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: Final rule.

SUMMARY: The U.S. Department of Agriculture's (USDA or Department) Agricultural Marketing Service (AMS or the Agency) amends its Packers and Stockyards Act, 1921, regulations to prohibit undue prejudice and unjust discrimination against individuals on a prohibited basis unrelated to the quality of the service or product provided. The rule also identifies retaliatory practices that interfere with lawful communications, assertion of rights, and associated participation, among other protected activities, as unjust discrimination prohibited by the law. Finally, the rule identifies deceptive practices that violate the Packers and Stockyards Act with respect to contract formation, contract performance, contract termination, and contract refusal. The purpose of this rule is to promote inclusive competition and market integrity in the livestock, meats, poultry, and live poultry markets.

DATES: This rule is effective May 6, 2024.

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SUPPLEMENTARY INFORMATION:

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I. Executive Summary

The rise of concentration and changes in contracting practices in livestock and poultry markets over the last four decades have facilitated and exposed producers and growers (hereafter, producers unless otherwise noted) to increasing economic harms from exclusionary, prejudicial, or otherwise discriminatory conduct, as well as deceptive conduct, by packers, swine contractors, and live poultry dealers (hereinafter regulated entities, unless otherwise noted). The regulatory toolkit embodied in the Packers and Stockyards Act, 1921, as amended (P&S Act or the Act) (7 U.S.C. 181 *et seq.*), authorizes USDA to issue regulations to address these issues. This final rule seeks to address a discrete but important set of those wrongfully exclusionary or deceptive practices that undermine inclusive competition and market integrity: specifically, (1) discriminatory prejudices on certain bases relating to the producer's characteristics, (2) retaliation for engaging in certain acts as part of being a livestock or poultry producer or grower, and (3) false or misleading statements or material omissions in certain contexts. These practices deny producers opportunities to compete in the marketplace and earn the full value of their livestock sales or poultry growout services.

On October 3, 2022, AMS published in the **Federal Register** (87 FR 60010) a proposal to amend the regulations implementing the Act located in title 9, part 201, of the Code of Federal Regulations (CFR) by adding a new subpart O titled ''Competition and Market Integrity.'' AMS solicited comments on the proposed rule for an initial period of 60 days, and extended the comment period for an additional 45 days on November 30, 2022 (87 FR 73507). AMS received 446 comments from industry trade associations, non-profit organizations, individuals, State attorneys general, farm bureaus, academic/research institutions, and other groups. After consideration of all comments, AMS is adopting the proposed rule, with modifications designed to increase specificity and, therefore, certainty and enforceability.

AMS is issuing these regulations to enhance basic protections that modern livestock and poultry producers need to promote inclusive competition and market integrity. Specifically, this final rule will:

- Prohibit, as undue prejudices or disadvantages, actions that inhibit market access or actions that are otherwise adverse to covered producers on the basis of race, color, religion, national origin (including ethnicity), sex (including sexual orientation and gender identity, as well as pregnancy), disability, marital status, or age; or because of the covered producer's status as a cooperative, with certain narrow exceptions such as the provision of religious meats and the functions of Tribal governments;
- 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 false or misleading statements or omissions of material information in contract formation, performance, and termination; and prohibit regulated entities from providing false or misleading representations regarding refusal to contract; and
- Require recordkeeping to support USDA monitoring, evaluation, and enforcement of compliance with aspects of this rule.

AMS is adopting this final rule to promote inclusive competition and market integrity, as rational decision-making, so critical to economic success, can most effectively occur in a market free of the practices prohibited by this

rule. This final rule also affirms the importance of a clear and direct regulatory framework with respect to prohibited conduct, thus protecting producers in the marketplace. This rule does not address every possible way in which producers may be wrongfully excluded or deceived under the Act. Producers who believe their rights under the Act have been violated—whether specifically under this final rule, or in other circumstances—can report a violation to AMS.[1] For some matters in poultry, USDA further refers the case to the U.S. Department of Justice (DOJ) for enforcement.[2] Producers may also enforce the law and its regulations through private rights of action under the Act. Penalties under the Act depend upon the nature of the particular violation, including the particular animal species, and range from monetary penalties to injunctive relief.

This final rule is effective 60 days after publication in the **Federal Register**. AMS has chosen this effective date because it believes that compliance with this final rule will not require significant administrative or financial obligations for regulated entities. The low cost, coupled with minimal process changes regulated entities will be required to make to comply, support an effective date 60 days after publication. Sixty days will provide adequate time for regulated entities to be informed of the specified conduct this final rule prohibits as well as make changes to comply with the final rule.

