop unjust discrimination. AMS views vulnerability to adverse marketplace treatment to include, but not be limited to, exclusion or disadvantage on the basis of race, ethnicity, or sex or gender prejudices (including discrimination against an individual for being lesbian, gay, transgender, or queer), religion, disability, or age.[59] AMS seeks comment on these bases, and whether there are other bases for vulnerability to adverse marketplace treatment.

This proposed rule aims to ensure more inclusive market competition and address allegations related to undue prejudices through enforceable regulatory prohibitions. The proposed prohibitions would protect producers at both individual and market-wide levels from undue prejudices and disadvantages and unjust discrimination—both of which AMS has determined violate the P&S Act. The Secretary is empowered under the P&S Act to address harms in their incipiency.[60] Moreover, given its experience interacting with producers and regulated entities, AMS believes that individual instances of prejudice and discrimination can have a cumulative adverse effect on relevant markets, including the national market.

AMS believes the proposed regulatory scheme results in a flexible approach to resolving marketplace vulnerabilities. AMS's proposed regulatory approach of prohibiting unjust discrimination and undue prejudices and disadvantages against market vulnerable producers recognizes that discrimination against producers may evolve. AMS expects the proposed definition will be sufficiently responsive to the particular facts of given cases and particular markets over time. AMS is considering issuing guidance on the proposed regulatory approach.

AMS is seeking comment on the definition of ''market vulnerable producers.'' AMS's goal is to appropriately govern regulated entities' conduct for the purpose of ensuring inclusive competition in the marketplace, grounded in the Act's authorities. This includes seeking comment on whether it should delineate specific categories of vulnerable producers on the basis of membership in groups that have historically been subject to adverse treatment owing to racial, ethnic, gender, or religious prejudices. If so, AMS solicits supporting evidence regarding the historical adverse treatment of such groups.

AMS also seeks comment on the use of a ''market vulnerable producer'' approach—rather than a list of protected classes that may not be discriminated against—to the regulatory prohibition against discrimination. In the alternative to using the market vulnerable producer approach, the agency is considering whether this regulation should ban discrimination against specific classes, such as on the basis of race, color, national origin, religion, sex, sexual orientation, gender identity, age, disability, marital status, or family status. Such an approach would differ from the market vulnerable individual approach and would instead more closely follow the civil rights laws that prohibit prejudicial discrimination against certain protected classes.

The prohibition on prejudice against cooperatives also seeks to prevent barriers to market access for cooperatives. Congress has long recognized the need to provide enhanced protections for cooperatives, as embodied for example in the Agricultural Fair Practices Act of 1967 (Pub. L. 90–288), which protects producers' rights to form a cooperative.[61]

i. Authority Provided by the Act

There is no indication that Congress intended to exempt any practice of regulated entities affecting producers covered under the Act.[62] The P&S Act, through secs. 202(a) and (b), broadly prohibits certain practices or devices, including undue or unreasonable prejudices and disadvantages and unjust discrimination. Sections 202(a) and (b) of the Act identify a number of prohibited actions with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry. To effectuate these statutory prohibitions, AMS proposes to prohibit specific undue and unreasonable prejudices, disadvantages, and discrimination against any covered producer. AMS also seeks comment on whether to extend these protections to all persons buying or selling meat and meat food products in markets under the jurisdiction of the Act.

In enacting the P&S Act, Congress cast a wide net to capture all acts of unjust discrimination and unreasonable prejudice against any particular person. The Act's prohibition of anti-competitive, discriminatory, and unreasonably prejudicial actions against a particular person was not a new statutory concept, as the Interstate Commerce Act also banned unreasonable prejudices and discriminatory practices well before the enactment of the P&S Act. While a finding of being within the Interstate Commerce Act's (ICA) scope is not a necessary precondition for a violation of the P&S Act, the comparison is nevertheless useful, especially with respect to the structure and design of provisions governing undue prejudices. A comparison is provided in Table 1, below.

In *Mitchell* v. *U.S.,* the Supreme Court decided that the Interstate Commerce Act prohibited discrimination based on race. 313 U.S. 80 (1941). The Supreme Court held that ''it is apparent from the legislative history of the Interstate

[59] Supreme Court case law has established that discriminating against an individual for being lesbian, gay, transgender or queer is discrimination on the basis of sex or gender prejudices. *Bostock* v. *Clayton Cnty., Georgia,* 140 S. Ct. 1731, 1741 (2020) (''[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.'').

[60] *E.g. Bowman* v. *United States Dep't of Agric.,* 363 F.2d 81, 85 (5th Cir. 1966) ('''the Act is designed to '* * * prevent potential injury by stopping unlawful practices in their incipiency. Proof of a particular injury is not required.' '').

[61] For the purposes of this preamble, a cooperative is an incorporated or unincorporated association of producers, with or without capital stock, formed for mutual benefit of its members. Farm cooperatives are formed under state, not Federal law, even though cooperatives have Federal protections. *See* James B. Dean & Thomas Earl Geu, *The Uniform Limited Cooperative Association Act: An Introduction,* 13 Drake J. Agric. L. 63, 67 (2008) (''There is, however, no single type of cooperative. Although much of the law that has developed around cooperatives has developed with respect to agricultural cooperatives, cooperatives exist in many areas . . . including housing, insurance, banking, health care, and retail sales, among others.''). Cooperatives can both be buyers and sellers of agricultural products. Cooperatives made up of sellers, because they jointly fix the prices of their goods, are legally permitted to market the products they produce when the cooperative organization meets the requirements of the Capper-Volstead Act (see 7 U.S.C. 291) or the Clayton Act (see 15 U.S.C. 17).

[62] *See* 7 U.S.C. 193. *C.f. Mitchell* v. *United States,* 313 U.S. 80, 94, 61 S. Ct. 873, 877, 85 L. Ed. 1201 (1941) (''We have repeatedly said that it is apparent from the legislative history of the Act that not only was the evil of discrimination the principal thing aimed at, but that there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach.'').

Commerce Act that not only was the evil of discrimination the principal thing aimed at, but that there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach.'' [63] Further, the Court isolated a section of the Interstate Commerce Act and noted that, ''Paragraph 1 of Section 3 of the Act says explicitly that it shall be unlawful for any common carrier subject to the Act 'to subject *any particular person* * * * *to any undue or unreasonable prejudice or disadvantage* in any respect whatsoever.'' [64] (Emphasis added) The Court found that unreasonable prejudice against an individual based on race was a violation and concluded that, ''the Interstate Commerce Act expressly extends its prohibitions to the subjecting of 'any particular person' to unreasonable discriminations.'' [65]

The P&S Act contains similar but broader language than the Interstate Commerce Act sec. 3 in sec. 202, which reads, ''It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to: (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or (b) 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. . .'' (emphasis added). Table 1 illustrates where the text between the two Acts is similar, and also how the Packers and Stockyards Act is broader.[66]

TABLE 1—COMPARISON OF THE INTERSTATE COMMERCE ACT AND THE PACKERS & STOCKYARDS ACT

Interstate Commerce Act (1887 text) Sec. 3.	P&S Act, Section 202 [7 U.S.C.192]. Unlawful practices enumerated
That it shall be unlawful for any common carrier subject to the provisions of this act to make or **give any undue or unreasonable preference or advantage to *any particular person***, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, **or to subject *any particular person***, company, firm, corporation, or locality, or any particular description of traffic, **to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.** Every common carrier subject to the provisions of this act . . . **shall not discriminate in their rates and charges between such connecting lines[.]** (emphasis added).	It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to: (a) Engage in or use any unfair, unjustly ***discriminatory***, or deceptive practice or device; or (b) 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;** (emphasis added).

As shown in Table 1, unlike the Interstate Commerce Act, the P&S Act in secs. 202(a) and (b) prohibits undue or unreasonable prejudices or disadvantages *as well as* deception *and* unjust discrimination (without limitation to discrimination in rates and charges in particular). In this proposed rulemaking, AMS incorporates the language from sec. 202 to prohibit acts of unreasonable prejudice and to prevent unreasonable discrimination including but not limited to the race discrimination that the Court found to be violative of the Interstate Commerce Act in *Mitchell*.

This proposed regulation sets forth specific prohibitions on prejudicial or discriminatory acts or practices against individuals that are sufficient to demonstrate violation of the P&S Act without the need to further establish broad-based, market-wide prejudicial or discriminatory outcomes or harms. The prohibitions on regulated entities adversely treating individual producers set forth in this proposed rule address the types of harms the P&S Act is intended to prevent. AMS believes that preventing broad-based exclusion is most effectively enforced at the individual producer level when the conduct is in its incipiency.[67] To further allow for effective enforcement of the statute, AMS is also proposing a recordkeeping requirement to support evaluation of regulated entity compliance.

ii. Economic Rationale

Marketplace integrity and market access were leading policy goals at the time of the Act's passage. ''The primary purpose of [the P&S Act] is to assure fair competition and fair-trade practices in livestock marketing and in the meatpacking industry . . . The Act provides that meatpackers subject to its provisions shall not engage in practices that *restrain commerce* or create a monopoly. They are also prohibited from engaging in any . . . *unjust discriminatory practice or device.* . .'' (emphasis added). AMS believes that discrimination in the form of prejudice or retaliation against a covered producer on the basis of certain non-economic prejudices restrains commerce, including competition, and effects undue and unjust trade practices by denying or inhibiting full market access for producers. These limitations on market access are contrary to the primary purposes of the Act—assuring fair trade practices and competitive markets that producers can access, as well as prohibiting unjust discrimination. For these reasons, AMS has determined that prejudice on certain non-economic bases, as set forth under ''market vulnerable individual,'' is undue and unjust.

[63] *Id.* at 94.

[64] *Id.* at 95.

[65] *Id.* at 97.

[66] For more on the relationship between the Interstate Commerce Act and the P&S Act in this area, *see* Michael Kades, ''Protecting Livestock Producers and Chicken Growers,'' Washington Center for Equitable Growth, at 66 (May 2022) discussing *Wheeler* v. *Pilgrim's Pride Corp.,* 591 F.3d 355, 368–369 (5th Cir 2009) (en banc) (J. Jones concurring): ''In all the cases discussed by the concurrence dealing with both terms [under the ICA], the defendant faced charges that it treated customers differently. According to the court, 'railway companies are only bound to give the same terms to all persons alike under the same conditions.' If the conditions are different, then different treatment is merited. Further, 'competition between rival routes is one of the matters which may lawfully be considered in making rates.' Differential treatment driven by competitive forces is not a violation. Acknowledging that competition can justify differential treatment of customers is different than requiring the plaintiff to prove anticompetitive harm to establish a violation.''

[67] ''[T]he purpose of the Act is to halt unfair trade practices in their incipiency, before harm has been suffered.'' *See Farrow* v. *U.S. Dep't of Agr.,* 760 F.2d 211, 215 (8th Cir. 1985) (citing *De Jong Packing Co.* v. *U.S. Dep't of Agric.,* 618 F.2d 1329, 1336–37 (9th Cir. 1980)); *Swift & Co.* v. *United States,* 393 F.2d 247, 252 (7th Cir. 1968); *Armour and Company* v. *United States,* 402 F.2d 712, 723 n. 12 (7th Cir.1968).

Undue prejudice is, furthermore, a market abuse that undermines market integrity, deprives the producer of the benefit of the market, and prevents the producer from obtaining the true market value of the livestock, or their services.[68] While such a pathway for harm is sufficient justification for the rulemaking, prejudicial discrimination is also anti-competitive and leads to economic inefficiencies. This section addresses the economics of these issues, including by describing the history of prejudice and discrimination and their economic consequences in the agricultural sector and other economic sectors for market vulnerable individuals and groups.

Background and History of Economic Impacts of Prejudice and Unjust Discrimination in Agricultural and Other Economic Sectors

While not necessarily tied exclusively to the operation of livestock markets, it is well-documented that undue prejudice has occurred and persists in agricultural markets and has led to market abuse. For example, in the earlier part of the 1900s agricultural landholders conspired to restrict land sales and the administration of Federal farm support programs to Black people, including those engaged in livestock production.[69] A 1959 paper reported ''significant market discrimination'' against Black American producers in the Southern United States.[70] The loss of heirs' property—land that is passed down from generation to generation without a will or other legal documentation—has been the leading cause of Black land loss in US agriculture.[71] Some of the loss of heirs' property was the direct result of predatory and discriminatory abuse of partition sales processes and inequities in access and use of legal and other estate planning tools among Black populations.[72]

The Federal Government also played a role in discriminatory practices, which had significant economic consequences for Black producers especially. Reports from the U.S. Commission on Civil Rights in 1965 and 1982 documented discrimination in the provision of USDA programs and other prejudicial factors leading to the decline in Black farming.[73] In the late 1990s, Black producers won a lawsuit filed against USDA for engaging in discriminatory practices in its farm loan programs—practices which led to financial ruin and land loss for many Black farmers.[74]

These, and other widespread discriminatory practices, help explain the relative greater decrease in the number of Black producers over the course of the twentieth century.[75] Indeed, White farm ownership declined 62 percent and Black farm ownership 96 percent between 1930 and 2012.[76] Over the same period, total acres operated by Whites declined 9 percent and Blacks by 90 percent.[77]

Other racial and ethnic minorities have also been negatively impacted by prejudicial acts. Latino and Indigenous people farming on reservations lost their farmland through the same abuses of partition sale processes as Black farmers. Between 1900 and 2017, the percent of all producers identifying as White increased nine percentages points to 96 percent, while American Indian or Alaska Native producers increased by only 1.3 percentage points, to 2.3 percent.[78] Hispanic or Latino farmers increased by only 2.4 percentage points between 1920 and 2017, to 3.4 percent. Racial and ethnic inequities in farmland ownership and indicators of farm-related wealth have also been observed in recent years.[79] Concerns have also been highlighted regarding the treatment of Asian American and Pacific Islander poultry growers, in particular that immigrant communities may not appreciate the risks of contractual arrangements due to language barriers.[80]

Complete foreclosure of market access, for example through the loss of land or other capital, has clear adverse economic outcomes for protected groups who wish to engage in the agricultural sector but cannot. At the same time, discriminatory acts reduce economic opportunity for individuals in protected groups who are able to maintain market access. This not only causes economic harm to these groups but also has broader impacts.

Studies documenting these economic impacts of prejudicial discrimination in the agricultural sector are relatively sparse, partly due to data limitations. However, economic studies focused on employment practices, financial transactions, housing, and other markets outside the agricultural sector demonstrate how discrimination may cause economic harm across all types of markets, including agricultural ones. As early as the 1950s, economic studies documented racial wage gaps between

[68] See *Stafford* v. *Wallace,* 258 U.S. 495 (1922).

[69] Francis, Dania V., Darrick Hamilton, Thomas W. Mitchell, Nathan A. Rosenberg, and Bryce Wilson Stucki. ''Black Land Loss: 1920–1997.'' In AEA Papers and Proceedings, vol. 112, pp. 38–42. American Economic Association, 2022.

[70] Tang, Anthony M. ''Economic development and changing consequences of race discrimination in Southern agriculture.'' *Journal of Farm Economics* 41, no. 5 (1959): 1113–1126.

[71] U.S. Department of Agriculture, National Agricultural Library, ''Heirs' Property,'' *https://www.nal.usda.gov/farms-and-agricultural-production-systems/heirs-property* (last accessed Aug. 2022).

[72] Mitchell, Thomas W. 2019. Historic Partition Law Reform: A Game Changer for Heirs' Property Owners. In Heirs' property and land fractionation: fostering stable ownership to prevent land loss and abandonment. *https://www.fs.usda.gov/treesearch/pubs/58543* (last accessed 8/9/2022).

[73] U.S. Commission on Civil Rights. 1965. Equal Opportunity in Farm Programs: An Appraisal of Services Rendered by Agencies of the U.S. Department of Agriculture. *https://files.eric.ed.gov/fulltext/ED068206.pdfUS* Commission on Civil Rights. 1982. ''The Decline of Black Farming in America.'' *https://eric.ed.gov/?id=ED222604.*

[74] Feder, J. and T. Cowan. 2013. ''Garcia v. Vilsack: A Policy and Legal Analysis of a USDA Discrimination Case'', Congressional Research Service report number 7–5700, February 22, 2013.

[75] Touzeau, Leslie. 2019. ''Being Stewards of Land Is Our Legacy': Exploring the Lived Experiences of Young Black Farmers.'' *Journal of Agriculture, Food Systems, and Community Development* 8 (4): 1–6. *https://doi.org/10.5304/jafscd.2019.084.007.*

[76] Francis, Dania V., Darrick Hamilton, Thomas W. Mitchell, Nathan A. Rosenberg, and Bryce Wilson Stucki. ''Black Land Loss: 1920–1997.'' In *AEA Papers and Proceedings,* vol. 112, pp. 38–42. American Economic Association, 2022; Wood, S., & Gilbert, J. (2000, Spring). Returning African-American farmers to the land: Recent trends and a policy rationale. The Review of Black Political Economy, 27, 43–64. Available at *https://doi.org/10.1007/BF02717262.*

Touzeau, Leslie. 2019. '''Being Stewards of Land Is Our Legacy': Exploring the Lived Experiences of Young Black Farmers.'' Journal of Agriculture, Food Systems, and Community Development 8 (4): 1–6. *https://doi.org/10.5304/jafscd.2019.084.007.*

[77] The Agricultural Census figures on farm operations for 2012 are downloaded from the National Agricultural Statistics Service's Quick Stats and figures from 1930 are from volume 4 of the 1930 Census, *https://agcensus.library.cornell.edu/census_year/1930-census/.*

[78] Casey, Alyssa R. Racial Equity in U.S. Farming: Background in Brief 2021. Congressional Research Service. *https://crsreports.congress.gov/product/pdf/R/R46969.*

[79] Horst, M., Marion, A. ''Racial, ethnic and gender inequities in farmland ownership and farming in the U.S.'' *Agric Hum Values* 36, 1–16 (2019). *https://doi.org/10.1007/s10460-018-9883-3.*

[80] Christopher Leonard, ''The Meat Racket,'' (2015) and Witt, Howard. ''Hmong poultry farmers cry foul, sue'' Chicago Tribune. May 15, 2006. Available online at: *https://www.chicagotribune.com/news/ct-xpm-2006-05-15-0605150155-story.html.*

workers.[81] Enabled by a lack of competition among employers, this discrimination not only had adverse economic impacts for protected groups but also for employers who, due to their own discriminatory actions, ultimately paid higher wages for some equally productive workers.[82] Recent studies highlight how racial wealth disparities reduce labor market competition, since reduced wealth hinders job search abilities.[83] On the flip side, recent research shows that increased labor market participation among racial minorities and women contributed to increased economic output during the second half of the twentieth century.[84] Research on the U.S. patent system finds that racially-motivated violent acts reduced the number of patents by Black inventors in the U.S. during the late 1800s and through the middle of the twentieth century.[85] These patents could have led to new wealth for the inventors and increased business investments, potentially contributing to overall economic growth. In an analysis of data from the National Survey of Small Business Finances, Black led-businesses were found to have been more frequently issued loans with higher interest rates and other unfavorable terms relative to white or male-led businesses, which could reduce productivity and innovation in the broader economy.[86] In housing, recent evidence shows that minority households are steered towards areas with higher rates of poverty, crime, and pollution, and less economic opportunity.[87] Combined, these discriminatory practices have large economic consequences. A 2020 study estimates that if racial gaps in wages, housing, access to higher education, and lending were closed, the U.S. would experience a $5 trillion dollar increase in gross domestic product (GDP) from 2020 to 2025.[88]

Undue Prejudice and Economic Inefficiency

Prejudicial discrimination has been theorized and observed to be an artificial barrier to market activities, and as such, it can create a market distortion.[89] A variety of pathways for agricultural market distortions due to discrimination are possible. For example, if prices paid for otherwise identical cattle differed because of the race, ethnicity, or other producer characteristics that do not have any bearing on productivity, rather than the on the value of the marginal product of the cattle, then the prejudice based on these characteristics distorts prices and in turn both output and investment. While the specifics of producer returns in contract production are different from marketed production, producers receiving a lower contract payment rate or other unfavorable contract terms simply because of the producers' race or other personal characteristics would likewise induce market distortions.

Prejudicial discrimination can take other forms besides wage, contract, or price differentials, such as exclusionary practices in product purchases or sales, or higher lending costs. These examples of artificial barriers preventing resources from moving to their highest and best uses via allocative efficiency, such that marginal benefits equal marginal costs, lead to market inefficiency. Lowering the level of this market distortion would increase market efficiency, albeit noting there is limited information to empirically assess the impacts of discrimination on efficiency in agricultural markets.

Undue Prejudice and Potential Market Abuse in Concentrated Livestock Markets

Like in other parts of the economy and in other types of markets, those participating in agricultural markets from groups that have and continue to suffer racial, ethnic, gender, and religious prejudices may be particularly vulnerable to market abuses, especially in concentrated markets such as in the livestock sector. This is because they currently represent not only a very small share of producers in the industry, including those in the livestock sector and among producers who have production contracts, but their size, sales, and incomes are lower than other producers, leaving them more economically isolated and with fewer economic resources to counteract concentrated market forces and actors.

In the livestock sector, the results of historical prejudice and the risk of present-day prejudice are apparent when looking at data from the 2017 Census of Agriculture, which show that currently a very small fraction of livestock farms with production contracts are operated by Black, Asian, American Indian, or Native Hawaiian producers (Figure 1). As described earlier in this section, discriminatory acts, especially against Black producers, undoubtedly contributed to the current low levels of racial and ethnic minority participation in the livestock sector, including among producers with production contracts. These remaining producers may be particularly vulnerable to market abuses in concentrated livestock markets.

[81] Bayer, P., and K. K. Charles. ''Divergent Paths: A New Perspective on Earnings Differences Between Black and White Men since 1940.'' *The Quarterly Journal of Economics* (2018), 1459–1501. Becker, G.S. *The Economics of Discrimination.* First Edition, *The University of Chicago Press,* 1957.

[82] Becker, G.S. *The Economics of Discrimination.* First Edition, The University of Chicago Press, 1957.

[83] Kate Bahn, Mark Stelzner, and Emilie Openchowski, ''Wage discrimination and the exploitation of workers in the U.S. labor market,'' *Washington Center for Equitable Growth,* September 2020, available at *https://equitablegrowth.org/research-paper/wage-discrimination-and-the-exploitation-of-workers-in-the-u-s-labor-market/?longform=true.*

[84] Hsieh et al., ''The Allocation of Talent and U.S. Economic Growth,'' 2019, available at *https://onlinelibrary.wiley.com/doi/epdf/10.3982/ECTA11427.*

[85] Cook, Lisa D. ''Violence and economic activity: evidence from African American patents, 1870–1940.'' *Journal of Economic Growth* 19, no. 2 (2014): 221–257.

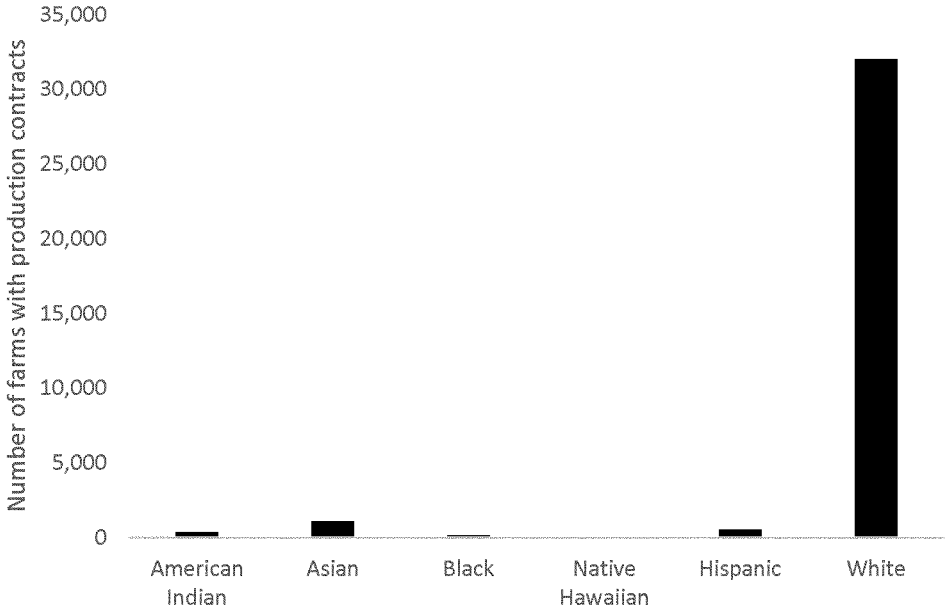
[86] Laura Alfaro, Ester Faia, and Camelia Minoiu, ''Distributional Consequences of Monetary Policy Across Races: Evidence from the U.S. Credit Register'' April 2022, available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4096092;* Ken S. Cavalluzzo, Linda C. Cavalluzzo, and John D. Wolken, ''Competition, Small Business Financing, and Discrimination: Evidence from a New Survey,'' *The Journal of Business,* October 2022, available at *https://www.jstor.org/stable/pdf/10.1086/341638.pdf?refreqid=excelsior%3Ab05443d9a80629ef03bbe4cb6e7747e4&ab_segments=&origin=&acceptTC=1.*

[87] Christensen, Peter, and Christopher Timmins. ''Sorting or steering: The effects of housing discrimination on neighborhood choice.'' *Journal of Political Economy* 130, no. 8 (2022): 2110–2163.

[88] *Closing the Racial Wealth Gap: The Economic Costs of Black Inequality in the United States. Citi GPS: Global Perspectives and Solutions.* 2020. Available at *https://ir.citi.com/NvIUklHPilz14Hwd3oxqZBLMn1_XPqo5FrxsZD0x6hhil84ZxaxEuJUWmak51UHvYk75VKeHCMI%3D.*

[89] Stiglitz, J. ''Approaches to the Economics of Discrimination'', *American Economic Review,* vol. 63/2, May 1973: 287–295.