II. Background

A. Current Market Structure and Risks for Producers

Market abuses of discrimination, retaliation, and deception can occur in livestock and poultry markets. Such conduct is amplified and exacerbated under increasingly concentrated livestock and poultry markets. Such markets are dominated by a few large packers and live poultry dealers. Additionally, changes in contracting practices, specifically bilateral contracting and vertical contracting that reaches farther into the production aspects of livestock and poultry, have given processors greater control over producers. These changes can exacerbate the impacts of discriminatory, retaliatory, and deceptive conduct by packers and live poultry dealers, which inhibits producers from fully participating in livestock and poultry markets or obtaining the full value of their livestock and poultry products and services. With few marketing options in concentrated markets, producers are more likely to suffer long lasting harm from market abuses by packers and live poultry dealers than would be the case in a marketplace that is more competitive.

A review of the historical structure of livestock and poultry markets shows how the risk of worsened competitive conditions or materially adverse effects to producers at the hands of a few large processors (livestock packers and live poultry dealers) has grown over time. In the late 1800s to early 1900s, the ''Big Five'' [3] large meat packers dominated the livestock market by working cooperatively to jointly set prices and divide territories amongst themselves.[4] [5] In 1921, Congress enacted the Packers and Stockyards Act, 7 U.S.C. 181–229, to promote effective competition and integrity in livestock, meat, and poultry markets because it believed that the large packers employed anticompetitive or abusive practices that harmed producers and consumers.[6] The objective of the P&S Act is ''to assure fair trade practices in the livestock marketing . . . industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock.'' [7] After the enactment of the P&S Act, several decades of relatively more competitive conditions in the livestock markets prevailed; however, structural shifts in the industry defined by technological and productivity advances and mergers and acquisitions by meat processors led to fewer and larger meat processors—increased market concentration—in the latter half of the 20th century. This transformation led to much larger sized packing plants, multi-plant packers and live poultry dealers; raised barriers to entry; reduced the number of meat processor competitors; and reduced competition. Today, greater use of bilateral and vertical contracting in the livestock and poultry industries also gives regulated entities greater practical ability to cause these harms in ways that are hard for producers to avoid.

The following table shows the level of concentration in the livestock and poultry slaughtering industries for 1980–2020 using four-firm Concentration Ratios (CR4).

[1] Parties may report tips or complaints to *farmerfairness.gov.* Additional information is available at *https://www.ams.usda.gov/services/enforcement/psd/reporting-violations.*

[2] 7 U.S.C. 181, including sections 203–205, 404, and 308 of the Act.

[3] Swift & Company, Armour and Company, The Cudahy Packing Company, Wilson & Co., Inc., and Morris & Company, Rosales, W.E., 2005. Dethroning economic kings: The Packers and Stockyards Act of 1921 and its modern awakening. *Journal of Agricultural & Food Industrial Organization, 3*(2). Accessed at *https://www.degruyter.com/document/doi/10.2202/1542-0485.1118/html* on 01–09–2024. *See also,* David Gordon, The Beef Trust: Antitrust Policy and the Meat Packing Industry, 1902–1922, at 230, 290 (1983) (Ph.D. Dissertation, Claremont Graduate School) (on file with the Wisconsin Historical Society Library) (referring to the ''Big Five'' and the ''Beef Trust'' interchangeably). *https://www.proquest.com/openview/b8fb565a39cdb1190b7b80e932cb8495/1?cbl=18750&diss=y&pq-origsite=gscholar&parentSessionId=XHRnq%2FulA9IQvIv3F8HNW40SbD8BIeNZTdBAIYAD8bQ%3D.*

[4] Rosales, William E. ''Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and its Modern Awekening'' *Journal of Agricultural & Food Industrial Organization* 3, no. 2, access Feb. 1, 2024, (2005), *https://doi.org/10.2202/1542-0485.1118.*

[5] 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.*

[6] The Packers and Stockyards Act: An Overview, National Agricultural Law Center, access Feb. 1, 2024, *https://nationalaglawcenter.org/overview/packers-and-stockyards/*

[7] *Bruhn's Freezer Meats* v. *U.S. Dep't of Agric.,* 438 F.2d 1332, 1337 (8th Cir. 1971), cited in *Van Wyk* v. *Bergland*, 570 F.2d 701, 704 (8th Cir. 1978) in AGRICULTURE DECISIONS Volume 72 Book One Part Two (P & S) Pages 371–434, page 13, access Feb. 1, 2024, *https://www.usda.gov/sites/default/files/documents/Vol%2072%20Book%201%20Part%202.pdf.*

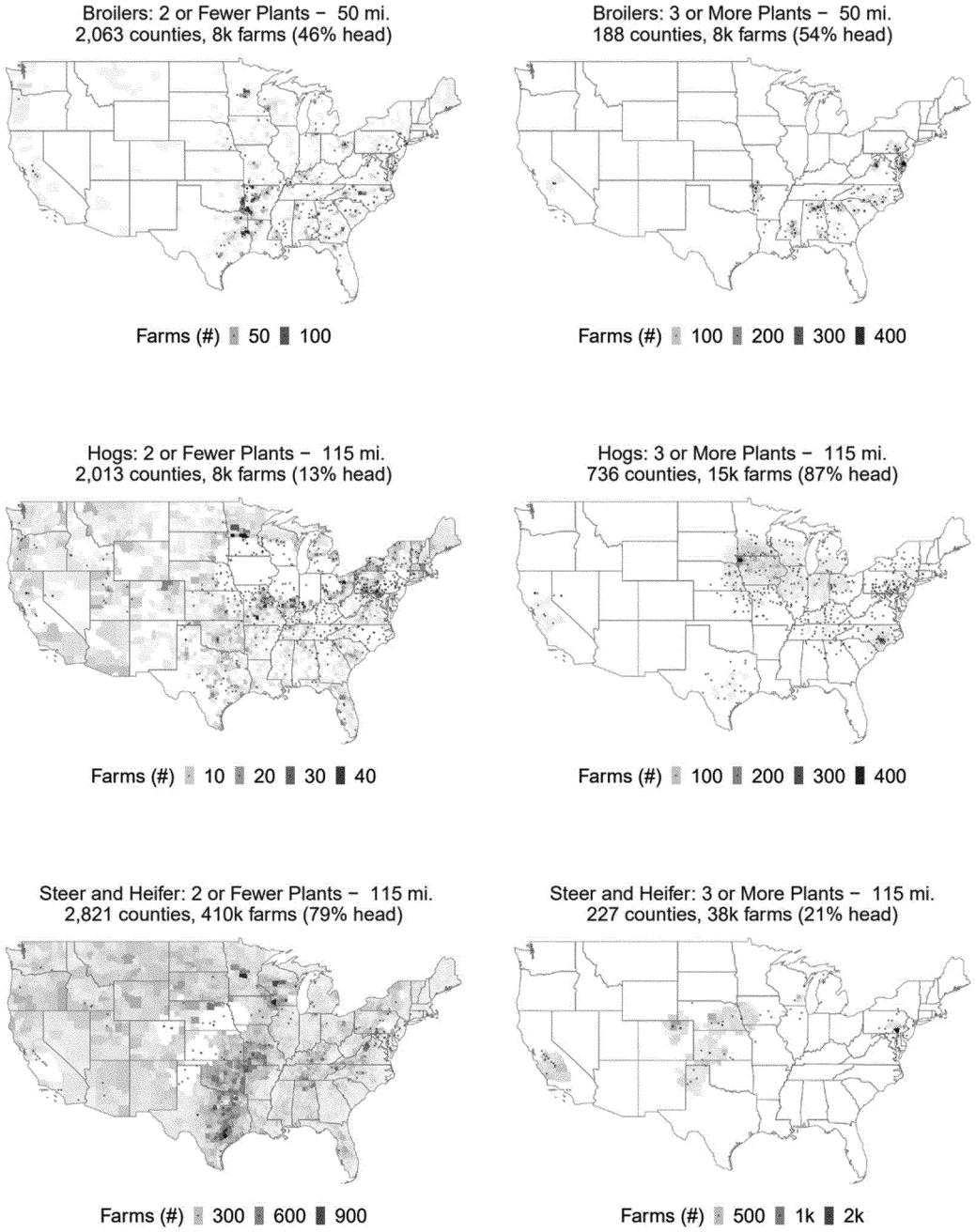
Table 1: Four-Firm Concentration Ratio in Livestock and Poultry Slaughter

Year	Steers & Heifers	Hogs	Broilers	Turkeys
	(%)	(%)	(%)	(%)
1980	36	34	32	40
1985	50	32	42	38
1990	72	40	41	45
1995	79	46	46	45
2000	82	57	49	41
2005	79	64	53	54
2010	85	65	51	56
2015	85	66	51	57
2020	81	64	53	55

Note: U.S. Department of Agriculture, AMS Packers and Stockyards annual reports. Available at https://www.ams.usda.gov/reports/psd-annual-reports.

The data are estimates of four-firm concentration ratios at the national level, but the relevant economic markets for livestock and poultry may be regional or local, where concentration may be higher than at the national level. The following figure shows the relative access that producers have to slaughter plants within various draw areas.

Figure 1. Relative Producer Access to Slaughtering Plants, 2017



Note: The figure shows the number of slaughter plants (2017): 2 or fewer (left) or 3 or more (right) within 50 miles (broiler - top) and 115 miles (hog – middle, steer and heifer – bottom) for broiler, hog, and cattle farms.[8]