Figure 1. Number of livestock and poultry farms with production contracts by race and ethnicity of their producers



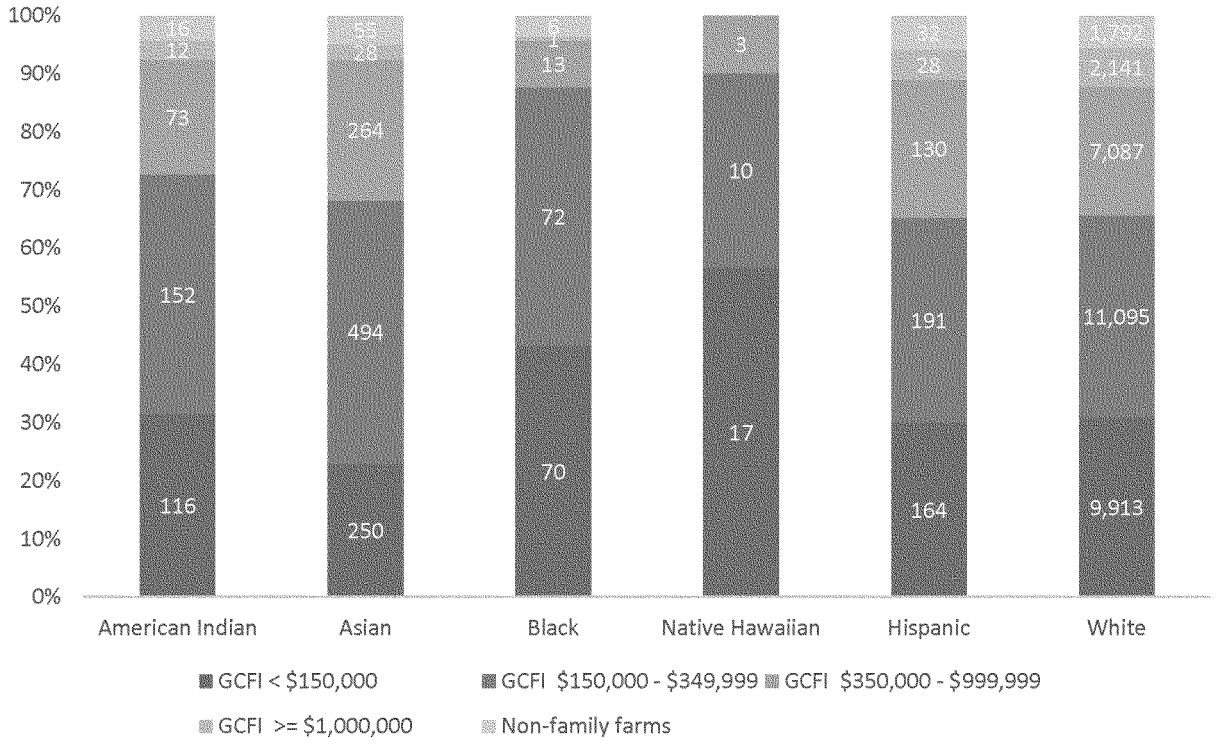
Data source: 2017 Agricultural Census, National Agricultural Statistics Service, USDA.

Disparities in farm size and income across racial and ethnic groups also exist among livestock and poultry farms with production contracts, highlighting additional vulnerability for particular groups in the sector. Figure 2 shows the percentage and number of livestock and poultry farms with production contracts by the reported race or ethnicity of their producers, categorized by level of Gross Cash Farm Income (GCFI), which includes commodity cash receipts, farm-related income, and Government payments.[90] USDA's Economic Research Service (ERS) classifies small farms as having a GCFI less than $150,000 and up to $349,999 per year, mid-sized farms as having GCFI between $350,000 and $999,999, and large-scale farms as having a GCFI equal to or greater than $1,000,000. Farms are also classified as being non-family farms, which are farms in which an operator or persons related to the operator do not own a majority of the business.[91] These data indicate that contracted livestock and poultry farms with producers who identify as Black and Native Hawaiian are more likely to be in the lower income GCFI categories than their white counterparts. To a lesser extent, farms with producers identifying as Native American also tend to be in the lower income GCFI categories than their White counterparts' farms. Markets dominated by one or a few large packers or live poultry dealers may be less accessible to these smaller farms, which have limited financial or other economic resources with which to engage. They may also be more vulnerable to discriminatory acts or market abuses such as retaliation.

[90] U.S. Department of Agriculture, Economic Research Service, ''Most farms are small, but large-scale farms account for almost half of production,'' available at: *https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58288* (last accessed Aug, 2022).

[91] U.S. Department of Agriculture, Economic Research Service, ''Farm Structure and Contracting,'' available at: *https://www.ers.usda.gov/topics/farm-economy/farm-structure-and-organization/farm-structure-and-contracting/* (last accessed Aug. 2022).

Figure 2. Percentage and number of livestock and poultry farms with production contracts by GCFI and family farm status and by race and ethnicity of their producers.



Notes: Number of farms displayed on bars in white text. Percentages reported by the bar height on the vertical axis.
Data source: 2017 Agricultural Census, National Agricultural Statistics Service, USDA.

iii. Specific Proposed Bases

In determining the proposed bases for protection under this section, AMS looked to several sources, including the Statement of General Policy Under the Packers and Stockyards Act published by the Secretary of Agriculture in 1968 (Statement of General Policy) (9 CFR 203.12(f)), the regulations governing USDA-conducted programs, and a series of statutes identifying producers that Congress has determined face special disadvantages, are underserved, or are otherwise more vulnerable to prejudices.

The Statement of General Policy reflects the current USDA policy on the enforcement of the P&S Act. The Statement of General Policy provides in part that it's a violation of sections 304, 307, and 312(a) of the Packers and Stockyards Act for a stockyard owner or market agency to discriminate, in the furnishing of stockyard services or facilities or in establishing rules or regulations at the stockyard, because of *race, religion, color, or national origin* of those persons using the stockyard services or facilities. Such services and facilities include, but are not limited to, the restaurant, restrooms, drinking fountains, lounge accommodations, those furnished for the selling, weighing, or other handling of the livestock, and facilities for observing such services.

While this part of the Statement of General Policy applies to violations of secs. 304, 307, and 312(a) of the Act—related to the provision of services and facilities at stockyards on an unreasonable and discriminatory basis, almost identical prohibitive language is used in sec. 202 of the Act. Section 202 pertains to packers, swine contractors, and live poultry dealers. Section 202(a) of the Act prohibits any unjustly discriminatory practice or device with respect to livestock, meats, meat food products or livestock products in manufactured form, or live poultry.

AMS also considered USDA's general regulatory prohibition against discrimination in USDA programs, which governs how USDA provides services to producers and growers. Most recently updated in 2014, it offers a more current interpretation of anti-discrimination standards. The relevant provision provides that no agency, officer, or employee of the USDA shall, on the grounds of race, color, national origin, religion, sex, sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or gender identity, exclude from participation in, deny the benefits of, or subject to discrimination any person in the United States under any program or activity conducted by the USDA.[92]

In that rulemaking, USDA identified areas where discrimination against a producer is an unacceptable denial of access to USDA's services.

[92] 7 CFR 15d.3; U.S. Department of Agriculture, ''Nondiscrimination in Programs or Activities Conducted by the United States Department of Agriculture,'' 79 FR 41406, July 16, 2014, available at *https://www.federalregister.gov/documents/2014/07/16/2014-16325/nondiscrimination-in-programs-or-activities-conducted-by-the-united-states-department-of-agriculture* (last accessed 8/9/2022).

AMS also looked to the legislative mandates that emerged over the last thirty years, directing USDA to make extra efforts to overcome the barriers that prevent members of those groups from accessing USDA's services and agricultural markets generally.[93] Congress adopted numerous statutes seeking to remedy market access barriers on the basis of prejudices across a wide range of areas, including: 7 U.S.C. 8711 (base acres); 7 U.S.C. 2003 (target participation rates); 7 U.S.C. 7333 (Administration and operation of noninsured crop assistance program); 7 U.S.C. 1932 (Assistance for rural entities); 16 U.S.C. 2202a, 3801, 3835, 3839aa–2, 3841, and 3844 (conservation); 7 U.S.C. 8111 (Biomass Crop Assistance Program); 7 U.S.C. 1508 (Federal crop insurance, covering underserved producers defined as new, beginning, and socially disadvantaged farmers or ranchers and including members of an Indian tribe); and 16 U.S.C. 3871e(d) (conservation, covering historically underserved producers defined as beginning, veteran, socially disadvantaged, and limited-resource farmers and ranchers). In 25 U.S.C. 4301(a) and elsewhere, Congress has clearly expressed its intent for the United States government to encourage and foster tribal commerce and economic development.[94]

The definitions and coverage in these statutes varies to some extent. Some focus principally on members of groups that have experienced racial or ethnic prejudices, while others include gender prejudices. Additionally, some provide further assistance to new and beginning farmers and military service veterans who are farmers. In sum, these statutes reflect the now multi-decade priority of U.S. agricultural policy to overcome barriers that stand in the way of full market access for all producers and growers, with significant emphasis placed on overcoming certain persistent forms of racial, ethnic, and gender prejudices that obstruct full market access for some producers.

In interpreting the P&S Act, AMS has sought to propose a rule that would remove barriers to market access for producers and growers most vulnerable to being denied access. For the purposes of this proposed rule, AMS is proposing a prohibition on undue prejudice on the basis of a covered producer's membership in a vulnerable group. We seek comment on whether to adopt one of several options for the term ''market vulnerable individual,'' and if so, which one we should adopt. We are also seeking comment on whether to specifically delineate certain protected classes.

Because of the Act's broad application discussed in an earlier section, ''II.B.i., Authority provided by the Act,'' the similar language used in secs. 202, 304, 305, and 312 of the Act, and the series of statutes outlining a range of prejudices identified as being deserving of public policy efforts to ensure full market access, AMS finds it reasonable that members of groups who have been subjected to discrimination, prejudice, disadvantage, or exclusion on the basis of race, ethnicity, or gender should be considered vulnerable and covered by the prohibitions against undue prejudice or disadvantage and unjust discrimination as enumerated by sec. 202 of the Act.

AMS is proposing, and seeking comment on, whether a flexible definition of vulnerable group would be advantageous to ensuring inclusive market access for covered producers by permitting an evolving as well as market-specific application of the regulation. Such an approach could address barriers to inclusion as they may arise. At the same time, AMS is seeking comment on how to ensure that most persons that would be protected under the Statement of General Policy and under USDA's general regulations prohibiting discrimination, as noted above, could be protected under this regulation.[95] In particular, as noted above AMS seeks comment on whether to delineate certain specific groups as examples of market vulnerable groups, and also seeks comment on whether it is preferable instead to prohibit discrimination based on protected classes, such as on the basis of race, color, national origin, religion, sex, sexual orientation, gender identity, age, disability, marital status, and family status. AMS seeks additional comment on the appropriate approach to protect market access for and stop unjust discrimination against Indian tribes and tribal members.

Refusing to deal, providing less compensation, or any other type of discrimination because of a person's particular non-economic characteristics is the type of behavior both the Act and USDA aim to prevent.

C. Cooperatives—Proposed § 201.304(a)(1)

Proposed § 201.304(a)(1) also specifies that regulated entities, which include packers, swine contractors, or live poultry dealers, may not discriminate against a cooperative of covered producers—*i.e.,* covered producers who collectively work together. For example, individual covered producers may form a cooperative to meet volume or other contractual requirements when they may not be able to meet those requirements by themselves. A covered producer is defined in the proposed regulations at § 201.302 as a livestock producer as defined in this section or swine production contract grower or poultry grower as defined in section 2(a) of the Act. Covered producers acting as a cooperative are an association or group made up of one or more producers collectively processing, preparing for market, handling, and marketing livestock or poultry. The P&S Act includes cooperative associations in the definition of ''person'' at 7 U.S.C. 182(1), providing that when used in the Act ''[t]he term ''person'' includes individuals, partnerships, corporations, and associations. . .''

Covered producer cooperatives improve economic conditions for individual producers. They have been demonstrated to be competitive and responsive to meeting the needs of regulated entities and the market.[96] For example, smaller livestock producers may move towards cooperative agreements on a regional basis to meet buyers' volume requirements.

Producers have indicated to AMS that they feel such a move is necessary, owing to the rise of concentration in the markets and the decline in options for smaller producers. Small cattle producers have expressed their concerns to AMS about disparate treatment by packers between large and small producers. Large packers have commonly shown limited interest in dealing with producers that operate on a smaller capacity. On this point, producers have informed AMS that packers are in search of deals with large quantities of product, and if a producer is unable to meet demand for readily available bulk quantities, that producer is unable to compete in the industry.

[93] For background, *see* Congressional Research Service, *Defining a Socially Disadvantaged Farmer or Rancher (SDFR): In Brief* (March 19, 2021), available at *https://crsreports.congress.gov/product/pdf/R/R46727/6.*

[94] See, *e.g.,* Native American Business Development Act, 25 U.S.C. 4301(a).

[95] *See, e.g.,* Pregnancy Discrimination Act, *see also Bostock* v. *Clayton Cnty.,* Georgia, 140 S. Ct. at 1741.

[96] At least some of the drafters of the Act fully expected the Act to be consonant to the goals of cooperatives: ''My own conviction is that the cooperative effort of producers and consumers to get closer together in an effort to reduce the spread between them is the most favorable tendency of our time, so far as the question of marketing and distribution is concerned.'' 61 Cong. Rec. 1882 (1921).

Producers testified in 2010 about packer buyers pulling out of their small-scale feedlots for months in retaliation for producers seeking higher prices and not allotting their entire herd capacity. Packer buyers often prefer to include large quantities on single transactions to lower transactions costs and maximize profits.[97] Adding protections for smaller producers that wish to work together to form cooperatives would enable smaller producers to (1) form cooperatives without fear of prejudice or disadvantage, and (2) reduce transactions costs for individual member producers.

This proposed regulation is intended, in part, to benefit smaller producers—who lack the necessary land, capital, or financing (or for other reasons may not wish) to establish a large enough operation to meet preferred contractual requirements—by preventing discrimination against their cooperative operations. Through cooperation, one or more producers may be able to jointly meet the requirements and participate as a producer in the industry, allowing producers to operate more efficiently. Preventing discrimination against producer cooperatives will provide another avenue for producers who otherwise might not have been able to participate in the market.

While this section proposes that regulated entities may not prejudice or disadvantage cooperatives of covered producers, based on their protected status as a cooperative under this regulation, AMS notes that regulated entities may decline contracting with cooperatives for other justified economic reasons—*i.e.,* for reasons other than the prospective business partner's status as a cooperative. For example, a regulated entity may refuse to contract with a cooperative of covered producers when the contract would not be cost-effective for the entity, regardless of the cooperative status of the producers. In this hypothetical example, the regulated entity would not be unduly prejudicing cooperatives of covered producers based on their status as a cooperative. Instead, the regulated entity would have a nonprejudicial basis for their business decision. AMS notes that antitrust laws also prohibit cooperatives themselves from participating in certain anticompetitive behavior. As discussed earlier, undue prejudice and disadvantage may inhibit producers' ability to obtain fair market value for their livestock and poultry and would be prohibited under proposed § 201.304(a)(1). Proposed § 201.304(a)(1) aims to encourage a diverse agricultural market and prevent undue prejudice and disadvantage and unjust discrimination against cooperatives.

Congress has long protected cooperatives in the agricultural space, acknowledging the need for farmers to meet the economic demands of the market. One year after the passage of the P&S Act, Congress passed the Capper-Volstead Act (Pub. L. 67–146), which permits producer cooperatives to collectively process, prepare for market, handle, and market their products. In a decision related to an antitrust action against a nonprofit cooperative association whose members were involved in production and marketing of broiler chickens, the Supreme Court noted that farmers faced special challenges in the agricultural market and therefore cooperatives are afforded legal protections in helping them address those challenges.[98] Congress also passed the Agricultural Fair Practices Act,[99] which provides enhanced protections to those seeking to form a cooperative. In particular, that statute prevents handlers from performing certain types of pricing and contract discrimination, coercion, and other practices that undermine cooperatives.

This proposed rule would provide additional protection for cooperatives by preventing a regulated entity from isolating cooperatives through contract termination and preventing cooperatives from accessing markets for their products. As noted above, the P&S Act intended to improve the agricultural market and includes associations in the definition of ''person'' when referred to in the Act. The Act affords cooperative associations the same protections against discrimination as are afforded to all other covered producers. 7 U.S.C. 182(1). Thus, protections for cooperatives against discrimination were contemplated at the time of the Act's passage.[100]

D. Enumerated Prejudices

Proposed § 201.302(a)(2) outlines an inexhaustive list of prejudices that, if based upon the covered producer's status, the regulation prohibits. The harm that may be done through discriminatory actions cannot be neatly cataloged, but the proposed § 201.302(a)(2) sets forth injuries that the agency believes are inherently prejudicial: offering less favorable terms, refusing to deal, differential contract enforcement, and contract termination or non-renewal. Under proposed § 201.302(b), prejudicial actions are to be considered together with the covered producer's membership in a market vulnerable group or cooperative, and they would not by themselves be violations. AMS seeks comment on the scope of these acts.

E. Retaliation

i. Retaliation as Discrimination Under the Act

Proposed § 201.304(b) would establish protected activities for covered producers and would prohibit regulated entities from retaliatory conduct on the basis of those activities. Regulated entities wield significant economic power given their vertical relationships with producers. Regulated entities choosing to discriminate among producers using their market power advantages for the purpose of preventing certain producers, or groups of producers, from engaging in the behaviors and activities discussed below, is disparate treatment that is unjustly discriminatory. This type of discrimination is oftentimes exercised through retaliation. The method of retaliation may take many forms. Accordingly, the proposed rule is designed to prohibit a variety of adverse actions. However, the proposed regulations are also narrowly tailored, requiring the adverse action to be linked to specific protected activities. Adverse actions not tied to the activities

[97] U.S. Department of Justice & U.S. Department of Agriculture, Public Workshops, Exploring Competition Issues in Agriculture Livestock Workshop: A Dialogue on Competition Issues Facing Farmers in Today's Agricultural Marketplaces, Fort Collins, Colorado, August 27, 2010. Available at *https://www.justice.gov/sites/default/files/atr/legacy/2012/08/20/colorado-agworkshop-transcript.pdf.*

[98] *Nat'l Broiler Mktg. Ass'n* v. *United States,* 436 U.S. 816, 825–26, 98 S. Ct. 2122, 2129, 56 L. Ed. 2d 728 (1978) (''Farmers were perceived to be in a particularly harsh economic position. They were subject to the vagaries of market conditions that plague agriculture generally, and they had no means individually of responding to those conditions. Often the farmer had little choice about who his buyer would be and when he would sell. A large portion of an entire year's labor devoted to the production of a crop could be lost if the farmer were forced to bring his harvest to market at an unfavorable time. Few farmers, however, so long as they could act only individually, had sufficient economic power to wait out an unfavorable situation. Farmers were seen as being caught in the hands of processors and distributors who, because of their position in the market and their relative economic strength, were able to take from the farmer a good share of whatever profits might be available from agricultural production. By allowing farmers to join together in cooperatives, Congress hoped to bolster their market strength and to improve their ability to weather adverse economic periods and to deal with processors and distributors.'').

[99] Public Law 90–288, Apr. 16, 1968, 82 Stat. 93 (7 U.S.C. 2301 *et seq.*).

[100] H.Rep. No. 85–1048, 1957.

proposed would not be regulated under this proposal.

ii. Economic Rationale

While the statute does not require market-wide harm as a condition to forbid retaliation, which is an abuse that undermines market integrity, this section explains the adverse economic effects of retaliation, which include harm across the marketplace. Indeed, oligopsonistic or monopsonistic market structures can allow firms with large market shares to use their market power advantage to punish certain producer behaviors that the firm believes could offset their market power advantage or even to punish producer behaviors that are unrelated to the product or service they provide. When firms retaliate by canceling contracts, selectively enforcing contract terms, renewing contracts with unfavorable terms for the producer, or otherwise impairing producers' ability to remain economically competitive as a penalty for their engagement in the activities identified in the next section, that conduct likely results in economic inefficiencies and should be prohibited on a market wide basis, even if the specific retaliatory act only affects one individual. Such impacts are especially difficult to address when those firms maintain dominant positions in the markets.

Retaliation against even one seller could presumably have a market-wide chilling effect on others (at least within the area where the retaliating entity is dominant). However, the ability to use such a tool does require the right conditions, such as those that exist in concentrated livestock markets where, in many cases, few or one firm hold a dominate position. It is unlikely that packers or poultry dealers operating in highly competitive markets (in which they are not in a dominant economic position) could effectively use retaliation, since livestock producers could simply find other buyers with whom to do business.

Economic measures of firm concentration may help to identify when retaliation may be more easily employed in a market, albeit noting that an empirical relationship between retaliation and concentration measures in livestock markets has not been established.

The following table shows the level of concentration in the livestock and poultry slaughtering industries for 2010–2020 using four-firm Concentration Ratios (CR4).

TABLE 2—FOUR-FIRM CONCENTRATION RATIO IN LIVESTOCK AND POULTRY SLAUGHTER [101]

Year	Steers & heifers (%)	Hogs (%)	Broilers (%)	Turkeys (%)
2010	85	65	51	56
2011	85	64	52	55
2012	85	64	51	53
2013	85	64	54	53
2014	83	62	51	58
2015	85	66	51	57
2016	84	66	50	57
2017	83	66	51	53
2018	84	70	54	55
2019	85	67	53	55
2020	81	64	53	55

The table shows the combined market share of the four largest steer and heifer slaughterers remained stable between 83 and 85 percent from 2010 to 2019 and dropped to 81 percent in 2020. Four-firm concentration ratios for hog and broiler slaughter has also remained relatively stable between 62 and 70 percent and 51 and 54 percent, respectively. The data above are estimates of national four-firm concentration ratios at the national level, but the relevant economic markets for livestock and poultry may be regional or local, and concentration in the relevant market may be higher than the national level.

As discussed previously, regional concentration is often higher than national concentration for hogs.[102] Based on AMS's experience conducting investigations and monitoring cattle markets, there are commonly only one or two buyers in some local geographic markets, and few sellers have the option of selling fed cattle to more than three or four packers.

Though poultry markets may appear to be the least concentrated in terms of their national four-firm concentration ratios, relevant economic markets for poultry growing services are more localized than markets for fed cattle or hogs, and local concentration in poultry markets is often greater than in hog and other livestock markets. The following table highlights this issue by showing the limited ability a poultry grower has to switch to a different integrator using the Herfindahl-Hirschman Index (HHI).[103] Similar to a CR4, HHI is an indicator of market concentration, with the index being increasing as market shares across firms (packers) become more unequal and/or the number of these firms decrease. Markets with HHIs above 2,500 are in some cases considered highly concentrated. The following table is a modification of a table in MacDonald (2104), adding HHI indices to the latter's calculations of the integrators in the broiler grower's geographic region. The HHIs in the table assume equal market share for each integrator, and as such are the minimum HHIs possible (at least with 2 to 4 growers). They show that 88.4% (72.2%) of growers are facing an integrator HHI of at least 2,500 (3,333). The data suggests that the majority of contract broiler growers in the U.S. are in markets where the sellers have the potential for market power advantage.

[101] U.S. Department of Agriculture, AMS Packers and Stockyards annual reports. Available at *https://www.ams.usda.gov/reports/psd-annual-reports* (last accessed 8/9/2022).

[102] Wise, T. A., S. E. Trist. ''Buyer Power in U.S. Hog Markets: A Critical Review of the Literature,'' *Tufts University, Global Development and Environment Institute (GDAE)* Working Paper No. 10–04, August 2010, available at: *https://sites.tufts.edu/gdae/files/2020/03/10-04HogBuyerPower.pdf.TAbl* (last accessed 8/9/2022).

[103] MacDonald, James M., and Nigel Key. ''Market power in poultry production contracting? Evidence from a farm survey.'' *Journal of Agricultural and Applied Economics* 44, no. 4 (2012): 477–490.

TABLE 3—INTEGRATORS IN THE BROILER GROWERS' REGION AND ASSOCIATED MARKET POWER INDICES

Integrators in grower's area	Minimum HHI of integrators in grower's area	Farms	Birds	Production	Can change to another integrator
Number		Percent of total			Percent of farms
1	10,000	21.7	23.4	24.5	7
2	5,000	30.2	31.9	31.7	52
3	3,333	20.4	20.4	19.7	62
4	2,500	16.1	14.9	14.8	71
>4		7.8	6.7	6.6	77
No Response		3.8	2.7	2.7	NA

Retaliation by oligopolistic or monopolistic firms can be effectuated in the pursuit of economic self-interest or be done against such interest for some nonpecuniary reason.[104] In the case of economic self-interest, oligopsonistic or monopsonistic integrators or packers may use retaliation to facilitate their ability to earn excess rents. However, this use of retaliation, as a means to protect excess profits, is only possible when markets for livestock are characterized by few integrators or packers. Where producers have few, if any, alternative packers, or integrators to engage with, the act of not renewing a contract, as retaliation for unfavorable behavior or actions, can cause economic inefficiencies.

Retaliation may also be used by integrators and packers to ensure that regulators or new entrants cannot discipline their behavior in the marketplace. Both regulators and new entrants may be inhibited by the inability to communicate with market participants. Regulators may be unable to obtain the information needed to learn of or establish violations, while prospective new entrants may be unable to establish necessary market relationships with industry participants.

Many producers have expressed concerns about retaliatory behavior from regulated entities with respect to activities inextricably relevant to the livestock and poultry markets. Examples include contract poultry and hog producers afraid to talk with USDA representatives, file comments with USDA (or not file comments that adopt their integrator's view), seek enforcement of contracts, organize associations, or even attend association meetings, opt out of arbitration, complain about feed outages and company personnel behavior, and question the need for farm upgrades.[105] In cattle and independent hog production, private complaints to AMS include fear that packers will refuse to visit farms or feedlots, offer bids on livestock, purchase livestock from disfavored producers, and other more subtle behaviors, like delaying delivery or shipment and manipulating where producers fall in order of procurement.