[8] Meat, Poultry and Egg Product Inspection Directory by Establishment Name, by Number, and Demographic Data, USDA Food Safety Inspection Service, available at *https://www.fsis.usda.gov/inspection/establishments/meat-poultry-and-egg-product-inspection-directory*. Big Meat Acquisition Datasets, Yale Thurman Arnold Project, access Feb. 1, 2024, (2021), *https://som.yale.edu/centers/thurman-arnold-project-at-yale/agriculture-and-antitrust*. Haines, Michael, Fishback, Price, and Rhode, Paul. United States Agriculture Data, 1840–2012, Inter-university Consortium for Political and Social Research [distributor], access Feb. 1, 2024, (2018), *https://doi.org/10.3886/ICPSR35206.v4* (County-level census data from 1978–2012). USDA Census of Agriculture Large Datasets, USDA National Agricultural Statistics Services, access at Feb. 1, 2024, *https://www.nass.usda.gov/datasets/* (Livestock data from 1997–2017). Ward, C.E., Meatpacking plant capacity and utilization: Implications for competition and pricing, access at Feb. 1, 2024, (1990), *https://doi.org/10.1002/1520-6297(199001)6:1%3C65::AID-AGR2720060107%3E3.0.CO;2-V* (Estimating travel distances for cattle to be around 100 miles). MacDonald, James M. & Ollinger, Michael & Nelson, Kenneth E. & Handy, Charles R., 2000, ''Consolidation In U.S. Meatpacking,'' Agricultural Economic Reports 34021, United States Department of Agriculture, Economic Research Service, access at Feb. 1, 2024, (2020), *https://www.ers.usda.gov/*

Continued

Half of all broiler growers have two or fewer processors for which they can grow broilers.[9] The following table is a modification of a table in MacDonald (2012),[10] adding the market concentration measure, the Herfindahl-Hirshman Index (HHI) [11] indices to MacDonald's calculations of the integrators, *i.e.,* live poultry dealers who typically have vertically integrated production, 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 percent of growers are facing an integrator HHI of at least 2,500. The data suggest that most contract broiler growers in the U.S. are thus in markets where the live poultry dealers have the potential to exercise market power.

Table 2: 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 (broiler operations)	Production (lbs. of broilers removed)	Can change to another integrator
Number	*HHI*	*Percent of total*		*Percent of farms*
1	10,000	21.7	24.5	7
2	5,000	30.2	31.7	52
3	3,333	20.4	19.7	62
4	2,500	16.1	14.8	71
>4		7.8	6.6	77

By the late 20th century and early 21st century, contracting practices were also changing. Bilateral and vertical contracting were becoming the increasingly dominant means to coordinate live animal supplies.[12] Today, most poultry production and about 98 percent of hog production fall under production contracts, and roughly 70 percent of cattle procurement falls under marketing contracts.[13] Bilateral and vertical contracting have benefits

webdocs/publications/41108/18011_aer785_1_.pdf?v=0. Smith, Timothy L., Andrew L. Goodkind, Tae-Gon Kim, Rylie E. O. Pelton, Kyo Suh, and Jennifer Schmitt, (2017). ''Subnational mobility and consumption-based environmental accounting of us corn in animal protein and ethanol supply chains'', Proceedings of the National Academy of Sciences (38), 114, access at Feb. 1, 2024, *https://doi.org/10.1073/pnas.1703793114* (Estimating travel distances for broilers to be 48 miles on average; and for pigs and cattle, ~115 miles). Beam, A.L. & Thilmany, Dawn & Pritchard, R.W. & Garber, L.P. & Metre, DC & Olea-Popelka, F.J.. (2015). Beam, A.L., D.D. Thilmany, R.W. Pritchard, L.P. Garber, DC Van Metre, and F.J. Olea-Popelka. ''Distance to Slaughter, Markets and Feed Sources Used by Small-Scale Food Animal Operations in the United States.'' Renewable Agriculture and Food Systems 31, no. 1, access at Feb. 1, 2024, (2016): 49–59. *https://doi.org/10.1017/S1742170514000441.* (Estimating transportation distances of 90 miles for 95 percent of percent of small-scale livestock operations). (Analysts filtered for plants that slaughtered beef, pork, and chicken. Analysts joined firm name appearing in directory to likely parent firm name by constructing a name lookup using merger data published by Yale Thurman Arnold Project; and manual internet search for poultry and livestock firms' mergers and acquisitions. Analysts obtained geographic coordinates from establishment address. For each establishment per animal class, analysts calculated the distance from the centroids of all U.S. counties to all plant establishments; and filtered for distances within 50 miles (broiler) and 115 miles (hog, cattle), based on estimates of travel distances for each animal obtained from literature search. Analysts calculated number of counties reachable by the travel distance for each animal species, *i.e.:* geographic draw area for each plant. Analysts produced for each county the number of plants appended with the parent firm name derived from the historic merger dataset described above. Analysts present as the summary figure the total number of unique parent firm names located within 90 (broilers) and 115 (hog, cattle) miles of county centroids that contain, for the purposes of this county-level analysis, the total number farm operations of each animal type in the county. Analysts summarized the number of counties, inventory, and operations with hog, broiler, and cattle sales, for all counties from 2017 NASS county-level dataset; and, for farm operations, filtered only for farm operations above the smallest class size, *e.g.:* for hog, above 25 head; for cattle, above 10 head; for broilers, above 2,000 head. This smallest class size is not likely to be utilizing the slaughter plants).

[9] MacDonald, J.M. and Key, N., 2012, Market power in poultry production contracting? Evidence from a farm survey, *Journal of Agricultural and Applied Economics, 44*(4), pp.477–490, access at Feb. 1, 2024, (2012), *https://www.proquest.com/scholarly-journals/market-power-poultry-production-contracting/docview/1183766436/se-2.*

[10] Ibid.

[11] The Herfindahl-Hirschman Index, HHI, is a ''commonly accepted measure of market concentration. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers.'' U.S. Department of Justice, ''Herfindahl-Hirschman Index,'' accessed Feb. 1, 2024, (2018), *https://www.justice.gov/atr/herfindahl-hirschman-index.*

[12] *Lauck,* J. K. (1998). *Competition* in the *Grain Belt Meatpacking Sector After World* War. II. The annals of Iowa, 57(2), *https://pubs.lib.uiowa.edu/annals-of-iowa/article/id/10311/* (Finding that in 1984, only 7 percent of livestock were marketed through terminal markets. By this time, many packers made vertical contracts with farmers or feedlots). ''Structural Change in Livestock: Causes, Implications, Alternatives,'' Research Institute on Livestock Pricing 232728, Virginia Polytechnic Institute and State University, Department of Agricultural and Applied Economics, access at Feb. 1, 2024, (1990), available at *https://ideas.repec.org/p/ags/vtrilp/232728.html.* See James M. MacDonald and Christopher Burns, ''Marketing and Production Contracts Are Widely Used in U.S. Agriculture,'' Economic Research Service, (July 2019), available at *https://www.ers.usda.gov/amber-waves/2019/july/marketing-and-production-contracts-are-widely-used-in-us-agriculture/* (For a producer to successfully bring an animal to processing, they must secure a source of animals to raise, feed, medicine, and processing services, among other needs. In contract production, regulated entities typically control the inputs and processing and distribution channels, and therefore can largely block market access for independent producers seeking to bypass these tightly controlled, vertically contracted supply chains).

[13] USDA ERS, J. M. MacDonald and C. Burnes, (July 1, 2019), Marketing and Production Contracts Are Widely Use in U.S. Agriculture, *Amber Waves.* (In 2017, 49 percent of the value of livestock production was raised under contract agreements—usually between farmers and processors. Most poultry is produced under contract, and what is not produced under contracts between processors and growers is raised in facilities operated directly by processors. See graph for data on hogs.) *https://ers.usda.gov/amber-waves/2019/july/marketing-and-production-contracts-are-widely-used-in-us-agriculture/;* See also, USDA Packers and Stockyards Division (PSD), (2020), Packers and Stockyards Division Annual Report 2020, access at Feb. 1, 2024, *https://www.ams.usda.gov/sites/default/files/media/PackersandStockyardsAnnualReport2020.pdf.*

and disadvantages for both processors and producers. However, the exercise of market power through the contracting practices occurring in concentrated livestock and poultry markets have left producers susceptible to the conduct this rule aims to prohibit.

One of the notable structural changes over the course of the 20th century was the improvement in refrigeration technology. Refrigeration enabled meat packers to move away from the from Great Lakes and the Upper Midwest, where they could source large quantities of ice and build facilities closer to the centers of livestock production.[14] Slaughterhouse and fabrication plants, therefore, could and did move away from urban areas to remote rural locations. As technology and the ability to scale operations also grew in the latter half of the 20th century, plants also grew in size.[15]

These changes had two implications over time. First, as processing plants moved from urban to rural areas, producers were more vulnerable to an exercise of monopsony power because the local and regional markets became more concentrated.[16] Second, instead of terminal (auction) stockyards aggregating livestock for sales to packers, packers and producers increasingly entered into bilateral contractual relationships to buy livestock.[17] When producers utilized stockyards for their livestock sales, they could rely for protection on the provisions of title III under the Act, which established robust nondiscrimination protections for producers (in sec. 312), as well as a DOJ Consent Decree in 1920 with the major packers, which established that the stockyards had to be structurally separate from packers.[18] For example, in 1968 USDA issued a Statement of General Policy under the Packers and Stockyards Act to clarify that the prohibitions against unjust discrimination under sec. 312 governing ''just and reasonable stockyard services'' prohibited discrimination on the basis of race, religion, color, or national origin. However, as the industry structure evolved and livestock were increasingly sold through bilateral, vertical contracts, producers were no longer protected by sec. 312 of the Act. Instead, the sales were governed by title II of the Act, under which sec. 202(a) and (b) prohibits unjust discrimination and undue prejudice.[19] This final rule seeks to articulate the necessary protections around unjust discrimination and deception under those provisions of the Act.

The broiler industry also grew quickly after the Second World War. Early on it adopted a production model in which live poultry dealers contracted with poultry growers to grow-out broilers, rather than a model of independent producers selling broilers on the open market. With most broiler growing contracts, the live poultry dealer provides the chicks, the feed, and veterinary services, while the grower provides labor, facilities, equipment, and energy necessary to turn the chicks into slaughter-ready birds. At first, live poultry dealers were often feed suppliers, but now most processors act as live poultry dealers. Overall, the reality is that live poultry dealers have extensive control over production through the contracting practices.