In addition, it is also possible that discriminatory or retaliatory acts by packers or integrators intended to prevent the transfer of rents also negatively affect efficiency by reducing the incentives for investment, beneficial coordination of actions, or adoption of innovative production process. In one case, a court found that an integrator retaliated against a grower who was a leader of a growers' association,[106] suggesting both that producer coordination may reduce the packers'/integrators' oligopsony excess profit and that growers' ability to compete in these markets may be harmed by retaliation. In another court case, *James* v. *Tyson Foods, Inc.,* fifty-four poultry growers sued the integrator for retaliatory actions and were awarded $10 million in damages as a result.[107]

F. Prohibition on Retaliation—Proposed § 201.304(b)

To address the dangers of the retaliatory practices described above, AMS is proposing to add § 201.304(b) to the regulations. Proposed § 201.304(b)(1) would prohibit and provide examples of retaliatory practices by regulated entities against covered producers who engage in protected activities. Proposed § 201.304(b)(2)(i) through (vi) lists these protected activities.

Under § 201.304(b)(1), regulated entities would be prohibited from retaliating or otherwise taking an adverse action against a covered producer because the covered producer participated in the activities described in § 201.304(b), to the extent that these activities are not otherwise prohibited by Federal or state antitrust laws. While a group of producers might be protected from retaliation when associating in the production or marketing of livestock, producers would not be protected from the adverse action of packers if the producers engaged in a violation of Federal or state antitrust law. AMS expects that prohibited retaliation would include, but not be limited to termination of contracts, non-renewal of contracts, refusing to deal with a covered producer, and interference in farm real estate transactions or contracts with third parties. The proposed rule is designed to prohibit all such actions with an adverse impact on a covered producer.

AMS has chosen these specific examples of retaliation because they represent the retaliatory practices that have been the most common causes for complaints or because AMS has otherwise determined them to be recurring problems in the livestock and poultry industries. Covered producers have experienced termination or non-renewal of their contracts for numerous reasons. Covered producers who have not personally experienced these forms of retaliation have nevertheless expressed fear of such retaliation through direct communication with AMS personnel, at workshops, and in comments on previous related rulemakings. Related to termination and non-renewal of contracts is a regulated entity's refusal to deal. This proposed rule extends protections against retaliation to covered producers who are refused a new contract due to their involvement in protected activities. A regulated entity would also be prohibited from interfering in a covered producer's farm real estate transactions

[104] Fehr, Ernst, and Simon Gächter. ''Fairness and retaliation: The economics of reciprocity.'' *Journal of economic perspectives* 14, no. 3 (2000): 159–181.

[105] U.S. Department of Justice & U.S. Department of Agriculture, Public Workshops Exploring Competition in Agriculture, Poultry Workshop, May 21, 2010, Alabama A&M University Normal, Alabama. Available at *Poultry Workshop Transcript* (*justice.gov*).

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

[107] *James* v. *Tyson Foods, Inc.,* 292 P.3d 10 (Okla., 2012).

or contracts with third parties. Impeding or obstructing a covered producer's attempts to sell his or her farm or ability to contract with a third party as a result of his or her participation in certain activities hinders a covered producer's ability to freely participate in the market. AMS believes that punishing covered producers or denying them opportunities afforded to other covered producers because they engaged in certain activities is an unjustly discriminatory practice. Not only do retaliatory practices harm individual covered producers; recurrent instances and patterns of retaliation erode market integrity and discourage fairness and competition in the livestock and poultry markets.

The specific examples of retaliatory practices listed in the proposed regulation are not meant to be exhaustive; other retaliatory actions with an adverse impact on covered producers would be prohibited as well. When investigating complaints of retaliatory practices that do not conform to one of these examples, AMS would, as it has in the past, continue to use its expertise to determine whether a regulated entity's action has an adverse impact on the covered producer.

G. Bases for Protected Activities—Proposed § 201.304(b)

AMS has identified three categories of producer activities that we propose to be protected due to concerns about retaliatory behavior from packers, live poultry dealers, and swine contractors. Starting with the recognition that these activities are related to the business of being a producer or grower or involvement in that sectoral or geographic community, the criteria used to establish the three categories—consistent with the Act's purpose to safeguard farmers and ranchers against receiving less than the true market value of their livestock [108]—include the extent to which the activities are supported under existing legal doctrine and the activities' potential to mitigate market power abuses or enhance economic efficiency. The following sections discuss three categories of protected activities: (i) assertion of rights, (ii) associational participation, and (iii) lawful communication, in the context of the criteria.

i. Assertion of Rights

The basis of rights in this context is two-fold, including both legal rights derived under various statutes and contractual rights contained in agreements with regulated entities. Assertions of rights may be necessary to ensure that covered producers are receiving appropriate treatment in their dealings with regulated entities. Disputes relating to contract terms and legal compliance could be over differences between the buyer and seller over what constitutes mutually agreeable returns or could even be over issues extraneous to the actual product or service provided by the covered producer. Access to existing legal remedies under state and Federal law may be necessary for covered producers to effectuate their bargained-for exchange in contracting and to address their inability to make complete contracts and associated hold-up risk, which leads to under investment and less efficient market allocations. Hold-up is the risk growers face at the time of contract renewal when integrators make contract renewal dependent on further grower investments not disclosed at the time of the original agreements.[109]

Some regulated entities may prefer to limit, minimize, or otherwise eliminate producer assertions or legal and contractual rights, as they are likely associated with additional economic costs. For example, a poultry grower may seek to enforce a production contract term providing the grower with the right to five flocks annually, when the grower only received four flocks. If a regulated entity sought to punish a grower seeking enforcement of this term, the grower's risk of contract termination would likely outweigh the benefit to them of contract enforcement, and thereby undermine their contract, from the grower's perspective. On the other hand, the regulated entity's cost of breaching or terminating the agreement may be lower than their cost of performance under the contract. Systemic conduct of this type would be an abuse of market power and result in reduced allocative efficiency. Attempts to limit, deter, or curtail producers' assertions of rights mitigates or removes a primary producer tool for proper enforcement of their rights.

ii. Associational Participation

While individual producers and growers operate at a tremendous informational deficit compared to the larger sophisticated packer operations, producer and grower organizations and associations can mitigate incomplete and asymmetric information frictions in the market. Producer and grower organizations may provide individual covered producers the opportunity to counter other market power imbalances that exist in the livestock and poultry industries. Associational participation is connected to the provision of the product or service of growing poultry or raising livestock and can serve to improve producer productivity. Agriculture associations and organizations have historically been favored under Federal [110] and state laws and exempted from certain types of Federal antitrust violations under the Capper-Volstead Act.[111] By narrowing the asymmetrical information gap and creating other benefits, associations can enhance production and allocative efficiencies.

Growers have expressed concern that associations and organizations have repeatedly been targets of retaliatory behavior, and in some instances, USDA and DOJ have intervened under the P&S Act. In the 1960s, poultry growers in Arkansas and Mississippi joined organizations to try to advance their interests and protections in their contracts with poultry companies. The poultry companies with which they had contracts engaged in harassment, threats, intimidation, and retaliation against the associations and the growers that joined them. A USDA Administrative Law Judge held that the poultry companies' conduct was a violation of the P&S Act and ordered the companies to cease and desist from their unlawful actions and reinstate the growers who were retaliated against.[112]

In 1989, a company operating a poultry slaughtering complex in northern Florida, terminated its contract with a poultry grower who was the president of a poultry growers' association. The U.S. District Court issued an injunction against the company, finding that it acted to hamper legal action by the growers' association and to discourage other growers from presenting grievances to

[108] *Stafford* v. *Wallace,* 258 U.S. 495 (1922).

[109] Vukina, Tom, and Porametr Leegomonchai. ''Oligopsony Power, Asset Specificity, and Hold-Up: Evidence from the Broiler Industry.'' *American Journal of Agricultural Economics* 88 (2006).

[110] *See* 7 U.S.C. 2301; 7 U.S.C. 291. The Agriculture Fair Practices Act prevents agricultural handlers from discrimination and coercion against individuals who belong to cooperatives. Among other things, this statute prohibits handlers from undermining a cooperative's ordinary operations by either bribing members of the cooperative or making false reports about the cooperative's operations.

[111] For example, under Missouri's Nonprofit Cooperative Marketing Law, RSMo 1939 section 14362, a nonprofit cooperative is exempt from a number of taxes (including sales tax), and only pay an annual fee of ten dollars.

[112] *See In re: Arkansas Valley Industries, Inc., Ralston Purina Company, and Tyson's Foods, Inc.,* 27 Ag. Dec. 84 (January 23, 1968), and *In Re: Curtis Davis, Leon Davis, and Moody Davis d/b/a Pelahatchie Poultry Company,* 28 Ag. Dec. 406 (April 3, 1969).

governmental authorities. USDA and DOJ filed a lawsuit,along with poultry growers, to enjoin the company's actions as constituting an unfair, unjustly discriminatory, and deceptive practice and device, and an undue and unreasonable prejudice and disadvantage, in violation of the P&S Act.[113] The Court agreed and also determined that the company's actions would constitute obstruction of justice, extortion, mail fraud, and wire fraud in furtherance of a pattern of racketeering activity.

In these cases, courts determined that attempts to limit, deter, or curtail associational participation limits lawful information exchanges and prevents or dilutes the potential for covered producers to engage in pro-competitive collaboration. This proposed regulation seeks to codify this line of analysis, which has arisen under direct enforcement of the statutory terms, and in the face of more recent court decisions involving private litigation, to provide clarity to market participants regarding USDA enforcement priorities going forward.[114]

iii. Lawful Communications

Under this proposed rule, covered producer communications would include any lawful communications with government agencies or other persons for the purpose of improving the production or marketing of livestock or poultry, exploring a possible business relationship, or supporting proceedings under the Act against a regulated entity. Broadly, these types of communication improve transparency, facilitate compliance with and enforcement of relevant laws and regulations, and can serve to mitigate market power abuse and enhance production and allocative efficiencies, as well as protect market integrity.

Communications With Government Agencies and Communications Related to Proceedings Under the Act

Related to ''assertions of rights,'' covered producers seeking the enforcement of a regulatory scheme designed to benefit them will likely need to communicate with government representatives. This communication is only incidental to the product or service provided to the regulated entity, and communication with government representatives serves numerous public policy interests. Abuses of market power to restrict communication related to government compliance programs would systematically result in deprivation of legal rights, losses in income or welfare for producers, and costs to markets and society.[115] Covered producers have expressed concerns regarding their communications with government agencies and support for government actions. For example: a cattle producer believes he has been the victim of weight fraud by a regulated entity, but as a producer with limited alternative outlets for sale of his cattle, the producer may be hesitant to report the fraud to USDA or other authorities for fear the regulated entity will refuse to engage in future business.

Communications for the Purpose of Improving Production/Marketing or Exploring a Business Relationship

As with communications related to enforcement, communications for the purpose of improving production or marketing or exploring business relationships aid covered producers in obtaining fair market value for their livestock and poultry. Protecting such communications would protect the producer's ability to obtain help from experts and professionals unaffiliated with the regulated entity. In addition, covered producers would be able to explore business opportunities without fear of reprisal from firms with which they currently do business. Communications of this type can improve production efficiency and price discovery mechanisms.

Retaliatory actions can also result from a blend of protected activities. In *Philson* v. *Cold Creek Farms, Inc.,* turkey growers alleged in part that the poultry company provided them with lower quality poults than it provided to other growers, and that the company's motivation for doing that was to punish and discourage growers from voicing their complaints (lawful communication) about the company's practices. Some of the turkey growers also alleged that their poultry contracts were terminated in retaliation for their objections to the poultry company's weighing and computing practices (assertion of rights). The Court noted that ''[s]uch a retaliatory act is properly challenged under the PSA as it adversely affects competition and could be considered unfair, unjustly discriminatory or deceptive.''[116] Here, we see retaliation related to two categories of protected activities.

H. Delineation of Protected Activities

Paragraphs (b)(2)(i) through (vi) of proposed § 201.304 list activities that would be protected. Regulated entities would be prohibited from retaliating against covered producers due to the covered producer's participation in these protected activities. AMS has determined that a covered producer's ability to freely participate in these activities without fear of retaliation is essential to promoting fair and competitive markets in the livestock and poultry industries. Many of these activities also represent activities for which covered producers have experienced or expressed fear of retaliation.

Specifically, proposed paragraph (b)(2)(i) would protect a covered producer's ability to communicate with a government agency regarding the production of poultry or livestock, or to petition for redress of grievances before a court, legislature, or government agency. A covered producer's ability to communicate with a government agency is an essential tool for ensuring that a covered producer's rights are protected. Likewise, a covered producer must be able to freely petition for the redress of grievances for the protections afforded to covered producers by laws and regulations to have their intended effect.

Proposed paragraph (b)(2)(ii) would protect a covered producer's ability to assert any of the rights granted under the Act or the regulations in 9 CFR part 201, or to assert rights afforded by their contact. These rights include, for example, growers' rights to view the weighing of flocks, which is legally protected but which growers have complained is not practically enforceable. Although these rights are ostensibly protected by laws, regulations, or legal contracts, they lose their efficacy if covered producers suffer repercussions for asserting them.

Proposed paragraph (b)(2)(iii) would protect a covered producer's ability to assert the right to formor joinaproducer or grower association or organization, or to collectively process, prepare for market, handle, or market livestock or poultry.An assertion of rights in this context may involve expressing interest

[113] *Baldree* v. *Cargill, Inc.* and *United States* v. *Cargill, Inc., et al.,* 758 F.Supp.704 (M.D.Fla. 1990)

[114] See, *e.g., Terry* v. *Tyson Farms Inc.* 604 F.3d 272, 275 (6th Cir. 2009). On these line of cases, see also Michael Kades, ''Protecting Livestock Producers and Chicken Growers,'' *Washington Center for Equitable Growth* (May 5, 2022), available at *https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/.*

[115] Heese, Jonas, and Gerardo Pérez-Cavazos. ''The effect of retaliation costs on employee whistleblowing.'' *Journal of Accounting and Economics* 71, no. 2–3 (2021): 101385. European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, Rossi, L., McGuinn, J., Fernandes, M., *Estimating the economic benefits of whistleblower protection in public procurement: final report,* Publications Office, 2017, *https://data.europa.eu/doi/10.2873/125033* (last accessed Aug. 2022).

[116] *Philson* v. *Cold Creek Farms, Inc.,* 947 F. Supp. 197 at 202 (E.D.N.C. 1996).

or intent to engage in these activities or engaging in these activities. Associations and organizations provide a means for covered producers to share information regarding the production of poultry and livestock, to potentially uncover recurrent problematic practices in the industry, and to potentially organize to seek redress of grievances, among other benefits. Collectively processing, preparing for market, handling, or marketing livestock or poultry affords covered producers the opportunity to combine their resources to potentially counteract market imbalances. AMS believes that retaliating against producers for engaging in these activities hinders the free flow of information and hampers producers' ability to fairly compete in the market.

Proposed paragraph (b)(2)(iv) would protect a covered producer's ability to communicate or cooperate with a person for the purposes of improving production or marketing of livestock or poultry. Such communication may include, for example, communication with extension programs or with independent veterinarians and animal health experts.

Proposed paragraph (b)(2)(v) would protect a covered producer's ability to communicate or negotiate with a regulated entity for the purposes of exploring a business relationship. A covered producer may want to seek information from a regulated entity with which they do not currently have a business relationship regarding the possibility of a future business relationship, such as entering into a contract. Protecting this activity would allow covered producers to freely compare potential business relationships and choose between several regulated entities, encouraging competition.

Finally, proposed paragraph (b)(2)(vi) would protect a covered producer's ability to support or participate as a witness in any proceeding under the Act or a proceeding that relates to an alleged violation of law by a regulated entity. Owing to the close-knit and concentrated markets in which covered producers operate, protecting some covered producers as witnesses may enable *other* covered producers to effectuate their rights under the Act and related laws. Without such protections, enforcement of the Act may be frustrated overall.

I. Recordkeeping

To help lessen these threats of retaliation, the proposed rule contains compliance systems for monitoring and facilitating compliance and change within companies. Vital to such an effort will be AMS's ability to inspect relevant records, as they may exist, such as policies and procedures, staff training and producer information materials, data and testing, board of directors' oversight materials, and other relevant materials. AMS may utilize compliance inspections, company reports to AMS, and public analyses to benchmark industry practice and improve market standards. AMS believes that its recordkeeping approach will enable it to monitor and facilitate a regulated entity's approach to compliance at the highest levels, including the tone at the top: chief executive officers and boards of directors. The tone and compliance practices set by senior executives can be expected to play a vital role in establishing a corporate culture of compliance, which is a critical defense against legal and regulatory violations and a first step towards more inclusive market practices.

Proposed paragraph (c) would ensure appropriate recordkeeping regarding compliance. It indicates certain specific records should be kept for a period of 5 years. Specifically, regulated entities would be required to retain, to the extent that they produce them, policies and procedures, staff training materials, materials informing covered producers about reporting mechanisms and protections, compliance testing, board of directors' oversight materials, and records about the number and nature of complaints received relevant to prejudice and retaliation. AMS is proposing 5 years to provide a broader ability to monitor the evolution of compliance practices over time in this area, and to ensure that records are available for what may be complex evidentiary cases.

Recordkeeping, as described in the proposed rule, is a commonly utilized regulatory compliance and monitoring mechanism among market regulators.[117] Access to these records will assist AMS in assessing the effectiveness of the regulated entity's compliance with § 201.304. Existing gaps in both generally applicable agricultural and PSD-specific data collection make addressing widespread reports of discriminatory behavior difficult. Recordkeeping is critical if AMS is to fulfill its duties to prevent and secure enforcement against undue prejudice and unjust discrimination in the relevant agricultural sector.

J. Request for Comments on Proposed § 201.304

AMS specifically invites comments on various aspects of the proposal to prohibit undue prejudices and unjust discrimination as described above. Please fully explain all views and alternative solutions or suggestions, supplying examples and data or other information to support those views where possible. Parties who wish to comment anonymously may do so by entering ''N/A'' in the fields that would identify the commenter. While comments on any aspect of the proposed rule are welcome, AMS specifically solicits comments on the following.

Undue Prejudices and Unjust Discrimination

1. Would the regulatory protections provided by the prohibition on undue prejudices for market vulnerable individuals and cooperatives, as described above, assist those producers and growers in overcoming barriers to market access or equitable and reasonable treatment, or otherwise address prejudices or the threat thereof in the marketplace? If so, why? If not, why not?

2. With respect to undue prejudices, are the proposed prohibited bases of market vulnerable individuals and cooperatives broad enough to provide appropriate flexibility and ensure equitable market access? If not, please suggest changes.

3. Should AMS delineate specific examples of groups that are market vulnerable? If so, please provide supportive evidence regarding historical adverse treatment of such groups.

4. Should AMS delineate specific forms of prejudice, such as racial, ethnic, gender, or religious prejudices, that would apply for producers who are members of the relevant group without regard to their individual qualities?

5. Is the proposed list of undue prejudices appropriately clear and inclusive—for example, is it sufficiently clear that prejudices relating to gender include sexual orientation?

6. As an alternative or in addition to the market vulnerable individual approach, should AMS prohibit discrimination based on protected classes (*i.e.,* prohibit discrimination on the basis of race, color, national origin, religion, sex, sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political

[117] *See, e.g.,* generally, Board of Governors of the Federal Reserve System, ''Federal Trade Commission Act, Section 5: Unfair or Deceptive Acts or Practices,'' *Consumer Compliance Handbook,* available at *https://www.federalreserve.gov/boarddocs/supmanual/cch/ftca.pdf* (last accessed June 2022).

beliefs, or gender identity)? Why or why not?

7. Should prejudices be more specifically delineated in the rulemaking to cover some or all of the bases governing non-discrimination in conducted programs as discussed in the section on specific proposed bases, and specifically: race, color, national origin, religion, sex, sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or gender identity? Why or why not?

8. With respect to undue prejudices, should localities be addressed in any special way, such as localities where producers or growers are underserved or otherwise face persistent challenges of equitable and reasonable market access owing to the locality or related reasons? Please provide specific examples, if possible.

9. What specific challenges or burdens may regulated entities face in complying with the undue prejudices provisions of the proposed rule? How do they differ from existing policies, procedures, and practices of regulated entities?

10. Should AMS clarify how producers and growers demonstrate qualification for the protections as market vulnerable individuals in a local market? If so, what factors should be included?

11. Are the specific prejudicial acts specified in proposed § 201.304(a)(2) appropriate? Are there additional forms of prejudicial conduct that should be specifically delineated? If so, please identify them and provide examples of how such actions have been used to target market vulnerable individuals or cooperatives.

12. Are there different types of purchase arrangements than those generally or ordinarily offered, such as forward contracts, formula contracts, other alternative marketing agreements, or cash market purchases, which could be employed in a prejudicial manner as a class of contract or in specific circumstances? If so, please identify them and provide examples of how such actions have been used to target market vulnerable individuals or cooperatives.

13. Does the undue prejudices provision provide sufficient protection regardless of the type of business organization of the covered producer? If not, please suggest specific changes.

14. Should prejudicial discrimination and retaliation provisions be extended to all persons buying or selling meat and meat food products, including poultry, in markets subject to the Act? Why or why not?

15. Does the proposed rule appropriately enable the production of religiously compliant meats? Do any concerns turn on whether the prohibited prejudices in proposed § 201.304(a)(1) are defined to include religious bases? Please explain your views and suggest specific approaches to address any concerns.

16. Do the provisions on undue prejudice adequately address concerns regarding inequitable market access for Tribal members and Tribes? If not, what additional changes should be proposed?

17. How should AMS handle Tribal government entities that sponsor or manage regulated entities? Should AMS permit compliance with proposed § 201.304(a) be substituted for compliance with Tribal government rules, policies, or guidance governing equitable market access?

18. AMS is aware of at least one private industry program aimed at establishing preferences intended to create ''a more equitable agricultural economy''—in response to ''systemic inequality''—by partnering with Black producers.[118] Were such a program (or a similar program designed to address socially inclusive supply chains) present in livestock and poultry markets, should AMS evaluate and determine that such program is an undue preference pursuant to the criteria set forth in 9 CFR 201.211? Please explain views and offer suggestions on ways to address relevant concerns.

19. Does the proposed regulation provide appropriate protection for cooperatives, in particular as the structure and organization of cooperatives vary across livestock and poultry markets? Please explain any particular concerns that should be better addressed by the proposed regulation.

20. Prejudice and other prohibited actions the agency proposes refers to offering contract terms that are less favorable than those generally or ordinarily offered. Should the agency be more specific to include differential contract terms, such as: price terms, including any base or formula price; formulas used for premiums or discounts related to grade, yield, quality, or specific characteristics of the animals or meat; the duration of the commitment to purchase or to contract for the production of animals; transportation requirements; delivery location requirements; delivery date and time requirements; terms related to who determines date of delivery; the required number of animals to be delivered; layout periods in production contracts; financing, risk-sharing, and profit-sharing; or terms related to the companies' provision of inputs or services, grower compensation, and capital investment requirements under production contracts? Please explain why or why not, and what terms the agency could add or change.

21. Should the Agency include among the prejudices, the action of offering less favorable price terms, contract terms, and other less favorable treatment in the course of business dealings than those generally offered to similarly situated producers? Should an allowance be made for legitimate business reasons? Please explain why or why not, and what terms the Agency could add or change.

Retaliation

22. Would the regulatory protections provided by the prohibition on retaliation, as described above, assist producers and growers in avoiding unjust discrimination in the market or otherwise help them access markets, obtain meaningful and accurate price discovery, or avoid anticompetitive or unjust practices or the threats thereof? If so, why; if not, why not?

23. Are the specific acts of retaliation listed in proposed § 201.304(b)(3) appropriate? Are there additional forms of retaliatory conduct that should be specifically delineated?

24. Should prohibitions on retaliation protect producers and growers who choose not to participate in protected activities? For example, should the provision prohibit the giving of any premiums or discounts with respect to joining or not joining livestock or poultry associations?

25. Are the bases of protected activities appropriate, including their nexus to the business, industry, and community, criteria for selection, and application of those criteria? Should they be broader, narrower, or different in some way? Please explain your views.

26. Should the protected activities relating to communication and cooperation, beyond government entities, be limited to USDA extension and USDA supported (grantees and cooperators) non-profit entities? Why or why not?

27. Does the proposed anti-retaliation provision provide sufficient protection regardless of the covered producer's type of business organization? If not, please suggest specific changes.

28. Should protections for exploring a business relationship be extended to such activities with any person, or

[118] Cargill's ''Black Farmer Equity Initiative'': *https://www.cargill.com/about/black-farmer-equity-initiative* (last accessed 8/9/2022).

should they be limited, as they are in the proposal, to exploring a business relationship with a regulated entity?

29. Should the proposed list of retaliatory actions include a catch-all clause, such as ''offering unfavorable contract terms that otherwise effect reprisal'' or ''offering contract terms that are less favorable than those generally or ordinarily offered''? That is, is the offering of a contract term a proper subject of retaliation? If so, should we also include a non-exclusive list of contract terms that could affect reprisal, such as price terms, including any base or formula price; formulas used for premiums or discounts related to grade, yield, quality, or specific characteristics of the animals or meat; the duration of the commitment to purchase or to contract for the production of animals; transportation requirements; delivery location requirements; delivery date and time requirements; terms related to who determines date of delivery; the required number of animals to be delivered; layout periods in production contracts; financing, risk-sharing, and profit-sharing; or terms related to the companies' provision of inputs or services, grower compensation, or capital investment requirements under production contracts? Please explain why or why not, and what terms the agency could add or change.