Furthermore, it is important to acknowledge the impact of a consolidating farm production landscape overall. With the livestock and poultry farming sectors consolidating over the last several decades, the aggregate number of producers has declined significantly, even as total production is stable or growing. Many factors driving the loss of producers in the marketplace are the same factors underlying the market changes referenced above and include productivity growth wrought by scientific and technological advances, economies of scale, and transportation improvements. As shown in Figures 2 and 3 below, over the last 60 years, changes in animal production have corresponded to declines on the order of

[14] David I. Smith, (Spring 2019), 19th Century Development of Refrigeration in The American Meat Packing Industry, access at Feb. 1, 2024, *https://scholarworks.harding.edu/cgi/viewcontent.cgi?article=1118&context=tenor.* (''Development of refrigeration and transportation in Chicago led the city to become the meat packing center of the world,'' p. 100 from Howard Copeland Hill, ''The Development of Chicago as a Center of the Meat Packing Industry,'' Mississippi Valley Historical Review 10, no. 3 (1923): 253). (And, ''Refrigerator cars ''enabled dressed beef to be slaughtered in Chicago and shipped to the East at a lower cost than livestock,'' p. 103, from Mary Yeager Kujovich, ''The Refrigerator Car and the Growth of the American Dressed Beef Industry,'' The Business History Review 44, no. 4 (1970): 460.); Warren, Wilson, (2009), Tied to the Great Packing Machine: The Midwest and Meatpacking, Bibliovault OAI Repository, the University of Chicago Press, access at Feb. 1, 2024, *https://books.google.com/books?hl=en&lr=&id=f-CAclXhhCYC&oi=fnd&pg=PR7&dq=history+of+meat+packing&ots=oFnnxzABzR&sig=gp3eackbDY2CzAdcz8Q67cg0pvQ#v=onepage&q=history%20of%20meat%20packing&f=false* (Wilson notes that in the late 19th century plants were starting to move closer to livestock; and, by the 1950s, the industry hit the end of its third phase (1920s to 1950s) of packers buying direct from feedlots/producers and the decline of terminal markets.).

[15] MacDonald, J.M., Ollinger, M., Nelson, K.E. and Handy, C.R., (2000), Consolidation in US meatpacking. Economic Research Service, U.S. Department of Agriculture. Agricultural Economic Report No. 785, access at Feb. 1, 2024, *https://www.ers.usda.gov/webdocs/publications/41108/18011_aer785_1_.pdf?v=0#:~:text=Consolidation%20in%20slaughter%20features%20three,the%20location%20of%20animal%20feeders.*

[16] Willard Williams, ''Small Business Problems in the Marketing of Meat and Other Commodities (Part 4, Changing Structure of Beef Packing Industry),'' Hearings before the Subcommittee on SBA and SBIC Authority and General Small Business Problems of the Committee on Small Business, House, 96th Cong., 1st sess. (Washington, DC, 1979), 3; ''Structural Change in Livestock: Causes, Implications, Alternatives,'' Research Institute on Livestock Pricing 232728, Virginia Polytechnic Institute and State University, Department of Agricultural and Applied Economics, access at Feb. 1, 2024, (1990), available at *https://ideas.repec.org/p/ags/vtrilp/232728.html;* Lauck, J. K., (1998), Competition in the Grain Belt Meatpacking Sector After World War. II. The annals of Iowa, 57(2), access at Feb. 1, 2024, available at *https://pubs.lib.uiowa.edu/annals-of-iowa/article/id/10311/;* Marion, Bruce W., ''Restructuring of Meat Packing Industries: Implications for Farmers and Consumers,'' Working Papers 204107, University of Wisconsin-Madison, Department of Agricultural and Applied Economics, Food System Research Group (1988), available at *https://ideas.repec.org/p/ags/uwfswp/204107.html;* Aduddell, Robert M. & Cain, Louis P., ''The Consent Decree in the Meatpacking Industry, 1920–1956,'' Business History Review, Cambridge University Press, vol. 55(3) 1981; Aduddell, Robert M., and Louis P. Cain. ''A Strange Sense of Deja Vu: The Packers and the Feds, 1915–82.'' Business and Economic History 11 (1982): 49–60. *http://www.jstor.org/stable/23702755* (Documenting the historic shift from terminal auctions, in which around 90 percent of livestock were marketed in the 1920s; to 75 percent in the 1940s; to just 7 percent by 1984 (Lauck 1998; Aduddell 1981). In terminal auctions, market participants, including producers, new independent packers, and retailers enjoyed the benefits of transparent pricing and many possible marketing channels. The number of terminal auctions doubled every decade from 1935–1955 (Aduddell 1981). In the latter half of the 20th century, a new generation of large packers located closer to producers; and built new facilities to process larger numbers of animals which they purchased directly from increasingly larger feedlots (Williams 1978). Various researchers during the time period documented how direct purchases from these packers accounted for a larger share of the industry's sales; and contributed to decreasing numbers of market transactions and bids in terminal markets. For example, for cattle, the number of single bid transactions for cattle increased by 64 percent from 1982 to 1987; and by 38 percent for hogs (Purcell 1990). In turn, producers facing fewer buyers often reported lower prices paid (Marion 1988).