30. What specific challenges or burdens might regulated entities face in complying with the anti-retaliation provisions of the proposed rule? How do the proposed provisions differ from existing policies, procedures, and practices of regulated entities?

Recordkeeping

31. Are the recordkeeping obligations of the proposed regulation appropriate to permit AMS to monitor regulated entities for compliance? Why or why not, and what changes, if any, should be made?

32. Should AMS require regulated entities to produce and maintain specific policies and procedures, specific compliance practices or certifications, or specific disclosures to help ensure compliance with the undue prejudices and anti-retaliation provisions of the proposed rule? Please explain why for specific items.

33. What specific challenges or burdens might regulated entities face in complying with recordkeeping duties of the proposed rule? How do they differ from existing policies, procedures, and practices of regulated entities?

III. Deceptive Practices

AMS also proposes a new § 201.306 designed to prohibit regulated entities from specified deceptive practices in contracting. Because of the power of the regulated entities over their vertical relationships, deceptions in contracting are of considerable concern.

Similar to its broad prohibition of unjustly discriminatory practices, the Act does not specifically define the ''deceptive practices'' it prohibits in sec. 202(a). The agency's interpretation of ''deceptive practices'' here relates to trends underlying the Act's passage. At the time of the Act's passage, state common law already prohibited deceptive practices, such as fraudulent inducement of contract and misattribution of the source of goods. These are not, as the Act is not, limited to deceived and injured contracting parties, but also include deceptions that directly injure competitors. Regardless, courts were cautiously expanding common law beyond misrepresentations of source to misrepresentations concerning other characteristics or qualities of the seller's goods.[119] Likewise, in 1920—shortly before the passage of the Act—Congress passed a Federal trademark law that prohibited intentional deception regarding the origin of goods. Public Law 66–163, 41 Stat. 534 (1920). So, in 1921, the Act was one of the earliest Federal prohibitions against deceptive practices. It did not remain so for long.

Less than a decade after the passage of the Act, in 1930, the Perishable Agricultural Commodities Act followed with its prohibitions against ''deceptive practices in connection with the weighing, counting, or in any way determining the quantity of any perishable agricultural commodity received, bought, sold, shipped, or handled in interstate or foreign commerce.'' See 7 U.S.C. 499b. In 1938, the Federal Trade Commission Act was amended to declare unlawful ''deceptive acts or practices in or affecting commerce.'' Public Law 75–447, 52 Stat. 111 (1938). As observed in 1967, ''[d]eceptive trade practices victimize honest merchants as well as consumers, and impair rational allocation of economic resources.'' [120] The FTC has characterized deception as: involving a material representation, omission or practice that is likely to mislead a consumer acting reasonably in the circumstances.[121]

''[I]ntegrity and ethics of those engaged in marketing livestock'' is a vital concern.[122] With respect to regulating deception, the supply of meat to the American consumer depends on a market that is safe, reliable, and *honest.*[123] Protecting the market from the harms of deception starts with protecting suppliers: producers, market agencies, dealers, and packers. To achieve a market free of deceptive practices, the Secretary has established regulations and pursued administrative and Federal enforcement cases.

In the case law and through regulations, as described below, violative deceptions under the Act include false statements or omissions that occur even before contracting that prevent or mislead sellers or buyers from making an informed decision. Thus, obvious falsehoods, such as false weighing and false accounting have always been considered deceptive practices under sec. 202(a) of the Act. Another obvious falsehood, delivering checks drawn on accounts with insufficient funds—whether for livestock or meat—is also deceptive. Moreover, the Act requires honest dealing, so misleading omissions are also prohibited. Prohibited omissions include failure to tell a business partner that the regulated entity was receiving a commission from a competitor, sales tactics that omit relevant information, or failure to have the required bond. And finally, where regulated entities have close business relationships, secret payments and bribes undermine the ability of producers and consumers to rely on an honest market and are therefore deceptive.

This proposed regulation would not be the first to prohibit deception. Current Packers and Stockyards regulations require honesty in weighing (§§ 201.49, 201.71), price reporting (§ 201.53), fees (§ 201.98), and business relationships (§ 201.67). Even in the consideration of whether termination of a contract violated the Act, AMS currently considers the quality of the communication, and therefore considers its honesty. (See § 201.217.)

Producers and consumers cannot make rational decisions in a dishonest market, and honest competitors cannot compete when regulated entities deceive. For example, if one packer is paying more for livestock by weight but is also deceptively weighing livestock to lower the total value of the livestock during processing, the honest packer

[119] Restatement (Third) of Unfair Competition sec. 2 (1995), comment b.

[120] Richard F. Dole, Jr., Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act, 76 Yale L.J. 485 (1967).

[121] Federal Trade Commission, Policy Statement on Deception, 1983, available at *https://www.ftc.gov/legal-library/browse/ftc-policy-statement-deception* (last accessed Aug. 2022).

[122] *See, e.g., Midwest Farmers* v. *United States,* 64 F. Supp. 91, 95 (D. Minn. 1945).

[123] *In re: Frosty Morn Meats, Inc.,* 7 B.R. 988, 1020 (M.D. Tenn. 1980).

must compete with that deception. On the other hand, if the weight of livestock from a packer were to be regularly more favorable, due to falsely increasing the weight, honest competitors would have to respond to a reputation that their weights are lower. A packer that fails to pay for meat promptly is not only deceiving the seller—by financing their operations using the seller's goods—but is also forcing honest meat packers to compete without financing their operations in this deceptive manner.

Proposed § 201.306—Deceptive practices—would name practices and devices that AMS considers deceptive in violation of sec. 202(a) of the Act, which prohibits deceptive practices and devices by packers, swine contractors, and live poultry dealers. AMS intends that this proposed regulation would address broad areas of specific concern, but it may not exhaustively identify all deceptive practices that would violate sec. 202(a) of the Act.

As outlined extensively in the separately proposed transparency rule, poultry growers face incomplete information regarding contracting and tournaments and have complained of inaccurate information influencing their decisions to be growers or make additional capital investments. While AMS has separately proposed specific disclosures relating to transparency in poultry growing contracts and tournaments in another proposed rule, Transparency in Poultry Growing Contracting and Tournaments, 87 FR 34980 (June 8, 2022), the provisions of this proposed rule are broader. These provisions also encompass poultry growing contracting and tournaments; for example, this proposed rule would address communications by the live poultry dealer and its agents in the context of contracting or tournaments. Further, this rulemaking addresses deception in hog and cattle markets, which is not addressed in the proposed transparency rule.

The provisions of this proposed rule would also focus on general circumstances that may give rise to the provision of false or misleading information in the production or growing of poultry or livestock. Such circumstances could include where a live poultry dealer's poultry nutrition adviser provides misleading advice to a contract grower, where a swine production contract provides false information regarding manure compliance procedures, or where a packer provides false or misleading information about cash market trading in livestock.

These proposed provisions respond, in part, to the range of complaints lodged with USDA, Congress, and the media over the years regarding inaccurate, incomplete, or otherwise misleading representations or pretexts that affect the decision-making or access to markets by producers and growers of livestock and poultry. For example, packers and industry representatives have routinely indicated that producers may choose the form of pricing mechanism for their transactions. However, as cash-negotiated markets have declined, producers have increasingly complained to USDA that they are not provided such a choice, and in fact are commonly given a take-it-or-leave-it offer to buy their cattle off of a pricing formula provided by the company. Producers have complained that they have been told their cattle are not of sufficiently high quality or that formula market arrangements are necessary to incentivize such quality, but cattle procured under those marketing arrangements may not in fact be of any higher quality. This raises legitimate concerns that certain refusals to deal are based upon pretext or deception, which hinders the free flow of livestock from producer to consumer. If producers have been misled, they are hindered from organizing their operations so that they can correctly identify competitor packers that will accept their livestock or otherwise contract with them.

Poultry growers have complained over the years regarding unfavorable provision of inputs made to certain producers despite statements by live poultry dealers that there are no differences in treatment. Growers have also complained of terminations, suspensions, or reductions in flocks on the basis of pretext, such as animal welfare contractual violations, when in fact other reasons may exist for the termination, including but not limited to the discrimination and retaliation noted above, or other unreasonable bases such as a preference for family or friends of the local agent of a live poultry dealer or for a poultry grower connected to a senior executive of a live poultry dealer.[124] If misleading information in connection with a termination is provided to a bank that forecloses on the grower, this may be actionable as well by the grower who was the victim of the deception. While this would not necessarily be an undue preference or unjust discrimination, it would be covered by this deception rulemaking. Therefore, the proposed rule supports market integrity more broadly by ensuring that producers and growers can make decisions and operate in the market based on complete and accurate information.

Hog producers and growers, as well as cattle producers, have also highlighted concerns regarding preferential market access for company-owned or controlled livestock. Again, while this part of the proposed rule would not prohibit undue preferences, this deception rulemaking would establish a clearer duty on regulated entities regarding honesty and market integrity in the relationships with covered producers, including with respect to statements made regarding market access and other aspects of contracting.

The high levels of oligopsony in the local marketplaces in which many producers and growers operate today, and the extensive reliance on vertical integration, forward contracting, and long-term marking agreements, mean that producers and growers are more vulnerable to being excluded from, or to suffering adverse pricing in, the marketplace by these deceptions in contracting, if and where they may arise.

More than 100 years of history illustrate the types of conduct prohibited as deceptive by the Act, which provide a foundation for some of the specific deceptions that this proposed rule addresses. The FTC employed a similar approach when developing its policy on deceptive practices. Recognizing that there was no single definitive statement of the FTC's authority on ''deceptive acts or practices,'' it reviewed its own history of decided cases to identify the most important principles of general applicability and provide a greater sense of certainty as to how the concept of deception will be applied. The FTC's approach informs AMS in identifying and prohibiting deceptive practices. Past cases indicate that USDA's approach, generally, is to view representations, omissions, and practices from the perspective of a reasonable party receiving them and determine if those deceptions affect the conduct or decision of the recipient. As the court explained in *Gerace* v. *Utica Veal Co.,* 580 F. Supp. 1465, 1469 (N.D.N.Y. 1984), regulated entities are liable to anyone for the damages they sustain in consequence of an entity's deceptive practice, even if they are not a direct party to the transaction.

AMS believes that a substantial arc of deceptive practices in the marketplace that this specific rulemaking intends to prohibit can be organized and summarized as deceptions in contract formation, contract operation, contract cancellation, and refusals to contract.

[124] *Wheeler* v. *Pilgrim's Pride,* 536 F.3d 455 (5th Cir. 2008).

Deceptions in the contracting process present harms that cause the type of injury the Act was designed to prevent. This proposed regulation addresses these four types of deceptions.

A. Scope of Deceptive Practices Regulated

Proposed § 201.306(a), Deceptive practices, sets forth the scope of the prohibition of deceptive practices in the rest of § 201.306. The P&S Act limits the Secretary's jurisdiction to the regulated entities' operations subject to the P&S Act. Thus, the proposed regulation's scope relates to those operations with respect to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry.

B. Deceptive Practices in the Offering or Formation of Contract

Proposed § 201.306(b) would prohibit a regulated entity from making or modifying a contract when the entity employs a pretext, false or misleading statement, or fails to state a material fact necessary to make the statement made not otherwise false or misleading. Therefore, this proposed regulation is intended to prevent deception in contract offering or formation.

Deception in the offering or formation of a contract has taken many forms through the Act's history. One example is false advertising, specifically bait and switch advertising, which occurs through advertising on price when, in fact, the customer has to pay a higher price at the point of sale. This practice is illegal under both the P&S Act and the FTC Act. In the case under the P&S Act, *In re: Larry W. Peterman, d/b/a Meat Masters,* 42 Agric. Dec. 1848 (1983), *aff'd Peterman* v. *United States Dep't of Agric,* 770 F.2d 888 (10th Cir. 1985), the packer advertised meat at a very attractive low price. Customers responded to the advertised price, only to be subjected to deceptive sales tactics, causing them to purchase higher priced meats. The advertised meat was ''so fat [the customer] could see very little red muscle tissue in it,'' causing the customer to purchase primal cuts rather than what they intended to buy because the packer represented that the fat loss and yield would be a better option. After their purchase, customers determined that they had paid significantly more than they were led to believe, and they could have paid much less even at retail grocery stores.

Under certain circumstances, failures to disclose information are also deceptive. The Act's purposes include protecting farmers and ranchers from receiving less than fair market value for their livestock and protecting consumers from unfair practices. *Solomon Valley Feedlot, Inc.* v. *Butz,* 557 F.2d 717, 718 (10th Cir. 1977). ''Among the means employed to accomplish this purpose is the use of surety bonds.'' *Id.* at 720. Sellers of livestock are entitled to the protection of a packer, dealer, or market agency's surety bond securing its obligations. Failure to maintain an adequate bond is therefore a deceptive practice.[125] When a packer fails to maintain a bond, the seller does not know that the sale is unsecured, and therefore the seller is at greater risk of nonpayment.

Deception in contract formation is not limited to false statements and omissions with respect to regulatory requirements. The Act includes affirmative duties to be truthful. For instance, a court has recognized that the P&S Act prohibits a regulated entity from negotiating using published prices it knows are inaccurate because using incorrect prices deceives the livestock seller. See *Schumacher* v. *Tyson Fresh Meats, Inc.,* 434 F.Supp.2d 748 (Dist. S.D. 2006). In *Schumacher,* the packer failed to disclose inaccurately reported boxed beef prices when it negotiated the purchase of cattle on the basis of those prices. Because the Act prohibits deceptive practices with respect to the price paid to the producer, the court found that those deceptive practices do not need to adversely affect competition to violate the Act. *Id.*

Likewise, *Bruhn's Freezer Meats of Chicago, Inc.* v. *U.S. Dept. of Agriculture,* 438 F.2d 1332 (8th Cir. 1971), affirmed that a variety of deceptions violate the Act, including short weighing, misrepresenting grades and cuts of meat, and false advertising in the selling of meat to customers. The agency's proposed regulation with respect to deceptive practices in contract formation prohibits all these types of deception.

More importantly, AMS is concerned that transparency in market transactions—reported prices, offered contracts, and long-term contracts—is inhibited by potentially deceptive practices and statements. AMS has long received complaints regarding statements that entice producers to contract to their eventual detriment. This provision would make clear that statements at the time of contract formation will be evaluated to determine if there is deception in order to prevent injury to the producers in their inception.

C. Deceptive Practices in the Operation of Contract

Proposed § 201.306(c) would prohibit a regulated entity from performing under or enforcing a contract by employing a pretext, false or misleading statement, or omission of a material fact necessary to make the statement not false or misleading.

Deceptive practices take many forms throughout the operation of a contract. USDA and the courts have recognized these forms in a variety of administrative and Federal enforcement actions, including false weighing, false or deceptive grading (including failure to disclose the formulas for determining payment), commercial bribery, and failing to pay for purchases.

False or inaccurate weighing has long been recognized as deceptive under secs. 202(a) and 312 of the Act. See *Bruhn's Freezer Meats,* 438 F.3d 1337 (8th Cir. 1971); *Solomon Valley Feedlot,* 557 F.2d at 717; *Gerace* v. *Utica Veal Co.,* 580 F. Supp. 1465, 1470 (N.D.N.Y. 1984). False weighing can occur in various ways. In some cases, the regulated entity records inaccurate weights using an improperly calibrated scale. In other cases, a regulated entity uses the scale improperly. Among examples where packers have been found to have committed this deceptive practice, in *in re: DuQuoin Packing Company, Decatur Packing Division and William S. Martin,* 41 Agric. Dec. 1367 (1982), a weigher committed a deceptive practice when he failed to properly adjust an otherwise properly working scale to a zero balance prior to weighing, which caused the scale to register less than actual weights. Weighing is ''a serious matter and one of paramount importance to the farmer, industry and consumers.'' *In re Trenton Livestock, Inc.,* 33 Agric. Dec. 499, 510 *aff'd* 510 F.2d 966 (4th Cir. 1975). Even if a regulated entity does not intentionally set out to deceive with respect to the weight of livestock, the Act does not require proof of a particularized intent. *Parchman* v. *U.S. Dep't of Agric.,* 852 F.2d 858, 864 (6th Cir. 1988) (interpreting sec. 312 of the Act). Short weighing alone is enough to be an unfair and deceptive practice under the Act, without regard to the competitive injury the short weighing causes. *Garace,* 580 F. Supp. at 1470.

False or inaccurate grading has the same effect as false weighing because deceptive grading prevents the seller from receiving the full value of their livestock or poultry. USDA's Judicial Officer found a deceptive practice when

[125] *United States* v. *Hulings,* 484 F. Supp. 562, 567 (D. Kan. 1980). *See also In Re: Mid-W. Veal Distributors,* 43 Agric. Dec. 1124, 1139–40 (1984), *citing In re: Norwich Veal and Beef, Inc.,* 38 Agric. Dec. 214 (1979), *In Re: Raskin Packing Co.,* 37 Agric. Dec. 1890, 1894–6 (1978).

a packer failed to inform hog producers of a change in the formula it used to estimate lean percent in hogs. Lean percent was one factor used in determining price when the packer purchased hogs on a carcass merit basis. USDA determined that nearly twenty thousand lots of hogs were purchased under the changed formula without notice to producers, resulting in payment of $1.8 million less than they would have received under the previous formula. *In re: Excel Corporation,* 63 Agric. Dec. 317 (2004), aff'd *Excel Corp.* v. *United States Dep't of Agric.,* 397 F.3d 1285, 1293 (10th Cir. 2005). This type of deceptive practice harms honest competitors because ''[h]ad hog producers been alerted to the change, they could have shopped their hogs to other packers.'' 397 F.3d at 1291.

Paying ''kickbacks'' and commercial bribery may occur both in the contract formation and during the operation of a contract. Whether the payment comes before or after the contract was formed, those payments are a deceptive practice. For example, in *Holiday Food Serv., Inc.* v. *Dep't of Agric.,* 820 F.2d 1103, 1105 (9th Cir. 1987), a packer paid the purchasing agents of hotels and restaurants ''kickbacks'' after they purchased meats for their principals. And, in *Nat'l Beef Packing Co.* v. *Sec'y of Agric.,* 605 F.2d 1167, 1168 (10th Cir. 1979), not only was the commercial bribery a violation of the Act, but the court also agreed with the Secretary that a packer's executives had a positive duty to inquire into the payment of commissions that served as bribes. *Id.*

Payment violations can be deceptive, especially issuance of insufficient funds checks. *E.g. In Re: Mid-W. Veal Distributors, d/b/a Nagle Packing Co., & Milton Nagle,* 43 Agric. Dec. 1124, 1140 (1984). Failing to pay for meat has also been found to be deceptive in numerous instances.[126] Under the similar language of sec. 312 of the Act, the Eighth Circuit explained that timely payment was unfair and deceptive even prior to the enactment of sec. 409 of the Act: ''Timely payment in a livestock purchase prevents the seller from being forced, in effect, to finance the transaction.'' *Van Wyk* v. *Bergland,* 570 F.2d 701, 704 (8th Cir. 1978).

The live poultry dealer's honesty is vitally important to poultry growers. Because much of the payment system relies on information that is wholly within the live poultry dealer's control, deception is particularly dangerous. The Department has received complaints regarding statements made during the operation of the contract that led producers to believe that specific terms would not be enforced, only to see the live poultry dealer implement policy changes that led to immediate changes to contracting requirements. These sorts of communications may reach the level of unlawful deception under the P&S Act, which reaches beyond common-law fraud. Likewise, for the market to function, livestock producers must be able to reasonably rely on a packer's calculation of value, and they must be able to rely on statements and accountings the packers deliver.

D. Deceptive Practices in the Termination of Contract

Proposed § 201.306(d) would prohibit regulated entities from terminating a contractortaking any otheradverse action against a covered producer by employing pretext, false or misleading statements, or omission to state a material fact necessary to make the statement not false or misleading.

AMS notes, for example, that poultry growers complain of companies terminating their broiler production contracts based on pretext or for a deceptive reason. Contract termination puts the grower at severe risk of significant economic loss. A production broiler house often has significant long-term financial obligations. The potential loss includes not only the loss of production income, but construction is often financed with mortgages on the grower's farm or family home. Pretextual cancellation may make even the sale or transfer of the broiler production house impossible because purchasers may be unable to determine if the broiler houses have value.

E. Deceptive Practices in Refusal To Deal

Proposed § 201.306(e) would prohibit the deceptive practice of providing false or misleading information to a producer, grower, or association of producers or growers concerning the regulated entity's refusal to contract. AMS proposes this ban to meet producer concerns that packers use pretext to deny access to certain livestock transactions and pretextual refusals to renew growing contracts. This proposal also supports the statutory prohibition in sec. 202(a) of the Act of unjust discrimination and the sec. 202(b) prohibition of undue preferences and prejudices. A refusal to contract may be lawful or unlawful. So, while an ordinary refusal to deal is not a violation of the Act, some refusals have unlawful purposes or effects. Group boycott, for example, has unlawful purpose and effect. See *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959). Group boycott—or blanket refusal to deal—forces the boycotted party to adopt conforming trade practices, or they must quit the business entirely. *Id.* Under the P&S Act, unlawful practices have included attempts to force livestock markets to adopt terms that were favorable to the packer. See *De Jong Packing Co.* v. *U.S. Dep't of Agric.,* 618 F.2d 1329, 1336 (9th Cir. 1980). Packers may not ''exert a coercive influence upon the trade practices of third parties in order to exact more favorable terms than they could otherwise obtain.'' *Id.* Moreover, refusal to deal was firmly on the minds of the legislature when the Act passed. 61 Cong. Rec. 1861 (1921) (explaining that packers refused to bid on a load of cattle in more than one market, thereby preventing sellers from re-consigning livestock to different markets). Deceptions related to these refusals to deal may conceal other unlawful practices designed to pose barriers to entry for farmers that may wish to enter these markets.

A regulated entity that refused to contract on unlawful grounds may well choose to hide their motives with misleading or deceptive statements. This proposed regulation would recognize misleading statements in a refusal to enter into a contract as ''deceptive'' within the meaning of the Act.

F. Request for Comments on Proposed § 201.306

AMS invites comment on (1) the proposed addition of new § 201.306 to the regulations and (2) the specific proposed prohibitions on deceptive practices. Parties who wish to comment anonymously may do so by entering ''N/A'' in the fields that would identify the commenter. While comments on any aspect of the proposed new section are welcome, AMS specifically solicits comments on the following:

1. Do the proposed regulations accurately and adequately identify recurrent deceptive practices in the livestock and poultry industries? Please

[126] *See, e.g. Milton Abeles, Inc.* v. *Creekstone Farms Premium Beef, LLC,* No. 06–CV–3893(JFB)(AKT), 2009 WL 875553, at *19 (E.D.N.Y. Mar. 30, 2009) (*citing Liberty Mutual Ins. Co.* v. *Bankers Trust Co.,* 758 F.Supp. 890, 896 n. 7 (S.D.N.Y.1991)*; In re FLA Packing & Provision, Inc., and C. Elliot Kane,* P & S Docket No. D–95–0062, 1997 WL 809036, at *6 n. 1 (1997); *In re: Central Packing Co., Inc. d/b/a Plat–Central Food Services Co., Inc., a/k/a Plat–Central Food Service Supply Co., and Albert Brust, an individual,* 48 Agric. Dec. 290, 297–99 (1989)*); see also In Re: Ampex Meats Corp. & Laurence B. Greenburg.,* 47 Agric. Dec. 1123, 1125 (1988) (*citing In Re: Rotches Pork Packers, Inc. & David A. Rotches.,* 46 Agric. Dec. 573, 579–80 (U.S.D.A. Apr. 13, 1987) *In Re: George Ash,* 22 Agric. Dec. 889 (1963); *In re Goldring Packing Co.,* 21 Agric. Dec. 26 (1962); *In Re: Eastern Meats, Inc.,* 21 Agric. Dec. 580 134 (1962)).

explain why or why not and explain in detail any areas of deception that may be missing.

2. Are there recurrent deceptive practices that are not adequately addressed by these regulations? Please discuss.

3. Should deception in contract refusal be governed by the categorical approach as proposed, or should it be governed by a single statement setting out one standard for contract formation, performance, and termination? Why or why not?

4. Should deception be structured instead around prohibiting the deceptive pretext, statement, or omission, rather than prohibiting the contractual activity based on the deceptive statement or omission? Why or why not?

5. Do the prohibitions against ''employing'' certain false or misleading statements, pretexts, and omissions in the formation, operation, etc., of a contract appropriately capture the importance or effect of the misleading statement (its materiality or relevance to the producer or the formation/operation/etc., of the contract)? Or should a regulated entity be prohibited from employing any pretext, false or misleading statement, or omission of material facts necessary to make a statement not false or misleading, *in connection with* making, enforcing, or cancelling contact? In either case, if not, how could AMS better approach this issue, including using elements or defenses?

6. Are there other elements, such as the reasonableness of the recipient, that AMS should explicitly consider in a rule on deception? Why or why not?

7. What specific challenges or burdens might regulated entities face in complying with the deceptive practices provisions of the proposed rule? How do they differ from existing policies, procedures, and practices of regulated entities?

8. Should AMS propose specific recordkeeping provisions relating to these deceptive practices? If so, what should they include?

9. Should AMS require that all contracts with respect to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry be in writing? Why or why not?

10. Do the provisions on deception provide sufficiently clarity regarding deception with respect to a regulated entity's course of business dealings generally or ordinarily offered? If not, how might such a provision be structured?

11. Should a failure to continue to buy in the cash market, following a regular or dependable pattern or practice of such buying, be treated for the purposes of this proposed rule as more similar to termination of a contract, rather than as refusal to deal? Why or why not?

IV. Severability

AMS proposes to add a new § 201.390 to 9 CFR part 201 of the Packers and Stockyards regulations. This provision would ensure that if any provision of part 201 was declared invalid, or if the applicability of any of its provisions to any person or circumstances was held invalid, the validity of the remaining provisions of part 201 or their applicability to other persons or circumstances would not be affected. Such a provision is typical in AMS regulations that may cover several different topics and is proposed for addition here as a matter of housekeeping.

V. Required Regulatory Analyses

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. Chapter 35), AMS has requested Office of Management and Budget (OMB) approval of the information collection and recordkeeping requirement of proposed § 201.304(c). AMS invites comments on this new information collection. All comments received on this information collection will be summarized and included in the final request for OMB approval. Below is detailed information on the burdens of these new information collection and recordkeeping requirements. A similar amount of detail can be found in the Regulatory Impact Analysis (RIA), as the recordkeeping costs apply to both the PRA and the RIA. Comments on this section will be considered in the final rule analysis.

OMB Number: 0581–NEW.

Expiration Date of Approval: This is a NEW collection.

Type of Request: Approval of a New Information Collection.

Abstract: This rulemaking has been determined to be significant for the purposes of Executive Order (E.O.) 12866 and, therefore, has been accordingly reviewed by the Office of Management and Budget. As a required part of the regulatory process, AMS prepared an economic analysis of the costs and benefits of the proposed §§ 201.302, 201.304, 201.306, and 201.390.

In the late 1910s, Congress was concerned about the monopoly power wielded by the five large meatpackers and the consequent constraint to competition and diminished economic opportunities for rural communities, agricultural producers and small food manufacturers.[127] Congress believed the existing the Sherman Act and Federal Trade Commission Act was inadequate in its protections of agricultural producers.[128] Consequently, Congress expanded and furthered its protections of farmers and ranchers by enacting the 1921 Packers and Stockyards Act and giving the Secretary of Agriculture authority to regulate the meat packing industry.

Proposed § 201.304(a) ensures full and non-discriminatory market access for producers who would be considered vulnerable to prejudice, disadvantage, or exclusion from the marketplace. The provision would also prohibit undue prejudices and disadvantages based upon the status of the covered producer as a cooperative. Proposed § 201.304(b) would address retaliation by setting out protected activities that a covered producer may engage in but that a regulated entity may not use as grounds for unjust discrimination or undue prejudice.

Proposed § 201.304(c)(1) would require live poultry dealers, swine contractors, and packers to incur recordkeeping costs by requiring regulated entities to retain all relevant records relating to their compliance with proposed § 201.304(a) and (b) for no less than 5 years. AMS is proposing this information collection and recordkeeping requirement to assist in evaluating compliance with proposed § 201.304 and to facilitate investigations and enforcements based on producer and grower complaints. Costs of recordkeeping include maintaining and updating records by regulated entities as will be discussed and quantified below.

Proposed § 201.304(c)(2) lists records that may be relevant and that must be retained if they exist. Specifically, regulated entities would be required to retain records relating to policies and procedures, staff training materials, materials informing covered producers regarding reporting mechanisms and protections, compliance testing, board of directors' oversight materials, and the number and nature of complaints received relevant to proposed § 201.304.

The information collection and recordkeeping requirement in this

[127] *See* 61 Cong. Rec. 1860 (1921) (House Floor Debate).

[128] *See,* Shively, J. and Roberts, J., ''Competition Under the Packers and Stockyards Act: What Now?'' 15 Drake Journal of Agricultural Law 419, 422–423 (2010); and Current Legislation, 22 Columbia Law Review 68, 69 (1922).

request may be valuable in reducing instances of undue prejudices, discrimination, and retaliation in the livestock and poultry industries, in accordance with the purposes of the P&S Act, 1921. The information collection request and recordkeeping requirement may also bolster AMS's ability to review the records of regulated entities during compliance reviews and investigations based on complaints of undue prejudices, discrimination, and retaliation in the livestock and poultry industries.

Live Poultry Dealer, Swine Contractor, and Packer Recordkeeping Costs

Estimate of Burden: Public reporting burden for maintaining records for this information collection is estimated to average 4.25 hours per response in the first year, and 3.50 hours thereafter.

Respondents: Live poultry dealers, swine contractors, and packers

Estimated Number of Respondents: 1,026

Estimated Total Annual Burden on Respondents: 4,361 hours in the first year and 3,591 hours thereafter.

Comments: Comments are invited on: (1) Whether the proposed collection of the information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection and Recordkeeping Costs of Proposed § 201.304(c)

Costs to comply with the proposed recordkeeping are likely relatively low. Proposed § 201.304(c), requires certain specific records that, if the regulated entity maintains, should be kept for a period of five years, including policies and procedures, staff training materials, materials informing covered producers regarding reporting mechanisms and protections, compliance testing, board of directors' oversight materials, and the number and nature of unduly prejudicial or discrimination-based complaints received relevant to proposed § 201.304(a) and (b).

Costs of recordkeeping include regulated entities maintaining and updating compliance records. From the perspective of the regulated entity, recordkeeping is a direct cost. Some smaller regulated entities that currently don't maintain records, may voluntarily decide to develop formal policies, procedures, training, etc., to comply with the rulemaking and would then have records to maintain.

AMS expects the recordkeeping costs would be comprised of the time required by regulated entities to store and maintain records. AMS expects that the costs will be relatively small because some packers, live poultry dealers, and swine contractors may currently have few records concerning policies and procedures, staff training materials, materials informing covered producers regarding reporting mechanisms and protections, compliance testing, board of directors' oversight materials, and the number and nature of complaints received related to prejudicial and discriminatory treatment. Some firms might not have any records to store. Others already store the records and may have no new costs.

The amount of time required to keep records were estimated by AMS subject matter experts. These experts were economists and supervisors with many years of experience in AMS's PSD conducting investigations and compliance reviews of regulated entities. AMS used the May 2020 U.S. Bureau of Labor Statistics (BLS) Occupational Employment and Wage Statistics for the time values in this analysis.[129] BLS estimated an average hourly wage for general and operations managers in animal slaughtering and processing to be $65.84. The average hourly wage for lawyers in food manufacturing was $80.39. In applying the cost estimates, AMS marked-up the wages by 41.56 percent to account for fringe benefits.

AMS expects that recordkeeping costs would be correlated with the size of the firms. AMS ranked packers, live poultry dealers, and swine contractors by size and grouped them into quartiles, estimating more recordkeeping time for the largest entities in the first quartile than for the smallest entities in the fourth quartile. The first quartile contains the largest 25 percent of entities, and the fourth quartile contains the smallest 25 percent of entities. AMS estimated that proposed § 201.304(c) would require an average of 4.00 hours of administrative assistant time, 1.50 hours of time each from managers, attorneys, and information technology staff for packers, live poultry dealers, and swine contractors in the first quartile to setup and maintain the required records in the first year. AMS expects the packers, live poultry dealers, and swine contractors in the second quartile would require an average of 2.00 hours of administrative assistant time, 0.75 hours of time each from managers, attorneys, and information technology staff for first year costs. The third quartile would require 1.33 hours of administrative assistant time, 0.50 hours of time each from managers, attorneys, and information technology staff for first year costs, and the fourth quartile would require 0.67 hours of administrative assistant time, 0.25 hours of time each from managers, attorneys, and information technology staff.

AMS also expects that packers, live poultry dealers, and swine contractors will incur continuing recordkeeping costs in each successive year. AMS estimated that proposed § 201.304(c) would require an average of 3.00 hours of administrative assistant time, 1.50 hours of time each from managers, attorneys, and 1.00 hour of time from information technology staff for packers, live poultry dealers, and swine contractors in the largest quartile to setup and maintain the required records in each succeeding year. AMS expects that packers, live poultry dealers, and swine contractors in the second quartile would require an average of 1.50 hours of administrative assistant time, 0.75 hours of time each from managers, attorneys, and 0.50 hours of time from information technology staff in each succeeding year. The third quartile would require 1.00 hour of administrative assistant time, 0.50 hours of time each from managers, attorneys, and 0.33 hours of time from information technology staff in each succeeding year, and the smallest quartile would require 0.50 hours of administrative assistant time, 0.25 hours of time each from managers, and attorneys, and 0.17 hours from information technology staff.

Estimated first-year costs for recordkeeping requirements in proposed § 201.304(c) totaled $26,000 for live poultry dealers,[130] $170,000 for swine contractors,[131] and $107,000 for

[129] Estimates are available at U.S. Bureau of Labor Statistics. Occupational Employment and Wage Statistics, available at *https://www.bls.gov/oes/special.requests/oesm20all.zip* (accessed 8/9/2022).

[130] 89 live poultry dealers x ($39.69 per hour admin. cost × (4 hours + 2 hours + 1.33 hours + .67 hours)) + ($93.20 per hour manger cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($113.80 legal cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($82.50 information tech cost × (1.5 hours + .75 hours + .5 hours + .25 hours))/4 = $26,390.

[131] 575 swine contractors × ($39.69 per hour admin. cost ×(4 hours + 2 hours + 1.33 hours + .67

packers.[132] Estimated yearly continuing costs for recordkeeping requirements in § 201.304(c) totaled $23,000 for live poultry dealers,[133] $147,000 for swine contractors,[134] and $93,000 for packers.[135]

Breaking out costs by market, AMS expects recordkeeping requirements in proposed § 201.304(c) to cost beef packers $47,000 in the first year and $41,000 in each following year. Proposed § 201.304(c) would cost lamb packers $21,000 in the first year and $18,000 in successive years. Proposed § 201.304(c) would cost pork packers $39,000, and it would cost swine contractors $170,000 for a total of $209,000 in the first year. Proposed § 201.304(c) would cost swine contractors $147,000 in successive years, and it would cost pork packers $33,000 for a total $180,000.

Executive Order 12866 and the Regulatory Flexibility Act

This rulemaking has been determined to be significant for the purposes of E.O. 12866 and, therefore, has accordingly reviewed by the Office of Management and Budget. As a required part of the regulatory process, AMS prepared an economic analysis of the costs and benefits of the proposed §§ 201.302, 201.304, 201.306, and 201.390. This regulatory filing is comprised of definitions in § 201.302, specific prohibited discriminatory and unduly prejudicial practices in § 201.304, specific prohibited deceptive practices in § 201.306, and a statement of severability among the provisions in § 201.390. The definitions in § 201.302 of a covered producer, market vulnerable individual, livestock producer, and regulated entity would apply to proposed §§ 201.304 and 201.306, and the regulatory impacts of the definitions are captured in the regulatory impacts of §§ 201.304 and 201.306, which are highlighted in this analysis.

The statement of severability in proposed § 201.390 has no quantified regulatory impact, as it only serves to ensure that if any provision of § 201.302, § 201.304, or § 201.306 is declared invalid or the applicability to any person or circumstance is invalid, the remainder of the provisions would remain valid.

Proposed § 201.304 would provide notice to the industry regarding unduly prejudicial and discriminatory practices that are prohibited and if they occur would be a violation of sec. 202(a) of the P&S Act. Practices that would be prohibited as unduly prejudicial and discriminatory under proposed § 201.304(a) include prejudice, disadvantage, or discrimination that otherwise inhibits market access to a covered producer with respect to livestock, poultry, meats, and meat food products based on a covered producer's status as a market vulnerable individual or as a cooperative. Examples of prejudice or disadvantage are included in proposed § 201.304(a)(3) and include offering less favorable contract terms than those generally offered, refusing to deal, or adversely differential performance, enforcement, or termination of contracts.

Proposed § 201.304(b)(1) prohibits retaliation or otherwise taking an adverse action against a covered producer because of the covered producer's participation in certain activities described in § 201.304(b)(2). Proposed § 201.304(b)(2)(i)-(vi) list activities that are protected under § 201.304(b)(1). A covered producer that communicates with a government agency, or petitions a court, legislature, or government agency for redress of grievances is protected from retaliation with respect to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry. A covered producer who asserts rights granted under the P&S Act, contract rights, or rights to form or join a producer or grower association to collectively market livestock or poultry would also be protected from retaliation. Additionally, covered producers would be protected from retaliation if they communicate or cooperate with a person for purposes of improving production or marketing of livestock or poultry, negotiate with a regulated entity for purposes of exploring a business relationship, or support or participate as a witness in any proceeding under the P&S Act or a proceeding that relates to an alleged violation of law by a regulated entity.

Proposed § 201.306(a) would provide notice to the industry regarding specific deceptive practices in which a regulated entity may not engage with respect to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry. Proposed § 201.306(b)-(e) would prohibit deceptive practices in contract formation, contract performance, contract termination, and contract refusal with respect to livestock and meats and lists specific practices that would constitute a violation of sec. 202(a) of the P&S Act. The prohibited deceptive practices include making or modifying a contract, performing under or enforcing a contract, terminating a contract, or refusing to contract with a covered producer based on pretext, omission of material facts, or false or misleading statements.

Proposed § 201.390 would ensure that if any provision of § 201.302, § 201.304, or § 201.306 is declared invalid or the applicability to any person or circumstance is invalid, the remainder of the provision would remain valid.

Protecting rights in contracting is an important feature of both proposed §§ 201.304 and 201.306. Proposed § 201.304 prohibits retaliation by regulated entities through termination of contracts, non-renewal of contracts, refusing to deal, and interference in farm real estate contracts as unduly prejudicial and discriminatory practices. Proposed § 201.306 prohibits deceptive practices by regulated entities in contracting with covered producers including making or modifying a contract, performing under or enforcing a contract, terminating a contract, or refusing to contract with a covered producer based on pretext, false or misleading statements, or omission of material facts. A discussion of contracting in these industries is, therefore, useful in explaining the need for these additional regulations. As will be seen in the next three tables below defining market shares of regulated entities and the discussion that follows, the unduly prejudicial, discriminatory, and deceptive practices, including retaliation, that proposed §§ 201.304 and 201.306 would prohibit are partially attributable to the structure of the livestock and poultry industries, the imbalance of market power between

hours)) + ($93.20 per hour manger cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + (113.80 legal cost ×(1.5 hours + .75 hours + .5 hours + .25 hours)) + ($82.50 information tech cost × (1.5 hours + .75 hours + .5 hours + .25 hours))/4 = $170,496.

[132] 362 packers × ($39.69 per hour admin. cost × (4 hours + 2 hours + 1.33 hours + .67 hours)) + ($93.20 per hour manger cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($113.80 legal cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($82.50 information tech cost × (1.5 hours + .75 hours + .5 hours + .25 hours))/4 = $107,338.

[133] 89 live poultry dealers ×($39.69 per hour admin. cost × (4 hours + 2 hours + 1.33 hours + .67 hours)) + ($93.20 per hour manger cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($113.80 legal cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + $82.50 information tech cost × (1.5 hours + .75 hours + .5 hours + .25 hours))/4 = $22,788.

[134] 575 swine contractors × ($39.69 per hour admin. cost × (4 hours + 2 hours + 1.33 hours + .67 hours)) + ($93.20 per hour manger cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($113.80 legal cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + $82.50 information tech cost × (1.5 hours + .75 hours + .5 hours + .25 hours))/4 = $147,225.

[135] 362 packers × ($39.69 per hour admin. cost × (4 hours + 2 hours + 1.33 hours + .67 hours)) + ($93.20 per hour manger cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($113.80 legal cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($82.50 information tech cost × (1.5 hours + .75 hours + .5 hours + .25 hours))/4 = $92,688.

regulated entities, producers, growers, and the potential market failure of asymmetrical information, which, along with imperfect competition, contributes to hold-up.

Prevalence of Contracting in Cattle, Hog, and Poultry Industries

Growing, production, and marketing contracts feature prominently in the livestock and poultry industries. As outlined above, several provisions in proposed §§ 201.304 and 201.306 would affect the process of making, enforcing, and terminating contracts for livestock, poultry, and meat grown or marketed under contract.

The type of contracting varies among cattle, hogs, and poultry. Broilers, the largest segment of poultry, are almost exclusively grown under production contracts, in which the live poultry dealers, a regulated entity, own the birds and provide poultry growers with feed and medication to raise and care for the birds until they reach the desired market size. Poultry growers provide the housing, the skill and efforts of labor, water, electricity, fuel, and provide for waste removal. Fed cattle marketing contracts typically take the form of marketing agreements as discussed below. Hog production falls between these two extremes.

As shown in the table below, over 96 percent of all broilers and over 42 percent of all hogs are grown under contractual arrangements. Similar to poultry contracts, swine contractors typically own the slaughter hogs and sell the finished hogs to pork packers. The swine contractors typically provide feed and medication to the swine production contract growers who own the growing facilities and provide growing services. The following table shows that the percentage of contract growing arrangements by species has remained relatively stable between 2007 and 2017.

TABLE 4—PERCENTAGE OF POULTRY AND HOG RAISED AND DELIVERED UNDER PRODUCTION CONTRACTS [136]

Species	2007	2012	2017
Broilers	96.5	96.4	96.3
Turkeys	67.7	68.5	69.5
Hogs	43.3	43.5	42.4

Other types of contracts include marketing agreements and forward contracts. Under marketing agreements, livestock producers market their livestock to a packer for slaughter under a verbal or written agreement. Under forward contracts, producers and packers agree to terms on a future sale and purchase of livestock. These types of agreements and contracts are commonly referred to as Alternative Marketing Arrangements (AMAs). Pricing mechanisms vary across AMAs. Some AMAs rely on a reported spot, or negotiated, market price or exchange-based futures price for at least one aspect of its price, while others involve complicated pricing formulas with premiums and discounts based on carcass merits. The livestock producer and packer agree on a pricing mechanism under AMAs, but usually not on a specific price.

AMS reports the number of cattle sold to packers under formula, forward contract, and negotiated pricing mechanisms. The following table illustrates the prevalence of contracting in the marketing of fed cattle. Formula pricing methods and forward contracts are two forms of AMA contracts. Thus, the first two columns in the following table are cattle marketed under contract and the third column represents the spot market, or negotiated market, for fed cattle including negotiated grid. The data in the below table show that the AMA contracting of cattle has increased since 2010. Approximately 55 percent of fed cattle were marketed under contracts in 2010. By 2021, the percentage of fed cattle marketed to packers under AMA contracts had increased to just over 72 percent. These data also show the declines in the percentage of cattle sold on the spot market from 45.6 in 2010 to 27.6 in 2021.

TABLE 5—PERCENTAGE OF FED CATTLE SOLD BY TYPE OF PURCHASE [137]

Year	Formula	Forward contract	Negotiated
2010	44.9	9.5	45.6
2011	48.4	10.9	40.7
2012	54.7	11.4	33.8
2013	60.0	10.2	29.8
2014	58.1	14.2	27.6
2015	58.2	16.5	25.3
2016	58.2	12.0	29.8
2017	58.7	11.4	29.9
2018	62.0	8.8	29.2
2019	65.7	9.8	24.4
2020	64.1	9.0	27.0
2021	61.5	10.9	27.6

As previously discussed, and illustrated in Table 4 above, over 40 percent of hogs are grown under production contracts. These hogs are then sold by swine contractors or to other contract production growers to packers under marketing contracts.

[136] Agricultural Census, 2012 and 2017, available at *https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf* (last accessed 8/9/2022).

[137] U.S. Department of Agriculture, Agricultural Marketing Service, available at: *https://mpr.datamart.ams.usda.gov/menu.do?path=Products\Cattle\Weekly%20Cattle* (last accessed Aug. 2022).

As can be seen in the below table, the percentage of hogs sold under marketing contracts has increased since 2010 to over 98 percent in 2020. The spot market for hogs has declined from 5.2 percent in 2010 to 1.5 percent in 2020. As these data demonstrate, almost all hogs are marketed to packers under some type of marketing contract.

TABLE 6—PERCENTAGE OF HOGS SOLD BY TYPE OF PURCHASE [138]

Year	Other marketing arrangements [139]	Formula [140]	Negotiated
2010	45.4	49.4	5.2
2011	47.6	48.2	4.2
2012	47.7	48.6	3.6
2013	48.3	48.4	3.2
2014	45.9	51.4	2.7
2015	46.0	51.4	2.6
2016	50.0	47.6	2.5
2017	52.5	45.0	2.5
2018	56.5	41.3	2.2
2019	59.8	38.4	1.8
2020	61.3	37.1	1.5

Structural Issues in the Cattle, Hog, and Poultry Industries

The livestock and poultry industries are characterized by a high volume of growing, production, and marketing contracts. High volume of this type of contracting, coupled with high levels of market concentration, may increase the risk for anticompetitive behaviors of undue prejudice and discrimination, retaliation, and deception by regulated entities, which can harm market vulnerable producers.

Despite various policy and public concerns with contracting, growing, production, and marketing contracts can offer certain benefits to the contracting parties. Properly tailored, benefits can include helping farmers, livestock producers, and processors manage price and production risks, elicit the production of products with specific quality attributes by tying prices to those attributes, and facilitate the smooth flow of commodities to processing plants. Such attributes may encourage certain efficiencies in use of farm and processing capacities. Quality-related attributes and standards can incentivize farmers to deliver products that consumers desire and produce products in ways that reduce processing costs.[141]

There are, however, trade-offs with the use of these contracts. In concentrated industries, like the cattle, hog, and poultry industries, where market power is present, these types of contracts may result in increased opportunities for undue prejudices and discrimination, retaliation, and deception, among other concerns, which cause inefficiencies in the markets for livestock, poultry, and meat.[142] Heightened market concentration implies that livestock producers and poultry growers face fewer marketing and contract options compared to less concentrated markets. Livestock producers and poultry growers may find themselves in a take-it-or-leave it situation when a new or renewal contract is presented due to a limited number of packers and live poultry dealers with which to contract. Thus, livestock producers and poultry dealers entering into new or renewal contracts may be taken advantage of through discriminatory, deceptive, or retaliatory practices.

Livestock and poultry contracts may hold producers and growers captive, due to limited number of packers and live poultry dealers and therefore susceptible to unjust, prejudicial and retaliatory practices. For example, a contract that limits a poultry grower's services to a single integrator, even if the contract provides for fair compensation to the grower, still leaves the grower subject to retaliation risks. The grower may face the hold-up risk that the contractor may require additional capital investments or may face retaliation, when the contractor imposes lower returns at the time of contract renewal.[143] Some growers make substantial long-term capital investments as part of livestock or poultry production contracts, including land, poultry or hog houses, and equipment. Those investments may tie the grower to a single contractor or integrator, furthering the indebtedness, and thus also imbalance of power.

In the poultry industry, limited integrator choice may accentuate contract risks. The data in Table 3 above show that 52 percent of broiler growers, accounting for 56 percent of total production, report having only one or two integrators in their local areas. Even where multiple growers are present, there are high costs to switching, owing to the differences in technical specifications that integrators require. The growers likely need to invest in new equipment and learn to apply different operational techniques due to different breeds, target weights and grow-out cycles.

[138] U.S. Department of Agriculture, Agricultural Marketing Service, available at: *https://mpr.datamart.ams.usda.gov/menu.do?path=\Products* (last accessed Aug. 2022).

[139] Includes Packer Owned and Packer Sold, and Other Purchase Arrangements.

[140] Includes Swine Pork Market Formula, and Other Market Formula.

[141] RTI International, 2007, GIPSA Livestock and Meat Marketing Study, Prepared for USDA, GIPSA; Stephen R. Koontz, ''Another Look at Alternative Marketing Arrangement Use by the Cattle and Beef Industry,'' in Bart Fischer et al., ''The U.S. Beef Supply Chain: Issues and Challenges Proceedings of a Workshop on Cattle Markets,'' 2021. But see C. Robert Taylor, ''Market Structure of the Livestock Industry,'' Testimony before the House Committee of Agriculture, April 16, 2007, available at *https://www.iatp.org/documents/c-robert-taylor-testimony-market-structure-of-the-livestock-industry;* C. Robert Taylor, ''Harvested Cattle, Slaughtered Markets,'' April 27, 2022, available at *https://www.antitrustinstitute.org/work-product/aai-advisor-robert-taylor-issues-new-analysis-on-the-market-power-problem-in-beef-lays-out-new-policy-framework-for-ensuring-competition-and-fairness-in-cattle-and-beef-markets/(contesting quality incentives delivered through these agreements).*

[142] Nathan H. Miller, *et al.,* ''Buyer Power in the Beef Packing Industry: An Update on Research in Progress,'' April 13, 2022, available at *http://www.nathanhmiller.org/cattlemarkets.pdf.* See also Michael Kades, ''Protecting Livestock Producers and Chicken Growers,'' *Washington Center for Equitable Growth (*May 5, 2022), available at *https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/.*

[143] *See* Vukina and Leegomonchai, ''Oligopsony Power, Asset Specificity, and Hold-Up: Evidence From The Broiler Industry,'' *American Journal of Agricultural Economics,* 88(3): 589–605 (August 2006).

In 2013, production contracts covered $58 billion in agricultural production, 83 percent of which was poultry and hog contracts.[144] Most hogs are produced and marketed under production and marketing contracts. Open market negotiated trade represented 9 percent of total trades for hogs in 2008 and dropped to 2 percent in 2020.[145] In effect, the only production/marketing choice for a hog producer is to enter a contract.

In the cattle sector, cow-calf operations incur a significant investment in breeding stock and typically sell steers and heifers once a year. Price risk can therefore rise from the months-long production process.[146] Access to competitive markets, absent from discrimination, undue prejudice, and retaliation, is important to the economic livelihood of vulnerable producers. Reduced marketing options—fewer options to sell on the spot market, or lack of access to contracts—can leave producers susceptible to unfair trade practices. Spot market trades, or negotiated trades, as opposed to marketing agreements or contracts, for fed cattle accounted for 51 percent of all trades in 2008 and fell to 27 percent in 2020.[147]

A 2006 survey indicated that growers with access to a single integrator received 7 to 8 percent less compensation, on average, than farmers located in areas with 4 or more integrators.[148] If live poultry dealers already possess some market power to reduce prices for poultry growing services, some contracts can extend that power by raising the costs of entry for new competitors or allowing for price discrimination.[149]

One indication of potential market power is industry concentration.[150] Table 2 presented earlier, shows the level of concentration in the livestock and poultry slaughtering industries for 2010–2020. The table shows the combined market share of the four largest steer and heifer slaughterers remained stable between 83 and 85 percent from 2010 to 2019 and dropped to 81 percent in 2020. Four-firm concentration ratios for hog and broiler slaughter has also remained relatively stable between 62 and 70 percent and 51 and 54 percent, respectively.