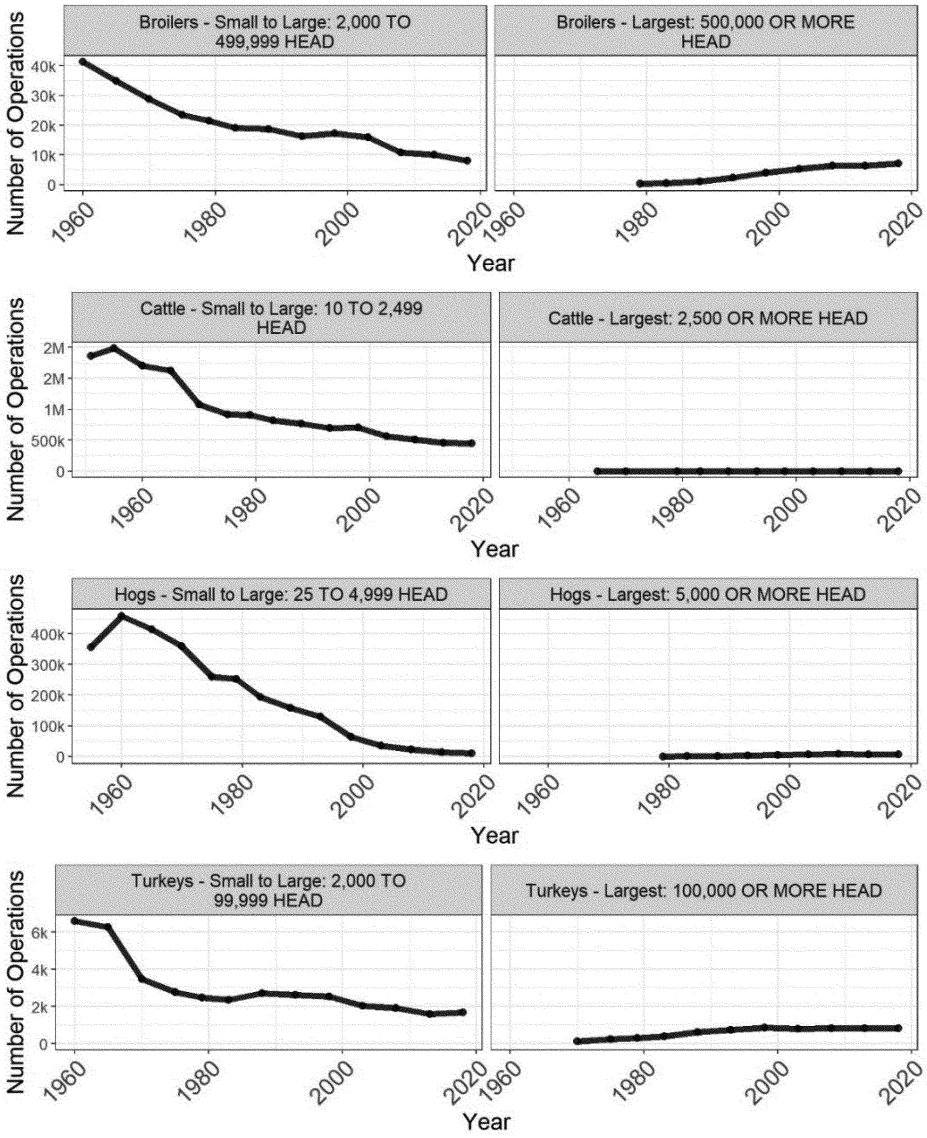
[17] Lauck, J.K., (1998), *Competition* in the *Grain Belt Meatpacking Sector After World* War. II. The annals of Iowa, 57(2), access Feb. 1, 2024, available at *https://pubs.lib.uiowa.edu/annals-of-iowa/article/id/10311/;* Unknown (W. Purcell, editor), (1990), ''Structural Change in Livestock: Causes, Implications, Alternatives,'' *https://ideas.repec.org/p/ags/vtrilp/232728.html.* Research Institute on Livestock Pricing Virginia Polytechnic Institute and State University, Department of Agricultural and Applied Economics, available at *https://ideas.repec.org/p/ags/vtrilp/232728.html;* Dickes, L.A. and Dickes, A.L. (2002), ''Oligopolists then and now: a study of the meatpacking industry,'' In *Allied Academies International Conference. Academy for Economics and Economic Education. Proceedings* (Vol. 5, No. 1, p. 15). Jordan Whitney Enterprises, Inc. *https://www.proquest.com/openview/919b243381c017244c764591d3d50a90/1?pq-origsite=gscholar&cbl=38640.*