As discussed previously, the data in Table 2 are estimates of national four-firm concentration ratios at the national level, but the relevant economic markets for livestock and poultry may be regional or local, and concentration in the relevant market may be higher than the national level. For example, while poultry markets may appear to be the least concentrated in terms of the four-firm concentration ratios presented above, relevant economic markets for poultry growing services are more localized than markets for fed cattle or hogs, and local concentration in poultry markets is often greater than in hog and other livestock markets. The data presented earlier in Table 3 highlights this issue by showing the limited ability a poultry grower has to switch to a different integrator. As a result, national concentration may not demonstrate accurately the options poultry growers in a particular region face.

The levels of industry concentration shown in Tables 2 and 3 may contribute to oligopolistic market power and asymmetric information. The result is that the contracts bargained between the parties may leave livestock producers, swine production contract growers, and poultry growers vulnerable to detrimental risks of anticompetitive conduct such as prejudice and discrimination, retaliation, and deception due to the structural issues discussed above and may result in inefficiencies in the marketplace.

Asymmetric Information

There is asymmetry in the information available to livestock producers and livestock and poultry growers and the packers, swine contractors, and live poultry dealers with whom they contract. The larger packers, swine contractors, and live poultry dealers generally have more information (costs of production, input quality, and consumer demand, for example) that is useful in contracting than the smaller livestock producers and livestock and poultry growers. This asymmetry of information can lead to deceptive practices by regulated entities with superior information in making or modifying production, marketing, or growing contracts, performing under, enforcing, or terminating these contracts, or refusing to contract with a covered producer based on pretext, omission of information, or false or misleading statements.

Some marketing contracts for fed cattle, for example, use various plant averages in the calculation for the base price of the cattle in the marketing contract. Only the packer has the information about the plant averages and producers cannot independently verify the information. Similar issues exist in hog marketing contracts. For contracts based on the pork cutout, the hog packer has more information about the direct retail pork demand and hence pork cutout prices than hog sellers.

Asymmetric information is particularly acute in all contracts between poultry growers and live poultry dealers. Live poultry dealers hold information on how individual poultry growers perform under a variety of contracts. The average number of contracts for the live poultry dealers filing annual reports with AMS in 2020 was 251. The largest live poultry dealers contracted with several thousand growers.[151] Most growers producing poultry under production contracts are paid under a poultry grower ranking or ''tournament'' pay system. Under tournament systems, the contract between the poultry grower and the company for whom the grower raises poultry for slaughter pays the grower based on a grouping, ranking, or comparison of poultry growers delivering poultry to the same company during a specified period. Generally, live poultry dealers provide most of the inputs to all the growers in each poultry tournament used to determine grower pay. In these tournaments, the live poultry dealers have information about the quality of the inputs, while each grower only knows what he or she can observe. Due to a lack of scales and tools to evaluate feed quality, a grower may not be able to weigh, measure or evaluate the inputs it received such as chicks and feed, and he or she almost

[144] MacDonald, J.M. ''Trends in Agricultural Contracts.'' Choices. 2015. Quarter 3. Available at *https://www.choicesmagazine.org/choices-magazine/theme-articles/current-issues-in-agricultural-contracts/trends-in-agricultural-contracts,* accessed 9–19–22.

[145] USDA, AMS, FTPP, Packers and Stockyards Division. Packer Annual Reports, 2021 and 2012. Available at *https://www.ams.usda.gov/reports/psd-annual-reports,* accessed 9–19–22.

[146] Martinez, C.C., Maples, J.G. and Benavidez, J. Beef Cattle Markets and COVID–19. Applied Economics Perspectives and Policy, (2021) 43: 304–314. Available at *https://doi.org/10.1002/aepp.13080,* accessed 9/19/22.

[147] USDA, AMS, FTPP, Packers and Stockyards Division. Packer Annual Reports, 2021 and 2012. Available at *https://www.ams.usda.gov/reports/psd-annual-reports,* accessed 9–19–22.

[148] MacDonald, J. and N. Key. ''Market Power in Poultry Production Contracting? Evidence from a Farm Survey.'' *Journal of Agricultural and Applied Economics.* 44(4) (November 2012): 477–490.

[149] *See, e.g.,* Williamson, Oliver E. ''Markets and Hierarchies: Analysis and Antitrust Implications,'' *New York: The Free Press* (1975); Edlin, Aaron S. & Stefan Reichelstein (1996) ''Holdups, Standard Breach Remedies, and Optimal Investment,'' *The American Economic Review* 86(3): 478- 501 (June 1996).

[150] For additional discussion see MacDonald, J.M. 2016 ''Concentration, contracting, and competition policy in U.S. agribusiness,'' *Competition Law Review,* No. 1–2016: 3–8.

[151] All live poultry dealers are required to annually file PSD form 3002 ''Annual Report of Live Poultry Dealers,'' OMB control number 0581–0308. The annual report form is available to public on the internet at *https://www.ams.usda.gov/sites/default/files/media/PSP3002.pdf.*

certainly will not know about the inputs received by other growers. Live poultry dealers also have historical information concerning growers' production and income under many different circumstances for all the growers with which it contracts, while an individual grower, like most other producers, only has information concerning his or her own production and income. Prohibiting deception may serve to reduce the negative impacts from asymmetric information. Prohibiting retaliation against producers or growers because they joined a cooperative or association, shared information to improve their production or growing practices, or communicated with the government should lead to reducing the information asymmetry between regulated entities and producers and growers.

Hold-Up Risk

Hold-up is another risk that is particularly acute in the service contracts between poultry growers and live poultry dealers. Hold-up is far less of a risk for hog and cattle producers, so the discussion here is limited to poultry growing to highlight this risk to poultry growers. Substantial gaps exist between the periods of time covered by the contract and the mortgage on poultry housing, creating uncertainty around whether growers will be able to repay their debt and recoup their investments, introducing hold-up risk into the contracting process. As discussed in the preamble, hold-up is the risk growers face at the time of contract renewal when integrators make contract renewal dependent on further grower investments not disclosed at the time of the original agreements.[152]

This is of concern in poultry production contracts because the capital requirements related to growing chickens are significant and highly specialized (that is, they have little value outside of growing chickens). As a result, growers entering the market are tied to growing chickens to pay off the financing of the capital investment. Growers have reported that they must accept unfavorable contract terms or endure unfavorable treatment during a contract—including inappropriate limits on their ability to form associations, assert their rights under the law or contract (such as viewing the weighing of broilers), communicate with government entities, and seek alternative business relationships—because they are tied to production to pay off lenders and they have few, if any, alternative integrators with whom they can contract. Hog producers which invest heavily in production facilities face may similar risks.

Long term, this behavior may result in underinvestment in production, which is inefficient. Alternatively, if growers do not anticipate hold-up, then growers may spend too much on investments because the integrator who demands them is not incurring any cost. The resulting over-investment in capital by those growers facing hold-up is also inefficient. Hold-up risk is a manifestation of both market power and asymmetric information.

Hold-up risk can be alleviated with a prohibition on retaliation for certain protected activities that enhance the competitive environment and market integrity, as well as a prohibition on deception and the accompanying reduction in asymmetric information. Increased information to growers by allowing growers to freely communicate and share information without fear of retaliation would allow growers to be make more informed decision about the efficient level of capital in which to invest.

Contracting, Industry Structure, and Market Failure: Summary of the Need for Regulation

Growing, production, and marketing contracts benefit the livestock and poultry industries. Existing structural issues may result in imperfect competition, risks of undue prejudice and discrimination, retaliation, deception, unequal bargaining power, and information asymmetries, potentially increasing hold-up risk.

USDA's long-standing policy has been that the P&S Act prohibits the type of conduct that this proposed rule addresses.[153] Sections 201.304 and 201.306 will serve to fill-in gaps where other Federal and state statutes, not specific to the agricultural sector, overlap and fail to provide full protections. Proposed § 201.304 would prohibit packers, swine contractors, and live poultry dealers from unduly discriminating and employing undue prejudices against market vulnerable producers and cooperatives.

Proposed § 201.304 would also prohibit retaliation including termination of contracts, refusing to deal, refusing to renew a contract, and interference in farm real estate transactions or contracts with third parties. Retaliation would only be effective if producers and growers had a small number of packers and live poultry dealers to market their livestock or growing services. If producers and growers had lots of choices among packers and live poultry dealers, producers and growers would simply market their livestock or growing services to a different packer or live poultry dealer if they were being retaliated against. Thus, retaliation is more likely to occur in markets with imperfect competition and an oligopsonistic structure, such as the cattle, hog, and poultry markets. This clear statement regarding prohibitions on retaliation could reduce instances of retaliation against livestock producers and livestock and poultry growers.

Proposed § 201.304 would also protect various activities that would allow covered producers to freely communicate with each other and governmental entities. To establish a climate of compliance, regulated entities would be required to maintain all relevant records in compliance with proposed § 201.304.

Proposed § 201.306 would prohibit packers, swine contractors, and live poultry dealers from employing deceptive practices against producers and growers in forming, performing, and terminating contracts and refusing to contract based on false or misleading information.

By setting forth specific prohibitions on unduly prejudicial and discriminatory and deceptive practices, the proposed rule would reinforce producers' and growers' existing rights to gather and share information, while reducing the fear of retaliation and interference in the contracting process. The prohibitions in the proposed rule would also continue to support, and possibly promote more efficient and equitable reducing information asymmetries and hold-up risk, reducing retaliation, pretext, false and misleading information, and increasing communication, cooperation, and retention of legal rights. The prohibitions specified in proposed §§ 201.304 and 201.306 would ultimately assist in mitigating the impacts of imperfect competition.

[152] Vukina, Tom, and Porametr Leegomonchai. ''Oligopsony Power, Asset Specificity, and Hold-Up: Evidence from the Broiler Industry.'' *American Journal of Agricultural Economics* 88 (2006).

[153] Agricultural Marketing Service, USDA, ''Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act,'' Final Rule, December 11, 2020, 85 FR 79779, 79787, available at *https://www.federalregister.gov/documents/2020/12/11/2020-27117/undue-and-unreasonable-preferences-and-advantages-under-the-packers-and-stockyards-act;* Agricultural Marketing Service, USDA, ''Frequently Asked Questions on the Enforcement of Undue and Unreasonable Preferences under the Packers and Stockyards Act,'' August 2021, available at *https://www.ams.usda.gov/rules-regulations/packers-and-stockyards-act/faq* (last accessed Aug. 2022).

Cost-Benefit Analysis of Proposed §§ 201.304 and 201.306

Regulatory Alternatives Considered

Executive Order 12866 requires an assessment of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulations and an explanation of why the planned regulatory action is preferable to the potential alternatives.[154] AMS considered three regulatory alternatives. The first alternative that AMS considered is to maintain the *status quo* and not propose §§ 201.304 and 201.306. The second alternative that AMS considered is to issue proposed §§ 201.304 and 201.306 as presented in this proposed rule.[155] This second alternative is AMS's preferred alternative as will be explained below. The third alternative that AMS considered is proposing §§ 201.304 and 201.306, but exempting small businesses, as defined by the Small Business Administration (SBA), from having to comply with the recordkeeping requirement of § 201.304(c).

Regulatory Alternative 1: Status Quo Alternative

If proposed §§ 201.304 and 201.306 are never promulgated, there are no marginal costs and marginal benefits as industry participants will not alter their conduct. From a cost standpoint, this Status Quo Alternative is the least-cost alternative compared to the other two alternatives. This alternative also has no marginal benefits. Since there are no changes from the *status quo* under this regulatory alternative, it will serve as the baseline against which to measure the other two alternatives.

Regulatory Alternative 2: The Proposed Alternative

As discussed above, proposed § 201.304 prohibits undue prejudice, discrimination, and retaliation by regulated entities and adds a requirement for regulated entities to maintain records, for a period of five years, related to its compliance with proposed § 201.304. Proposed § 201.306 would prohibit deceptive practices by regulated entities in contracting with covered producers including making or modifying a contract, performing under or enforcing a contract, terminating a contract, or refusing to contract with a covered producer based on pretext, omission of information, or false or misleading statements.

Regulatory Alternative 2: Benefits of the Proposed Alternative

Reductions in prejudicial, discriminatory, retaliatory, and deceptive practices by packers, swine contractors, and live poultry dealers would benefit livestock and poultry producers and growers. These types of anticompetitive conduct do not have procompetitive benefits and are generally conduct that occurs outside of written contracts. Retaliation, for example, is not written into a contract, but can occur by a packer terminating a contract based on pretext if a livestock producer takes an action for which a packer disapproves, such as joining a producer group that the packer denounces. There need not be any changes to the contracting process or changes in the use of marketing, production, or growing arrangements for producers and growers to receive benefits. Any reductions in prejudicial, discriminatory, retaliatory, and deceptive practices by packers, swine contractors, and live poultry dealers would benefits producers and growers. The amount of benefits that would be received by producers and growers depends on the extent to which the proposed rule reduces prejudicial, discriminatory, retaliatory, and deceptive practices. That, in turn, is bounded by the degree to which any of these types of activities are occurring in the baseline. The following discussion is about the types of benefits that producers and growers would receive from a reduction in prejudicial, discriminatory, retaliatory, and deceptive practices by packers, swine contractors, and live poultry dealers. If the reductions are small, the benefits would be small. The greater the reductions, the greater the potential benefits.

AMS discusses the potential benefits to livestock producers and growers from the Proposed Alternative (proposed §§ 201.304 and 201.306) compared to the *Status Quo* Alternative. USDA's long-standing policy has been that the P&S Act prohibits the type of conduct that the Proposed Alternative (proposed §§ 201.304 and 201.306) addresses. The Proposed Alternative adds specificity to deceptive, unjustly discriminatory practices (retaliation), and unreasonable prejudices. Consequently, AMS expects packers, live poultry dealers, and swine contractors would review the proposed rule and assess compliance of their contracts and conduct with the proposed rule. Some packers, swine contractors, and live poultry dealers may make some minor modifications if they believe their contracts or conduct are not in compliance. AMS expects all regulated entities to maintain relevant records relating to their compliance with proposed § 201.304, which would provide further benefits to the industry.

The size of the benefits is difficult to quantify as they depend on the amount of undue prejudice, discrimination, and deception that will be avoided should the provisions in the Proposed Alternative be adopted by the Agency. The more undue prejudice, discrimination, and deception that will be avoided, the larger the benefits. AMS is unable to quantify the benefits and will present a qualitative discussion of the types of potential benefits that accrue from reductions in prejudice, discrimination, retaliation, and deception.

The following discussion is for the benefits, in general, to the livestock and poultry industries from the provisions in the Proposed Alternative, and similar provisions that USDA has long viewed as violations of P&S Act. The added benefits to the industry from the Proposed Alternative over the *Status Quo* Alternative occur when packers, swine contractors, and live poultry dealers alter their contracts and/or conduct of their employees to reduce instances of deceptive, prejudicial, and discriminatory practices, including retaliation, and keep records about their compliance programs. The potential benefits include protecting producer and grower rights, improved corporate culture and the ability to investigate compliance through recordkeeping requirement, addressing asymmetric information, prohibiting deceptive practices, and other benefits.

Protecting Producer and Grower Rights

Concentration and lack of competition in livestock procurement markets and poultry contracting can lead to abuses of market power such as undue prejudice and discrimination, retaliation, deception, fraud, and restrictions of producer and grower rights. A key purpose of specifying certain prohibitions on unduly prejudicial, discriminatory, and deceptive practices, including those in the Proposed Alternative, is to protect livestock producers, swine contractors and poultry growers' rights under the P&S Act. The Proposed Alternative would also help protect producers and growers from unfair and deceptive practices stemming from market power

[154] *See* Section 6(a)(3)(C) of Executive Order 12866.

[155] This proposed rule includes § 201.302, which defines a covered producer, livestock producer, and regulated entity. These definitions would apply to proposed §§ 201.304 and 201.306. The definitions proposed in § 201.302 are captured in the regulatory impacts of proposed §§ 201.304 and 201.306. The proposed rule also includes § 201.390 which states all provisions are severable in case any provision is declared invalid. Proposed § 201.390

imbalances such as undue prejudice, discrimination, retaliation, and deception by using pretext and false and misleading information in contracting by packers and live poultry dealers. These benefits of prohibiting prejudicial, discriminatory, and deceptive practices, including those in the proposed rule, would accrue not only to the market's vulnerable and cooperative producers and growers who have been subjected to the prohibited practices, but also to those for whom the proposed rule's deterrence effects would protect from future potential abuses.

For example, proposed § 201.304(a)(1) and (2) in the Proposed Alternative would prohibit undue prejudice and discrimination by packers, swine contractors, and live poultry dealers against market vulnerable producers and growers and cooperatives. This prohibition would protect vulnerable producers and growers and cooperatives who would potentially face these types of discrimination. Proposed § 201.304(a)(3) in the Proposed Alternative includes examples of unduly prejudicial and discriminatory conduct, including termination of contracts, refusing to deal, and interference in farm real estate transactions or contracts with third parties. Unfair termination of contracts and refusal to deal can lead to an inefficient allocation of resources.

Proposed § 201.304(b)(1) in the Proposed Alternative would prohibit packers, swine contractors, and live poultry dealers from retaliating against producers and growers for engaging in certain protected activities. Additionally, proposed § 201.304(b)(2) would protect producers and growers from retaliation by regulated entities for engaging in various activities, including communicating with a government agency, seeking redress before a court, or asserting rights to join a producer or grower association, collectively process and market livestock or poultry, or supporting or participating as a witness in any proceeding under the P&S Act, or a proceeding that relates to an alleged violation of law by a regulated entity. These provisions would also protect producers and growers from retaliation resulting from communication or cooperating with a person to improve the production of livestock or poultry and from communicating with a regulated entity to explore a business relationship. These types of protections can improve market efficiency.

The Proposed Alternative's § 201.306 would add a prohibition on packers, swine contractors, and live poultry dealers of committing the deceptive practices of pretext, providing false and misleading information, or omission of material facts in forming, performing, and terminating contracts and refusing to contract with producers and growers with respect to livestock poultry and meat. Prohibitions on deception could also improve efficiency by reducing instances where resources are allocated based on pretext, false or misleading information, or omission of material facts. That is, incorrect or incomplete information can misguide the allocation of resources such as land, labor, and capital away from their best use. The benefits of a more efficient allocation of resources from these types of prohibitions would be captured by producers, growers, packers, and live poultry dealers. These types of benefits would be directly related to the reduction in prejudicial, discriminatory, retaliatory, and deceptive practices. These proposed provisions would further promote integrity in the market and should give current and prospective producers and growers more confidence that they would be treated fairly.

Recordkeeping

There are multiple potential benefits of the record-keeping provision in the Proposed Alternative's proposed § 201.304(c). Record-keeping regulations can reduce AMS investigative costs and improve the quality of the investigations. Access to essential records would improve AMS enforcement and assist AMS in assessing the effectiveness of the regulated entity's compliance with proposed § 201.304(c). Information that AMS would gather when conducting compliance reviews, can enable AMS to promote market competitiveness and efficiency, as well as protect market participants against discrimination and other abusive practices. The rights of vulnerable producers and cooperatives can be better upheld when records of regulated entities are maintained and can be reviewed by AMS.

Another potential benefit of the recordkeeping requirement in the Proposed Alternative's § 201.304(c) is that regulated entities would know that AMS may be able to obtain and review records during investigations. This may result in a change in corporate culture of regulated entities in favor of increased voluntary compliance with proposed § 201.304 and reductions in undue prejudice, discrimination, and retaliation because regulated entities would know their records can be reviewed. Company leaders may shift the corporate culture in order to comply with the proposed rule.

Addressing Asymmetric Information

Several provisions in the Proposed Alternative would enhance the protection of the rights of producers and growers to lawfully communicate and to associate with others to explore business relationships and improve production practices and in the marketing of livestock, poultry, and meat. These provisions would benefit producers and growers by encouraging the use of their currently existing legal rights to cooperate that would solidify and enhance their access to information. This in turn, would help address information asymmetry and thus help producers and growers make better business decisions, enhance their competitiveness, reduce hold-up risk, and promote innovation and economic efficiency in the industry.

The Proposed Alternative, by protecting the rights of growers and producers to form associations and communicate freely with one another and to communicate with other regulated entities for the purpose of exploring a business relationship, would help close this information gap. This would benefit producers and growers by improving industry transparency, enhancing the bargaining power of supplier groups if they elect to organize in such a way.

This proposed rule would prohibit retaliation against covered producers due to their association with other producers and regulated entities, which could increase the information available to growers that is important in decision making. Improved safeguarding of protected activities may enable the producer or grower to improve business decision-making and manage risk, including potentially acquiring external insurance and risk-management products. In addition, facilitating producers and growers' ability to gain more and better information would help correct information asymmetry and improve transparency and completeness in contracts.

More information would also reduce the risks associated with hold-up as discussed above. By protecting rights to freely communicate and associate, this proposed rule would facilitate communication across the industry that may help disseminate information regarding new innovations and best practices within the industry. These types of provisions that could provide producers and growers with access to more and better information should promote innovation and economic efficiency in the industry.

The Proposed Alternative may also serve to reduce the risk of violating sec.

202(a) of the P&S Act because it would provide clarification to the livestock and poultry industries as to the discriminatory and deceptive practices that would be prohibited under that section of the Act. Less risk through the clarification provided in the Proposed Alternative would likely foster fairness in contracting by providing explicit protections for livestock producers, swine production contract growers, and poultry growers.

Prohibiting Deceptive Practices

Proposed Alternative's § 201.306 specifies prohibited practices that would be considered deceptive, and thus in violation of sec. 202(a) of the P&S Act. Though USDA already protects producers and growers from deceptive practices, the proposed rule would explicitly protect suppliers from deception by packers and live poultry dealers from pretextual justifications, providing false and misleading information, and the omission of material facts in contracting. Prohibited deceptions, including false statements, pretext, or omissions, can prevent or mislead producers and growers, sellers, or buyers from making informed decisions and thus represents a market inefficiency. The provisions in the Proposed Alternative would help give producers and growers confidence that the information provided by processors is reliable, which would help them to make better and more informed business decisions and manage risk.

Other Benefits

While some of these protections already benefit individual producers and growers, ensuring they cover the full marketplace and can be enforced individually adds to the overall integrity and fairness of livestock and poultry contracting. Specifying these protections may bring additional benefits above the *Status Quo* Alternative.

Growing, production, and marketing contracting has many benefits in the livestock and poultry industries. The Proposed Alternative can further enhance the documented benefits of contracting by prohibiting unduly prejudicial, discriminatory, and deceptive practices. Packers, swine contractors, and live poultry dealers have at times exploited their market power through business practices that have unjustly harmed producers and livestock and poultry growers. These abuses have led to a climate of fear among producers and growers that certain actions they might undertake such as communication with government or other regulated entities to pursue business relationships, association with certain groups, or making lawful public complaints about the packers, swine contractors, or live poultry dealers might result in harmful retaliations. AMS intends the Proposed Alternative to promote integrity to the marketplace by enhancing the protection of the rights of the producers and growers and alleviating those fears.

The literature and data on these topics are not sufficient to allow AMS to estimate the magnitude of the inefficiencies that the Proposed Alternative may correct above the *Status Quo* Alternative, nor the degree to which the additional producer and grower protections would address inefficiencies. Though AMS is unable to quantify the benefits of the proposed regulation, this analysis has explained the types of benefits that would be derived from reductions in prejudice, discrimination, retaliation, and deception. If the reductions are small, the benefits would be small. The greater the reductions, the greater the potential benefits.

Regulatory Alternative 2: Costs of the Proposed Alternative

Under the Proposed Alternative, the proposed rule would not impose any restrictions on numbers or types of production or marketing contracts that can be utilized, use of AMAs, tournaments, or base price mechanisms in contracts for packers, swine contractors, and live poultry dealers. Instead, the Proposed Alternative enhances the prohibited unduly prejudicial, unjustly discriminatory, and deceptive practices that AMS already considers violations of secs. 202(a) and 202(b) of the P&S Act. AMS does not expect the Proposed Alternative's §§ 201.304 and 201.306 to result in any measurable indirect costs resulting from adjustments by the livestock and poultry industries to reduce their use of AMAs, poultry tournaments, pricing mechanisms, or to result in a significant number of substantial changes to existing marketing or production contracts. Nor does AMS expect the Proposed Alternative's §§ 201.304 and 201.306 to have any material effect on the quantity of meat or poultry produced.

Litigation Costs

AMS expects the Proposed Alternative's §§ 201.304 and 201.306 to reduce litigation. The Proposed Alternative clarifies the prohibited unduly prejudicial, discriminatory, and deceptive practices that would violate sec. 202(a) of the P&S Act. The clarification could result in a reduction in litigation costs if companies come into compliance without any enforcement action. This regulation encourages regulated entities to proactively avoid prejudicial, discriminatory, and deceptive practices that could otherwise lead to costly litigation. Further, some firms may develop policies and procedures to comply with the proposed recordkeeping requirements. This effect could reduce litigation and thus result in reduced litigation costs for regulated entities.

However, there are several provisions in the Proposed Alternative's § 201.304 that could result in additional litigation. AMS has received formal and informal complaints against packers, swine contractors, and live poultry dealers for retaliation for belonging to various producer and grower associations, contacting AMS to file a complaint, asserting legal rights, and contacting a competing regulated entity to pursue a contractual relationship. Similarly, there are several provisions in the Proposed Alternative's § 201.306 that could result in additional litigation, including refusals by regulated entities to enter into or renegotiate contracts and contract terminations by producers and growers. The clarity of the practices that AMS considers to be discriminatory and deceptive in the Proposed Alternative's §§ 201.304 and 201.306 could offer producers and growers new hope for relief from courts for perceived undue prejudicial, discriminatory, and deceptive practices by regulated entities. This effect could result in increased litigation.

AMS is uncertain as to which effect will dominate and to what extent. Given both effects, AMS does not expect large increases or decreases in litigation from the proposed rule and, therefore, does not estimate litigation costs in this analysis.

Direct Costs of the Proposed Option

AMS expects the Proposed Alternative's §§ 201.304 and 201.306 would only result in direct administrative and recordkeeping costs to the industry. AMS expects that packers, swine contractors, and live poultry dealers would incur direct administrative costs of learning the proposed rule and then reviewing and, if necessary, revising marketing and production contracts to ensure compliance with the Proposed Alternative's §§ 201.304 and 201.306. Regulated entities would also incur recordkeeping costs from keeping the records required under the Proposed Alternative's § 201.304. The expected total costs of the Proposed Alternative's

§§ 201.304 and 201.306 will be the direct administrative costs and recordkeeping costs of that regulatory alternative. The direct administrative costs and recordkeeping costs will be estimated below.

Direct Administrative Costs

AMS expects that the Proposed Alternative's §§ 201.304 and 201.306 would prompt packers, live poultry dealers, and swine contractors to first review and learn the proposed rule and then review their procurement policies and production contracts and make any necessary changes to ensure compliance with the new regulations. Expected costs are estimated as the total value of the time required to review and learn the rulemaking and then review and, if necessary, revise procurement and production contracts.

AMS expects the direct administrative costs of complying with the Proposed Alternative's §§ 201.304 and 201.306 would be relatively small. USDA policy has long held that several of the provisions in the Proposed Alternative's §§ 201.304 and 201.306 or similar provisions were violations of the P&S Act, although the position has not been established in regulations. Consequently, AMS expects packers, live poultry dealers, and swine contractors to make changes to relatively few contracts.

Estimates of the amount of time required to review and learn the proposed rule and to review and revise contracts and keep records were provided by AMS subject matter experts. These experts were economists and supervisors with many years of experience in AMS's PSD conducting investigations and compliance reviews of regulated entities. In May 2020, U.S. Bureau of Labor Statistics (BLS) released Occupational Employment and Wage Statistics that AMS used for the time values in this analysis.[156] BLS estimated an average hourly wage for general and operations managers in animal slaughtering and processing to be $65.84. The average hourly wage for lawyers in food manufacturing was $80.39. In applying the cost estimates, AMS marked-up the wages by 41.56 percent to account for fringe benefits.

AMS expects that each packer, swine contractor, and live poultry dealer would spend one hour of legal time and one hour of management time to review and learn the rulemaking and then review and, if necessary, revise production and marketing contracts to ensure compliance with the rulemaking.

Live poultry dealers are currently required to file form PSD 3002, ''Annual Report of Live Poultry Dealers,'' OMB control number 0581–0308, with AMS. Eighty-nine live poultry dealers filed annual reports with AMS for their 2020 fiscal year.

Packers are currently required to file form PSD 3004, ''Annual Report of Packers'' OMB control number 0581–0308, with AMS. Among other things, each packer reports the number of head of cattle or calves, hogs, and lamb, sheep, or goats that it processed. Three hundred sixty-two packers that processed cattle or calves, hogs, or lamb, sheep or goats filed reports with AMS for their fiscal year 2020. Two hundred forty-eight were beef or veal packers. Two hundred eight were pork packers, and 147 were lamb, sheep, or goat packers.[157] The number of beef, pork, and lamb packers do not sum to 362 because many firms slaughtered more than one species of livestock. For instance, 119 packers slaughtered both beef and pork, and 75 slaughtered beef, pork, and lamb.

AMS expects that packers processing more than one species of livestock will not incur additional costs for each species. That is, AMS expects that each packer will require one hour of attorney's time and one hour of management time regardless of how many species of livestock it processes. To allocate costs across (1) beef, (2) pork, and (3) lamb processors, AMS allocated one-third of the costs to each of (1) beef, (2) pork, and (3) lamb for packers that processed all three species. For packers processing any two, AMS allocated one half the costs to each.

AMS estimated that all live poultry dealers that are regulated under the Proposed Alternative would require 1 hour of an attorney's time costing the industry $10,000 [158] and 1 hour of management time costing the industry $8,000 [159] for learning the rulemaking, reviewing, and adjusting contracts. The total costs for learning, reviewing, and adjusting contracts would be $18,000 [160] for live poultry dealers. AMS also expects that rulemaking will cost all 575 swine contractors an hour of an attorney's time and 1 hour of management time costing a total of $119,000 across all swine contractors.[161]

AMS expects that packers would require an estimated 1 hour of an attorney's time and 1 hour of management time costing the industry $75,000.[162] Pork packers' share of the packers' costs would be $27,000. Combining costs to pork packers with costs to swine contractors arrives at a total cost of $146,000 for hogs and pork markets.

AMS estimates that beef packers and lamb packers would also require 1 hour of attorney's time and 1 hour of management time to learn the rulemaking, review, and revise contracts. The total costs for would be $33,224 for beef packers and $14,697 for lamb packers.

Direct Recordkeeping Costs

As presented in detail in the Paperwork Reduction Act (PRA) section, costs to comply with the proposed recordkeeping requirements are likely relatively low. Proposed § 201.304(c) requires specific records that, if the regulated entity maintains, should be kept for a period of five years, including policies and procedures, staff training materials, materials informing covered producers regarding reporting mechanisms and protections, compliance testing, board of directors' oversight materials, and any records of the number and nature of unduly prejudicial or discrimination-based complaints received.

Costs of recordkeeping, as described in detail in the PRA, include regulated entities maintaining and updating compliance records, and is considered a direct cost. Some smaller regulated entities that currently don't maintain records, may voluntarily decide to develop formal policies, procedures, training, etc. to comply with the rulemaking and would then have records to maintain.

As described in detail in the PRA section, AMS expects the recordkeeping costs would be comprised of the time required by regulated entities to store and maintain records. AMS expects that the costs will be relatively small because many packers, live poultry dealers, and swine contractors may currently have few records concerning policies and procedures, staff training materials, materials informing covered producers regarding reporting mechanisms and protections, compliance testing, and board of

[156] Estimates are available at U.S. Bureau of Labor Statistics. Occupational Employment and Wage Statistics, available at *https://www.bls.gov/oes/special.requests/oesm20all.zip* (accessed 8/9/2022).

[157] For brevity, all beef and veal packers will be collectively referred to as beef packers and all lamb, sheep, and goat packers will be collectively referred to as lamb packers.

[158] 89 live poultry dealers × $113.80 per hour × 1 hour = $10,128.

[159] 89 live poultry dealers × $93.20 per hour × 1 hour = $8,295.

[160] $10,128 + $8,295 = $18,423.

[161] 575 × ($113.80 per hour × 1 hour + $93.20 per hour × 1 hour) = $119,027.

[162] 362 × ($113.80 per hour × 1 hour + $93.20 per hour × 1 hour) = $74,935.

directors' oversight materials related to prejudicial treatment. Some smaller firms might not have any records to store. Others already store the records and may have no new costs.

As described in detail in the PRA, AMS estimated that recordkeeping time for larger entities will be greater than for smaller entities, and thus estimated costs by quartiles, from largest entities to smallest. AMS estimated that proposed § 201.304(c) would require packers, live poultry dealers, and swine contractors in each quartile an average 4.00 hours, 2.00 hours, 1.33 hours, and 0.67 hours of administrative time for the first, second, third, and fourth quartiles, respectively. Additionally, AMS estimated that the hours required of managers, attorneys, and information technology staff each will average 1.50 hours, 0.75 hours, 0.50 hours, and 0.25 hours for the first, second, third, and fourth quartiles, respectively.

As delineated in detail in the PRA, AMS also expects that packers, live poultry dealers, and swine contractors will incur continuing recordkeeping costs in each successive year. AMS estimated that proposed § 201.304(c) would require an average of 3.00 hours, 1.50 hours, 1.00 hour, and 0.50 hour of administrative assistant time; 1.50 hours, 0.75 hour, 0.50 hour, and 0.25 hour of time each from managers and attorneys; and 1.00 hour, 0.50 hour, 0.33 hour, and 0.17 hour of time from information technology staff for packers, live poultry dealers, and swine contractors in the first, second, third, and fourth quartiles, respectively, to setup and maintain the required records in each succeeding year.

As described in detail in the PRA, estimated first-year costs for recordkeeping requirements in proposed § 201.304(c) total $26,000 for live poultry dealers,[163] $170,000 for swine contractors,[164] and $107,000 for packers. Estimated yearly continuing costs for recordkeeping requirements in § 201.304(c) total $23,000 for live poultry dealers,[165] $147,000 for swine contractors,[166] and $93,000 for packers.[167]

Breaking out costs by market, AMS expects recordkeeping requirements in proposed § 201.304(c) to cost beef packers $47,000 in the first year and $41,000 in each following year, as described in detail in the PRA. Proposed § 201.304(c) would cost lamb packers $21,000 in the first year and $18,000 in successive years. Proposed § 201.304(c) would cost pork packers $39,000, and it would cost swine contractors $170,000 for a total of $209,000 in the first year. Proposed § 201.304(c) would cost swine contractors $147,000 in successive years, and it would cost pork packers $33,000 for a total $180,000.

Total Direct Administrative and Recordkeeping Costs

The below table summarizes combined expected administrative and recordkeeping costs for regulated entities in the first year and in succeeding years. AMS expects that administrative and recordkeeping costs associated with Proposed Alternative §§ 201.304 and 201.306 would cost each packer, swine contractor, and live poultry dealer an average $504 in the first year and an average $256 in each succeeding year. First-year costs would total $45,000 for live poultry dealers, $290,000 for swine contractors, and $182,000 for packers. Costs in successive years would be due to recordkeeping requirements and would total $23,000 for live poultry dealers, $147,000 for swine contractors, and $93,000 for packers annually.

TABLE 7—EXPECTED FIRST-YEAR COST AND SUCCEEDING YEARS COSTS FOR LIVE POULTRY DEALERS, PACKERS, AND SWINE CONTRACTORS

	First-year cost ($)	Cost for each succeeding year ($)
Average Cost per Live Poultry Dealer	504	256
Average Cost per to Swine Contractor	504	256
Average Cost per Packer	504	256
Total Cost to Live Poultry Dealers	45,000	23,000
Total Cost to Swine Contractors	290,000	147,000
Total Cost to Packers	182,000	** 93,000
Beef Packers *	80,000	41,000
Pork Packers *	66,000	33,000
Lamb Packers *	36,000	18,000
Total Cost	517,000	263,000

* Many packers process more than one species of livestock, but AMS expects that each packer will require one hour of attorney's time and one hour of management time regardless of how many species of livestock it processes. To allocate costs across (1) beef, (2) pork, and (3) lamb processors, AMS allocated one-third of the costs to each of (1) beef, (2) pork, and (3) lamb for packers that processed all three species.

** Column total may not sum due to rounding.

[163] 89 live poultry dealers × (($39.69 per hour admin. cost × (4 hours + 2 hours + 1.33 hours + .67 hours)) + ($93.20 per hour manager cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($113.80 legal cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($82.50 information tech cost × (1.5 hours + .75 hours + .5 hours + .25 hours))/4 = $26,390.

[164] (575 swine contractors × (($39.69 per hour admin. cost × (4 hours + 2 hours + 1.33 hours + .67 hours)) + ($93.20 per hour manager cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + (113.80 legal cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($82.50 information tech cost × (1.5 hours + .75 hours + .5 hours + .25 hours)))/4 = $170,496.

[165] (89 live poultry dealers × (($39.69 per hour admin. cost × (4 hours + 2 hours + 1.33 hours + .67 hours)) + ($93.20 per hour manager cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($113.80 legal cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + $82.50 information tech cost × (1.5 hours + .75 hours + .5 hours + .25 hours)))/4 = $22,788.

[166] (575 swine contractors × (($39.69 per hour admin. cost × (4 hours + 2 hours + 1.33 hours + .67 hours)) + ($93.20 per hour manager cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($113.80 legal cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($82.50 information tech cost × (1.5 hours + .75 hours + .5 hours + .25 hours)))/4 = $147,225.

[167] (362 packers × ($39.69 per hour admin. cost × (4 hours + 2 hours + 1.33 hours + .67 hours)) + ($93.20 per hour manager cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($113.80 legal cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($82.50 information tech cost × (1.5 hours + .75 hours + .5 hours + .25 hours)))/4 = $92,688.

The total direct administrative and recordkeeping costs are estimated to be $517,000 in the first year. Estimated first year total direct administrative and recordkeeping costs for the cattle and beef industry, hogs and pork, lamb, and poultry industries rounded to the nearest thousand dollars are listed in the following table.

TABLE 8—DIRECT ADMINISTRATIVE AND RECORDKEEPING COSTS FOR PROPOSED §§ 201.304 AND 201.306 IN 2022

Cattle ($ Th)	Hogs ($ Th)	Lambs ($ Th)	Poultry ($ Th)	Total ($ Th)
80	355	36	45	517

Regulatory Alternative 2—Proposed Alternative: Ten-Year Total Direct Administrative and Recordkeeping Costs

Expected administrative and recordkeeping costs of proposed §§ 201.304 and 201.306 for each year from 2022 through 2031 appear in the table below.

TABLE 9—TEN-YEAR TOTAL DIRECT ADMINISTRATIVE AND RECORDKEEPING COSTS OF PROPOSED §§ 201.304 AND 201.306 *

Year	Cattle ($ Th)	Hogs ($ Th)	Lambs ($ Th)	Poultry ($ Th)	Total ($ Th)
2022	80	355	36	45	517
2023	41	181	18	23	263
2024	41	181	18	23	263
2025	41	181	18	23	263
2026	41	181	18	23	263
2027	41	181	18	23	263
2028	41	181	18	23	263
2029	41	181	18	23	263
2030	41	181	18	23	263
2031	41	181	18	23	263
Totals	449	1,982	200	250	2,881

** Column total may not sum due to rounding.

Based on the analysis, AMS expects the ten-year total direct administrative and recordkeeping costs of proposed §§ 201.304 and 201.306 to be $2.9 million.

Regulatory Alternative 2—Proposed Alternative: Present Value of Ten-Year Total Direct Administrative and Recordkeeping Costs

Costs to be incurred in the future are lower than the same costs to be incurred today. This is because the money that will be used to pay the costs in the future can be invested today and earn a return on investment until the period in which the cost is incurred. After the cost has been incurred, the earned returns will still be available.

To account for the time value of money, the administrative costs 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. AMS relied on both a three percent and seven percent discount rate as discussed in Circular A–4.[168]

AMS calculated the PV of the ten-year total direct administrative and recordkeeping costs of the proposed regulations using a three percent and seven percent discount rate and the PVs appear in the following table.

[168] Circular A–4. December 17, 2003, available at *www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf* (accessed 01/10/2022).

TABLE 10—PV OF TEN-YEAR DIRECT ADMINISTRATIVE AND RECORDKEEPING COST OF §§ 201.304 AND 201.306

Discount rate	Proposed alternative ($ th)
3 Percent	2,487
7 Percent	2,082

AMS expects the PV of the ten-year total administrative and recordkeeping costs of proposed §§ 201.304 and 201.306 to be $2.5 million at a three percent discount rate and $2.1 million at a seven percent discount rate.

Regulatory Alternative 2—Proposed Alternative: Annualized PV of Ten-Year Total Direct Administrative and Recordkeeping Costs

AMS then annualized the PV of the ten-year total administrative and recordkeeping costs (referred to as annualized costs) of proposed §§ 201.304 and 201.306 using both a three percent and seven percent discount rate as required by Circular A–4 and the results appear in the following table.[169]

TABLE 11—ANNUALIZED DIRECT ADMINISTRATIVE AND RECORDKEEPING COSTS OF PROPOSED §§ 201.304 AND 201.306

Discount rate	Proposed alternative ($ th)
3 Percent	292
7 Percent	297

AMS expects the annualized ten-year administrative and recordkeeping costs of proposed §§ 201.304 and 201.306 to be $292,000 at a three percent discount rate and $297,000 at a seven percent discount rate.

Cost-Benefit Comparison of Proposed Alternative

Combined sales of beef, pork, and broiler chicken in the U.S. for 2019 were approximately $240 billion. As discussed above, the total cost of proposed §§ 201.304 and 201.306 in the first year is estimated to be $517,000, or 0.000002 percent of revenues. A reduction in prejudicial, discriminatory, retaliatory, and deceptive practices would lead to benefits that would be directly related to the reductions in these practices. If the reductions are small, the benefits would be small. The greater the reductions, the greater the benefits. AMS expects that the net benefits to society from the proposed rule will be very small in relation to the total value of industry production, leading to negligible indirect effects on industry supply and demand, including price and quantity effects.

Regulatory Alternative 3: Small Business Exemption Alternative

The third regulatory alternative that AMS considered is issuing proposed §§ 201.304 and 201.306, but exempting small businesses, as defined by the SBA, from compliance with the recordkeeping requirement of § 201.304(c).[170] All other provisions of §§ 201.304 and 201.306 would still apply to small businesses. Most packers are small businesses under the SBA definition. Of the 362 packers reporting to AMS, 346 are small businesses. Two hundred forty-two beef packers and 197 pork packers are small businesses. All 147 lamb packers are small businesses. Packers include multi-species packers. One hundred eight swine contractors are small businesses. There are 54 small poultry dealers.

Regulatory Alternative 3: Total Costs of the Small Business Exemption Alternative

The below table summarizes combined expected administrative and recordkeeping costs for regulated entities in the first year and in succeeding years. AMS expects that administrative and recordkeeping costs associated with Proposed Alternative §§ 201.304 and 201.306 would cost each live poultry dealer, swine contractor, and packer an average of $398, $485, $231, respectively, in the first year. AMS expects costs to average $165, $256, and $23 for live poultry dealers, swine contractors, and packers, respectively, in each succeeding year. First-year costs would total $35,000 for live poultry dealers, $279,000 for swine contractors, and $84,000 for packers. Costs in successive years would be due to recordkeeping requirements and would total $15,000 for live poultry dealers, $138,000 for swine contractors, and $8,000 for packers annually. The total direct administrative and recordkeeping costs are estimated to be $398,000 in the first year.

TABLE 12—SMALL BUSINESS RECORD KEEPING EXEMPTION ALTERNATIVE EXPECTED FIRST-YEAR COST AND SUCCEEDING YEARS COSTS FOR LIVE POULTRY DEALERS, PACKERS, AND SWINE CONTRACTORS

	First year cost ($)	Cost for each succeeding year ($)
Average Cost per Live Poultry Dealer	398	165
Average Cost per Swine Contractor	485	256
Average Cost per Packer	231	23
Total Cost to Live Poultry Dealers	35,000	15,000
Total Cost to Swine Contractors	279,000	138,000
Total Cost to Packers	84,000	8,000
Beef Packers *	36,000	3,000
Pork Packers *	33,000	5,000
Lamb Packers *	15,000	0
Total Cost	398,000	161,000

* Many packers process more than one species of livestock, but AMS expects that each packer will require one hour of attorney's time and one hour of management time regardless of how many species of livestock it processes. To allocate costs across (1) beef, (2) pork, and (3) lamb processors, AMS allocated one-third of the costs to each of (1) beef, (2) pork, and (3) lamb for packers that processed all three species.

[169] *Ibid.*

[170] *See,* ''Stay legally compliant (*sba.gov*),'' *available at https://www.sba.gov/business-guide/manage-your-business/stay-legally-compliant* (Last accessed 8/9/2022).

As discussed above, AMS considers the total costs from proposed §§ 201.304 and 201.306 to be increased direct administrative and recordkeeping costs with no indirect costs from adjustments by the cattle, hog, and poultry industries to reduce their use of AMAs, change pricing mechanisms or poultry tournaments, and no substantial changes to existing marketing, growing, or production contracts. AMS estimated the costs to small business from the direct administrative costs of §§ 201.304 and 201.306 but excluded the recordkeeping costs of § 201.304(c) in this alternative option.

AMS estimated the costs to small business to be the value of the time for management, attorneys, administrative staff, and information technology staff to review the rulemaking and the firms' practices determining compliance with the direct administrative costs of §§ 201.304 and 201.306. AMS estimated costs for the Small Business Exemption Alternative similarly to the Proposed Alternative. The only difference is the recordkeeping costs of § 201.304(c) attributable to small business are not included in the costs for the Small Business Exemption Alternative. The estimates appear in the table below. The Proposed Alternative is also shown for convenience.

TABLE 13—ANNUAL TOTAL DIRECT COSTS—SMALL BUSINESS EXEMPTION ALTERNATIVE

Year	Proposed alternative ($ th)	Small business exemption alternative ($ th)
2022	517	376
2023	263	161
2024	263	161
2025	263	161
2026	263	161
2027	263	161
2028	263	161
2029	263	161
2030	263	161
2031	263	161
Totals	2,881	1,809

AMS estimates that proposed §§ 201.304 and 201.306, with the small business exemption, will result in $376 thousand in direct total costs in the cattle, hog, lamb, and poultry industries in the first full year following implementation and $161 thousand each year in ongoing costs. AMS expects the ten-year total costs of proposed §§ 201.304 and 201.306 with a small business exemption to be $1.8 million. Exempting small business would save approximately $140,000 in the first year and $1.1 million over ten years.

Regulatory Alternative 3: PV of Total Costs of the Small Business Exemption Alternative

AMS calculated the PV of the ten-year total costs of the Small Business Exemption Alternative using both a three percent and seven percent discount rate and the PVs appear in the following table. The Proposed Alternative is also shown for convenience.

TABLE 14—PV OF TEN-YEAR TOTAL COST—SMALL BUSINESS EXEMPTION

Discount rate	Proposed alternative ($ th)	Small business exemption alternative ($ th)
3 Percent	2,487	1,567
7 Percent	2,082	1,331

AMS expects the PV of the ten-year total costs of proposed §§ 201.304 and 201.306 with a small business exemption to be $1.6 million at a three percent discount rate and $1.3 million at a seven percent discount rate.

Regulatory Alternative 3: Annualized Costs of the Small Business Exemption Alternative

AMS then annualized the PV of the ten-year total costs of proposed §§ 201.304 and 201.306 with a small business exemption using both a three percent and seven percent discount rate and the results appear in the following table. The Proposed Alternative is also shown for convenience.

TABLE 15—TEN-YEAR ANNUALIZED COSTS—SMALL BUSINESS EXEMPTION

Discount rate	Proposed alternative ($ th)	Small business exemption alternative ($ th)
3 Percent	292	184
7 Percent	297	190

AMS expects the annualized costs of proposed §§ 201.304 and 201.306 with a small business exemption to be $184,000 at a three percent discount rate and $190,000 at a seven percent discount rate.

Cost-Benefit Comparison of Regulatory Alternatives

The status quo alternative has zero marginal costs. AMS compared the annualized costs of the Proposed Alternative to the annualized costs of the Small Business Exemption Alternative by subtracting the annualized costs of the Small Business Exemption Alternative from those of the Proposed Alternative and the results appear in the following table.

TABLE 16—DIFFERENCE IN TEN-YEAR ANNUALIZED COSTS OF PROPOSED §§ 201.304 AND 201.306 BETWEEN PROPOSED ALTERNATIVE AND SMALL BUSINESS EXEMPTION ALTERNATIVE

Discount rate	($ th)
3 Percent	108
7 Percent	107

The annualized costs of the Small Business Exemption Alternative are $108,000 less expensive using a three percent discount rate and $107,000 less expensive using a seven percent discount rate. As is the case with costs, the benefits will be highest for the Proposed Alternative because the full benefits will be received by all livestock producers and growers, not just those doing business with large packers, swine contractors and live poultry dealers.

Though the Small Business Exemption Alternative would save between $108,000 and $106,000 on an annualized basis, this alternative would deny the potential benefits offered by proposed § 201.304(c) to all livestock producers, swine contract growers, and poultry growers who contract with small packers, swine contractors, and live poultry dealers. While most cattle, hogs, and poultry processed and grown are contracted with large businesses, there are many small businesses who would be exempt from keeping records under proposed § 201.304(c) if the Small Business Exemption Alternative is chosen. The Small Business Exemption Alternative of the recordkeeping requirement of § 201.304(c) would exempt all lamb processors and deny the potential benefits to all lamb producers. Under this alternative, these livestock producers, poultry growers and swine production contract growers would be denied the potential benefits of recordkeeping and improved corporate culture as discussed above in the section on *Regulatory Alternative 2: Benefits of the Proposed Alternative*.

AMS considered all three regulatory alternatives and believes that the Proposed Alternative is the best alternative as it benefits all livestock producers, swine production contract growers, and poultry growers, regardless of the size of the packer, swine contractor, or live poultry dealer with

which they contract above the Status Quo Alternative.

Regulatory Flexibility Analysis

Proposed § 201.304 prohibits retaliation by regulated entities by terminating contracts, non-renewal of contracts, refusing to deal, and interfering in farm real estate contracts as unduly prejudicial and discriminatory practices. Proposed § 201.306 prohibits deceptive practices by regulated entities in contracting with covered producers including making or modifying a contract, performing under or enforcing a contract, terminating a contract, or refusing to contract with a covered producer based on pretext, false or misleading statements, or omission of material facts.

Additionally, the Proposed Alternative's § 201.304(c) requires packers, live poultry dealers, and swine contractors to keep relevant records of policies and procedures, staff training materials, materials informing covered producers regarding reporting mechanisms and protections, compliance testing, and board of directors' oversight materials related to prejudicial treatment.

The SBA defines small businesses by their North American Industry Classification System Codes (NAICS).[171] Live poultry dealers, NAICS 311615, are considered small businesses if they have fewer than 1,250 employees. Meat packers, including, beef, veal, pork, lamb, and goat packers, NAICS 311611, are small businesses if they have fewer than 1,000 employees. Swine contractors, NAICS 112210, are considered small if their sales are less than $1 million annually.

AMS maintains data on live poultry dealers from the annual reports these firms file with AMS. Currently, 89 live poultry dealers would be subject to the proposed regulation. Fifty-four of the live poultry dealers would be small businesses according to the SBA standard.

AMS records identified 362 packers that file annual reports with PSD for their 2020 fiscal year. Two hundred forty-eight were beef packers. Two hundred eight were pork packers, and 147 were lamb or goat packers. Many firms slaughtered more than one species of livestock. For instance, 118 packers slaughtered both beef and pork.

Most packers would be small businesses, although large packers are responsible for most meat production. Three hundred forty-six packers would be small businesses. Two hundred forty-two beef packers and 197 pork packers were small businesses. All of the 147 lamb and goat packers were small businesses.

AMS does not have similar records for swine contractors because they are not required to register with AMS or provide annual reports. Table 24 of the 2017 USDA Census of Agriculture indicated that there were 575 swine contractors in 2017. The Census of Agriculture table has categories for the number of head that swine contractors sold, but not the value of the head sold. AMS expects that the 467 swine contractors that sold 5,000 head of hogs or more were large businesses, and the 108 contractors that sold less than 5,000 head were small businesses.

AMS estimated the costs in two parts. First, AMS expects that each packer, swine contractor, and live poultry dealer would review and learn the new rulemaking and then review and, if necessary, revise production and marketing contracts to ensure compliance with the new rulemaking. Second, AMS expects that packers, live poultry dealers, and swine contractors would have additional costs associated with the new recordkeeping requirements in proposed § 201.304(c).

AMS estimated that costs reviewing and learning the Proposed Alternative to small live poultry dealers, small packers, and small swine contractors would consist of one hour of a manager's time and one hour of a lawyer's time to review the requirements of proposed §§ 201.304 and 201.306. Expected first-year costs would be $207 [172] for each live poultry dealer, each swine contractor, and each packer. This would amount to a total $11,000 for the 54 live poultry dealers, $72,000 for the 346 packers, and $22,000 for the 108 swine contractors.

Concerning the recordkeeping requirements in the Proposed Alternative's § 201.304(c), AMS expects the cost would be comprised of the time required to store and maintain records. AMS expects that the costs will be relatively small because packers, live poultry dealers, and swine contractors would likely have few records concerning policies and procedures, staff training materials, materials informing covered producers regarding reporting mechanisms and protections, compliance testing, and board of directors' oversight materials related to prejudicial treatment. Many firms might not have any records to maintain. Others already maintain the records and have no new costs.

AMS expects that recordkeeping costs would be correlated with the size of the firms. AMS ranked packers, live poultry dealers, and swine contractors by size and grouped them into quartiles, estimating more recordkeeping time for larger entities than for the smaller entities. AMS estimated that proposed § 201.304(c) would require an average of 4.00 hours of administrative assistant time, 1.50 hours of time each from managers, attorneys, and information technology staff for packers, live poultry dealers, and swine contractors in the first quartile, containing the largest entities, to setup and maintain the required records in the first year. AMS expects the packers, live poultry dealers, and swine contractors in the second quartile would require an average of 2.00 hours of administrative assistant time, 0.75 hours of time each from managers, attorneys, and information technology staff for first year costs. The third quartile would require 1.33 hours of administrative assistant time, 0.50 hours of time each from managers, attorneys, and information technology staff for first year costs, and the fourth quartile, containing the smallest entities, would require 0.67 hours of administrative assistant time, 0.25 hours of time each from managers, attorneys, and information technology staff.

AMS also expects that packers, live poultry dealers, and swine contractors will incur continuing costs in each successive year. AMS estimated that proposed § 201.304(c) would require an average of 3.00 hours of administrative assistant time, 1.50 hours of time each from managers and attorneys, and 1.00 hour of time from information technology staff for packers, live poultry dealers, and swine contractors in the first quartile to setup and maintain the required records in each succeeding year. AMS expects the packers, live poultry dealers, and swine contractors in the second quartile would require an average of 1.50 hours of administrative assistant time, 0.75 hours of time each from managers and attorneys, and 0.50 hours of time from information technology staff in each succeeding year. The third quartile would require 1.00 hour of administrative assistant time, 0.50 hours of time each from managers and attorneys, and 0.33 hours of time from information technology staff in each succeeding year, and the fourth quartile would require 0.50 hours

[171] U.S. Small Business Administration. *Table of Small Business Size Standards Matched to North American Industry Classification System Codes. effective August 19, 2019.* ''The SBA Issues a Final Rule to Adopt NAICS 2017 for Small Business Size'' (last accessed 8/9/2022). Available at *https://www.sba.gov/article/2018/feb/27/sba-issues-final-rule-adopt-naics-2017-small-business-size-standards.*

[172] $113.80 per hour × 1 hour of an attorney's time + $93.20 per hour × 1 hour of a manager's time = $207.

of administrative assistant time, 0.25 hours of time each from managers and attorneys, and 0.17 hours from information technology staff.

Estimated first-year costs for recordkeeping requirements in the Proposed Alternative's § 201.304(c) totaled $9,000 for live poultry dealers,[173] $11,000 for swine contractors,[174] and $98,000 for packers.[175] Estimated yearly continuing costs for recordkeeping requirements in § 201.304(c) totaled $8,000 for live poultry dealers,[176] $9,000 for swine contractors,[177] and $84,000 for packers.[178]

Total expected first year costs, including one time reviewing costs and recordkeeping cost would be $169,000 for packers, $33,000 for swine contractors, and $21,000 for live poultry dealers. Table 17 lists expected costs for small businesses subject to proposed §§ 201.304 and 201.306. AMS expects marginal costs to total $223,000 in the first year. Ten-year costs annualized at 3 percent would be $94,000 for packers, $12,000 for swine contractors, and $10,000 for live poultry dealers. Total ten-year costs annualized at 3 percent would be expected to be $116,000.

Ten-year costs annualized at 7 percent would be $96,000 for packers, $12,000 for swine contractors, and $10,000 for live poultry dealers. Total ten-year costs annualized at 7 percent would be expected to be $118,000.

TABLE 17—ESTIMATED INDUSTRY TOTAL COSTS TO SMALL BUSINESSES

Estimate type	Packers ($)	Swine contractors ($)	Poultry processors ($)	Total ($)
First-Year Costs	169,000	33,000	21,000	223,000
10 years Annualized at 3 Percent	94,000	12,000	10,000	116,000
10 years Annualized at 7 Percent	96,000	12,000	10,000	118,000

Live poultry dealers annually file reports with AMS that list each firm's net sales. Packers that purchase more than $500,000 annually in livestock also file annual reports that list net sales. While packers that annually slaughter less than $500,000 in livestock also file annual reports with AMS, in order to reduce the reporting requirements for small packers, they are not required to provide annual net sales.

Data from the annual reports enables AMS to compare average net sales for small pork packers, beef packers, and live poultry dealers to the expected costs of proposed §§ 201.304 and 201.306 in the table below. A shortcoming in the comparison is that net sales for smallest packers, those that purchase less than $500,000 in livestock, are not included in the average.

Swine contractors are not required to file annual reports with AMS, and similar net sales data are not available for swine contractors. Census of Agriculture's 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, AMS used the estimated average value per head for sales of all swine operations and the production values for firms in the Agriculture Census size classes for swine contractors.

The following table compares the average per entity first-year costs of the Proposed Alternative's §§ 201.304 and 201.306 to the average revenue per establishment for all regulated small businesses. First-year costs are appropriate for a threshold analysis because all the costs would occur in the first year. First-year costs per regulated entity are considerably higher than annualized costs, and any ratio of annualized costs to revenues will be less than a ratio of first-year costs to revenues.

TABLE 18—COMPARISON OF AVERAGE COSTS PER ENTITY TO AVERAGE REVENUES PER ENTITY FOR SMALL BUSINESSES

NAICS	Number of small businesses	Average revenue or net sales per establishment ($)	First-year costs ($)	First-year cost as percent of revenue (percent)	Annualized cost discounted at 7%	Annualized cost as percent of revenue (percent)
112210—Swine Contractor	108	485,860	306	0.0629	115	0.0236
311615—Poultry Processor	54	50,729,044	381	0.0008	181	0.0004

[173] 9.5 live poultry dealers × ($39.69 per hour admin. cost × 2 hours + $93.20 per hour manger cost × .75 + $113.80 legal cost × .75 hours + $82.50 information tech cost × .75 hours) + 44.5 live poultry dealers × ($39.69 per hour admin. cost × (1.33 hours + .67 hours) + $93.20 per hour manger cost × (.5 hours + .25 hours) + $113.80 legal cost × (.5 hours + .25 hours) + $82.50 information tech cost × (.5 hours + .25 hours))/2 = $9,414.

[174] 108 swine contractors × ($39.69 per hour admin. cost × .67 hours + $93.20 per hour manger cost × .25 hours + $113.80 legal cost × .25 hours + $82.50 information tech cost × .25 hours) = $10,675.

[175] 74.5 packers × ($39.69 per hour admin. cost × 2 hours + $93.20 per hour manger cost × .75 hours + $113.80 legal cost × .75 hours + $82.50 information tech cost × .75 hours + 271.5 packers × ($39.69 per hour admin. cost × (2 hours + 1.33 hours + .67 hours) + $93.20 per hour manger cost × (.75 hours + .5 hours + .25 hours) + $113.80 legal cost × (.75 hours + .5 hours + .25 hours) + $82.50 information tech cost × (.75 hours + .5 hours + .25 hours))/3 = $97,850.

[176] 9.5 live poultry dealers × ($39.69 per hour admin. cost × 1.5 hours + $93.20 per hour manger cost × .75 + $113.80 legal cost × .75 hours + $82.50 information tech cost × .75 hours) + 44.5 live poultry dealers × ($39.69 per hour admin. cost × (1 hours + .5 hours)) + $93.20 per hour manger cost × (.5 hours + .25 hours)) + ($113.80 legal cost × (.5 hours + .25 hours) + ($82.50 information tech cost × (.33hours + .17 hours))/2 = $8,129.

[177] 108 swine contractors × ($39.69 per hour admin. cost × .5 hours + $93.20 per hour manger cost × .25 hours + $113.80 legal cost × .25 hours + $82.50 information tech cost × .17 hours) = $9,217.

[178] 74.5 packers × ($39.69 per hour admin. cost × 3 hours + $93.20 per hour manger cost × 1.5 hours + $113.80 legal cost × 1.5 hours + $82.50 information tech cost × 1 hour) + 271.5 packers × ($39.69 per hour admin. cost × (1.5 hours + 1 hours + .5 hours) + $93.20 per hour manger cost × (.75 hours + .5 hours + .25 hours) + $113.80 legal cost × (.75 hours + .5 hours + .25 hours) + $82.50 information tech cost × (.50 hours + .33 hours + .17 hours))/3 = $84,494.

TABLE 18—COMPARISON OF AVERAGE COSTS PER ENTITY TO AVERAGE REVENUES PER ENTITY FOR SMALL BUSINESSES—Continued

NAICS	Number of small businesses	Average revenue or net sales per establishment ($)	First-year costs ($)	First-year cost as percent of revenue (percent)	Annualized cost discounted at 7%	Annualized cost as percent of revenue (percent)
311611—Meat Packer*	346	83,356,860	490	0.0006	277	0.0003

* Averages exclude net sales for packers that purchased less than $500,000 in livestock annually.

First-year costs as a percent of revenues are small. It is highest for swine contractors because average revenues for swine contractors are considerably smaller than average revenues for packers and live poultry dealers. At 0.0629 percent, the first-year cost is small compared to revenue.

Average net sales for packers listed in Table 18 have the problem of excluding the smallest packers, and consequently the averages are biased toward being too large. However, first-year cost as a percent of net sales is 0.0006 percent. Estimated first year cost for each packer is $490. These are relatively small numbers. If average net sales for each packer were only one hundredth of the amount listed in Table 18, estimated first-year costs would be less than 0.1 percent of net sales.

AMS has limited data on revenues for the smallest packers and live poultry dealers. Eighty-five packers submitted shortened annual reports to AMS because they purchased less than $500,000 in livestock. For the largest of these packers, annual revenues are likely close to $500,000 and expected costs would be about 0.06 percent. AMS encourages comments concerning business sizes for packers that purchase less than $500,000 in livestock each year and the effect the proposed §§ 201.304 and 201.306 would have on their business.

Small Business Exception Alternative

AMS also considered a Small Business Exception Alternative to the Proposed Alternative's §§ 201.304 and 201.306. The Small Business Exception Alternative would be the same as the Proposed Alternative's §§ 201.304 and 201.306 in all respects with the exception that none of the recordkeeping requirements in proposed § 201.304(c) would apply to small businesses. This Small Business Exception Alternative would cost small packers, swine contractors, and live poultry dealers less than proposed §§ 201.304 and 201.306 would cost. Recordkeeping costs comprised the largest share of the costs associated with §§ 201.304 and 201.306.

Although the Small Business Exception Alternative would not require small businesses to keep any additional records, small businesses would still be required to comply with all of the other provisions of §§ 201.304 and 201.306. AMS expects that small live poultry dealers, small packers, and small swine contractors would need to review the new rulemaking and determine whether the proposed rule would require any changes to their procurement contracts or other business practices and make the necessary changes. AMS estimated that costs would consist of one hour of a manager's time and one hour of a lawyer's time to review the requirements of Proposed Alternative's §§ 201.304 and 201.306. This amounts to expected first-year costs of $207 [179] for each live poultry dealer, each swine contractor, and each packer that qualifies as small business. All costs would occur in the first year.

Table 19 lists expected costs for small businesses subject to the Small Business Exception Alternative. AMS expects marginal costs to total $105,000 in the first year. The Small Business Exception Alternative is expected to cost $72,000, $22,000, and $11,000 for packers, swine contractors, and live poultry dealers respectively.

TABLE 19—ESTIMATED INDUSTRY TOTAL COSTS FOR THE SMALL BUSINESS EXCEPTION ALTERNATIVE

Estimate type	Packers ($)	Swine contractors ($)	Poultry processors ($)	Packers ($)
First-Year Costs	72,000	22,000	11,000	105,000
10 years Annualized at 3 Percent	8,000	3,000	1,000	12,000
10 years Annualized at 7 Percent	10,000	3,000	1,000	14,000

Ten-year costs annualized at 3 percent would be $8,000 for packers, $3,000 for swine contractors, and $1,000 for live poultry dealers. This amounts to $24 for each live poultry dealer, swine contractor, and packer. Total ten-year costs annualized at 3 percent would be expected to be $12,000.

Ten-year costs annualized at 7 percent would be $10,000 for packers, $3,000 for swine contractors, and $1,000 for live poultry dealers. This amounts to $28 for each live poultry dealer, swine contractor, and packer. Total ten-year costs annualized at 3 percent would be expected to be $14,000.

Table 20 compares the average per entity first-year costs of the Small Business Exception Alternative to the average revenue for each regulated small business. First-year costs are appropriate for a threshold analysis because all of the costs associated with the alternative would occur in the first year.

[179] $113.80 per hour × 1 hour of an attorney's time + 93.20 per hour × 1 hour of a manager's time = $207.

TABLE 20—COMPARISON OF PER ENTITY COST TO REVENUES FOR THE SMALL BUSINESS EXCEPTION ALTERNATIVE

NAICS	Number of small businesses	First-year costs ($)	Average revenue or net sales per Establishment ($)	First-year cost as percent of revenue (percent)
112210—Swine Contractor	108	207	485,860	0.0426
311615—Poultry Processor	54	207	50,729,044	0.0004
311611—Meat Packer *	346	207	83,356,860	0.0002

* Averages exclude net sales for packers that purchased less than $500,000 in livestock annually.

First-year costs as a percent of revenues are small. Similar to proposed §§ 201.304 and 201.306, relative costs are highest for swine contractors because average revenues for swine contractors are considerably smaller than average revenues for packers and live poultry dealers. At 0.0426 percent, the first-year cost to swine contractors is small compared to revenue.

Average net sales for packers listed in Table 18 have the same problem as the net sales figures in Table 16. They exclude the smallest packers, and consequently the averages are biased toward being too large. However, first-year cost as a percent of net sales for packers purchasing more than $500,000 per year is 0.0002 percent. Estimated first year cost for each packer is $207. Costs would be less than 0.1 percent of revenues for any packer with revenue greater than $20,700. Even for the smallest packer that AMS regulates, $207 would not likely have a significant economic impact.

Comparison of Alternatives

Expected costs for small businesses under the Proposed Alternative's §§ 201.304 and 201.306 would be more than double the expected costs for small businesses under a Small Business Exception Alternative. The cost difference is due to recordkeeping requirements. First-year costs would be $128,000 more for the Proposed Alternative than the Small Business Exception Alternative. While all of the costs associated with the Small Business Exception Alternative occur in the first year, small businesses would continue to incur recordkeeping costs associated with the Proposed Alternative §§ 201.304 and 201.306 into the future. Estimated costs annualized at 7 percent are $104,000 higher for Proposed Alternative §§ 201.304 and 201.306 than for the Small Business Exemption Alternative.

With either the Small Business Exception Alternative, or the Proposed Alternative, AMS expects the costs to be relatively small. The number of regulated entities that could experience a cost increase is substantial. Most regulated packers and live poultry dealers are small businesses. However, AMS expects that few small businesses would experience significant costs. For all three groups of regulated entities: packers, live poultry dealers, and swine contractors, average first year costs are expected to amount to less than one 0.1 percent of annual revenue for either of the alternatives. AMS expects that any additional costs to small packers, live poultry dealers, and swine contractors from this proposed rulemaking will not change their ability to continue operations or place any small businesses at a competitive disadvantage.

AMS chose the Proposed Alternative's §§ 201.304 and 201.306 over the Small Business Exception Alternative because AMS wishes to prevent the kind of undue prejudices and discrimination described in the proposed rule. AMS believes that keeping relevant records serves as constant reminder to all packers, live poultry dealers, and swine contractors that they cannot purchase livestock or enter into contracts for growing services with the kind of undue prejudices and discrimination described in the rulemaking.

The Proposed Alternative's §§ 201.304 and 201.306 are not expected 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.*). While confident in this assertion, AMS acknowledges that individual businesses may have relevant data to supplement our analysis. AMS encourages small stakeholders to submit any relevant data during the comment period.

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—Consultation and Coordination With Indian Tribal Governments

This proposed rule has been reviewed in accordance with the requirements of E.O. 13175—Consultation and Coordination with Indian Tribal governments. E.O. 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 the distribution of power and responsibilities between the Federal Government and Indian tribes.

This proposed rule will impact individual members of Indian Tribes and will impact Tribal governments or instrumentalities of Tribal governments. The rulemaking will also impact the relationship between Tribes and the Federal Government. USDA will hold a consultation with Tribal governments regarding the impact of this proposed rule with respect to Tribal governments and Native American livestock producers. USDA also seeks comments and information from Tribal organizations concerning impact on individual American Indian/Alaska Native livestock producers. Additional details on the date and manner of the consultations will be announced in a ''Dear Tribal Leader Letter,'' to be sent individually to tribes and published on the USDA Office of Tribal Relations website at *https://www.usda.gov/tribalrelations/tribal-consultations.*

Civil Rights Impact Analysis

AMS has considered the potential civil rights implications of this proposed 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, or protected genetic information. This

rulemaking 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. In fact, the proposed regulation would create means by which AMS may be able to address potential civil rights issues in violation of the Act.

In its review, AMS conducted a disparate impact analysis, using the required calculations, which resulted in a finding that Asian Americans, American Indian/Alaskan Natives, Pacific Islanders, and Native Hawaiians were disproportionately impacted. AMS analysis reflects that most producers and poultry growers will experience greater access to information regarding acquiring, handling, and processing quality livestock. The proposed regulation provides clearer standards to address market disadvantages to small and medium scale producers and growers, contributing to favorable contract terms and equitable price premiums.

AMS will institute enhance efforts to notify the groups found to be more significantly impacted of the regulations and their implications. AMS outreach will specifically target several organizations that regularly engage with or otherwise may represent the interests of these impacted groups. As a result of this outreach, if AMS detects the possibility of the new regulation causing a potential disparate impact on any protected individual or group, AMS will develop a mitigation strategy.

Executive Order 12988—Civil Justice Reform

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

VI. Request for Comments

Comments submitted on or before December 2, 2022 will be considered. Comments should reference Docket No. AMS–FTPP–21–0045 and the date and page number of this issue of the **Federal Register**. Comments can be submitted by either of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Enter AMS–FTPP–21–0045 in the Search filed. Select the Documents tab, then select the Comment button in the list of documents.
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. AMS–FTPP–21–0045, S. Brett Offutt, Chief Legal Officer, Packers and Stockyards Division, USDA, AMS, FTPP; Room 2097–S, Mail Stop 3601, 1400 Independence Ave. SW, Washington, DC 20250–3601.

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, AMS proposes to amend 9 CFR part 201 as follows:

PART 201—ADMINISTERING THE PACKERS AND STOCKYARDS ACT

■ 1. The authority citation for 9 CFR part 201 continues to read as follows:

Authority: 7 U.S.C. 181–229c.

■ 2. Add subpart O, consisting of §§ 201.300 through 201.390, to read as follows:

Subpart O—Competition and Market Integrity

Sec.

201.300–201.301 [Reserved]
201.302 Definitions.
201.304 Undue prejudices or disadvantages and unjust discriminatory practices.
201.306 Deceptive practices.
201.307–201.389 [Reserved]
201.390 Severability.

§§ 201.300–201.301 [Reserved]

§ 201.302 Definitions.

For purposes of this subpart, the following definitions apply:

Covered producer means a livestock producer as defined in this section or a swine production contract grower or poultry grower as defined in section 2(a) of the Act (7 U.S.C. 182(8), (14)).

Livestock producer means any person engaged in the raising and caring for livestock by the producer or another person, whether the livestock is owned by the producer or by another person, but not an employee of the owner of the livestock.

Market vulnerable individual means a person who is a member, or who a regulated entity perceives to be a member, of a group whose members have been subjected to, or are at heightened risk of, adverse treatment because of their identity as a member or perceived member of the group without regard to their individual qualities. A market vulnerable individual includes a company or organization where one or more of the principal owners, executives, or members would otherwise be a market vulnerable individual.

Regulated entity means a swine contractor or live poultry dealer as defined in section 2(a) of the Act (7 U.S.C. 182(8)) or a packer as defined in section 201 of the Act (7 U.S.C. 191).

§ 201.304 Undue prejudices or disadvantages and unjust discriminatory practices.

(a) *Prohibited bases.* (1) A regulated entity may not prejudice, disadvantage, inhibit market access, or otherwise take adverse action against a covered producer with respect to any matter related to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry based upon the covered producer's status as a market vulnerable individual or as a cooperative.

(2) Prejudice or disadvantage with respect to paragraph (a)(1) of this section includes the following actions:

(i) Offering contract terms that are less favorable than those generally or ordinarily offered.

(ii) Refusing to deal.

(iii) Differential contract performance or enforcement.

(iv) Termination of a contract or non-renewal of a contract.

(b) *Retaliation prohibited.* (1) A regulated entity may not retaliate or otherwise take an adverse action against a covered producer because of the covered producer's participation in the activities described in paragraph (b)(2) of this section to the extent that these activities are not otherwise prohibited by Federal or state law, including antitrust laws.

(2) The following activities are protected under paragraph (b)(1) of this section:

(i) A covered producer communicates with a government agency with respect to any matter related to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry or petitions for redress of grievances before a court, legislature, or government agency.

(ii) A covered producer asserts any of the rights granted under the Act or this part, or asserts contract rights.

(iii) A covered producer asserts the right to form or join a producer or grower association or organization, or to collectively process, prepare for market, handle, or market livestock or poultry.

(iv) A covered producer communicates or cooperates with a person for the purposes of improving production or marketing of livestock or poultry.

(v) A covered producer communicates or negotiates with a regulated entity for the purpose of exploring a business relationship.

(vi) A covered producer supports or participates as a witness in any proceeding under the Act, or a proceeding that relates to an alleged violation of law by a regulated entity.

(3) For purposes of paragraph (b)(1) of this section, retaliation includes the following actions:

(i) Termination of contracts or non-renewal of contracts.

(ii) Adversely differential performance or enforcement of a contract.

(iii) Refusing to deal with a covered producer.

(iv) Interference in farm real estate transactions or contracts with third parties.

(c) *Recordkeeping of compliance practices.* (1) The regulated entity shall retain all records relevant to its compliance with paragraphs (a) and (b) of this section for no less than 5 years from the date of record creation.

(2) Records that may be relevant under paragraph (c)(1) of this section include, if any, policies and procedures, staff training materials, materials informing covered producers regarding reporting mechanisms and protections, compliance testing, board of directors' oversight materials, and the number and nature of complaints received relevant to this section.

§ 201.306 Deceptive practices.

(a) *Prohibited practices.* A regulated entity may not engage in the specific deceptive practices prohibited in paragraphs (b) through (e) of this section with respect to any matter related to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry.

(b) *Contract formation.* A regulated entity may not make or modify a contract by employing a pretext, false or misleading statement, or omission of material fact necessary to make a statement not false or misleading.

(c) *Contract performance.* A regulated entity may not perform under or enforce a contract by employing a pretext, false or misleading statement, or omission of material fact necessary to make a statement not false or misleading.

(d) *Contract termination.* A regulated entity may not terminate a contract or take any other adverse action against a covered producer by employing a pretext, false or misleading statement, or omission of material fact necessary to make a statement not false or misleading.

(e) *Contract refusal.* A regulated entity may not provide false or misleading information to a covered producer or association of covered producers concerning a refusal to contract.

§§ 201.307–201.389 [Reserved]

§ 201.390 Severability.

If any provision of this subpart is declared invalid or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of this subpart or the applicability thereof to other persons or circumstances shall not be affected thereby.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

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