[18] Aduddell 1981, *supra.*

[19] 7 U.S.C. 192(a) and (b).

hundreds of thousands of producers in nearly every size class except the largest, which increased by only hundreds of producers.[20]

Figure 2: Declines in Number of Small to Large Poultry and Livestock Operations While Numbers of the Largest Size Increased

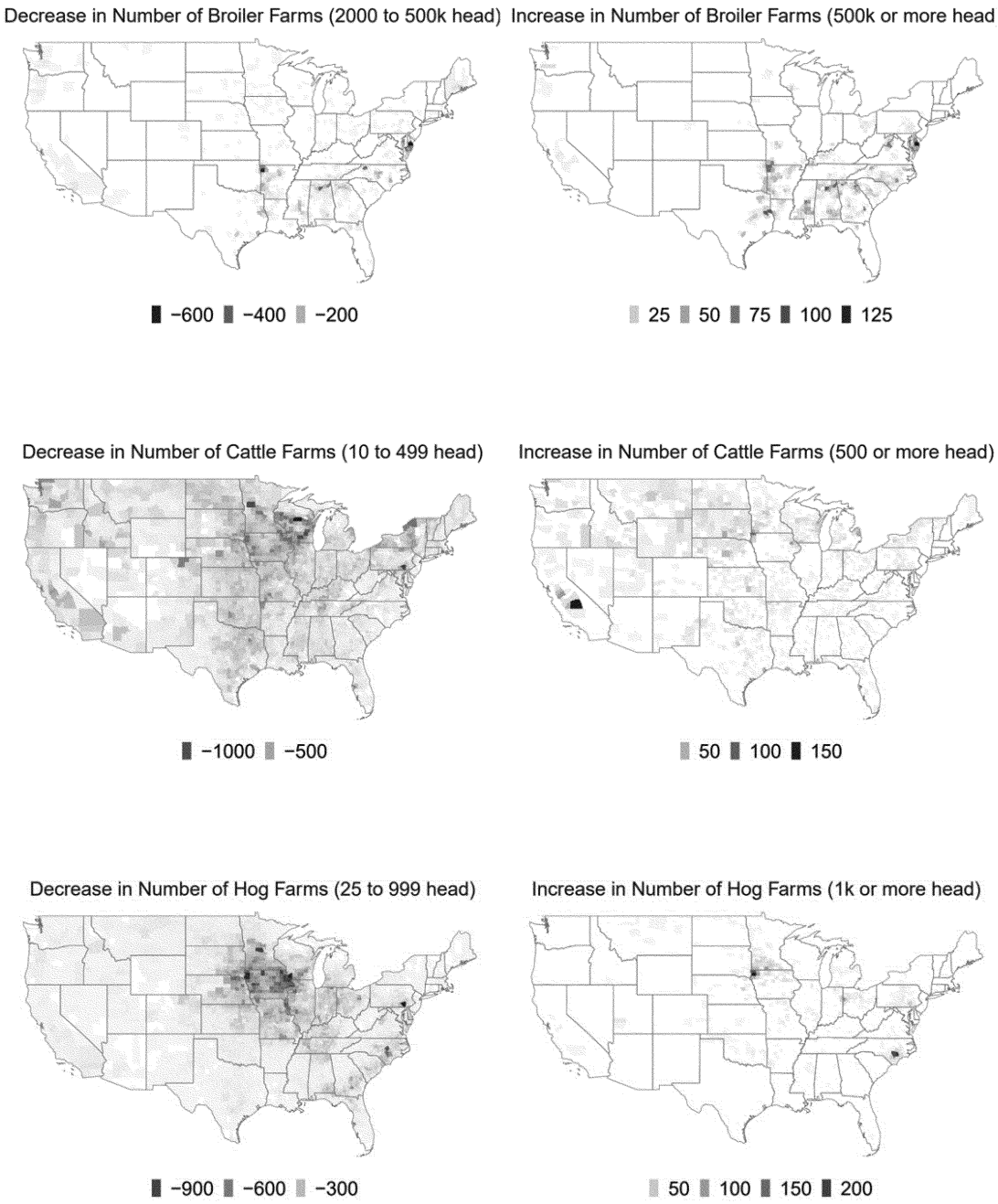


Note: The number of producers annually producing 2,000 to 499,999 boilers (top), 10 to 2,499 head of cattle (second row), 25 to 4,999 head of hogs (third row), and 2,000 to 99,999 head of turkeys (bottom row) in the U.S. decreased by thousands to hundreds of thousands of operations from 1978 to 2017 (left); while the number of operations of the largest size class (right) increased on a smaller order or remained stagnant.[21]

[20] Haines, Michael, Fishback, Price, and Rhode, Paul. United States Agriculture Data, 1840–2012, Inter-university Consortium for Political and Social Research [distributor], (2018), *https://doi.org/10.3886/ICPSR35206.v4* (County-level census data from 1978–2012). USDA Census of Agriculture Large Datasets, USDA National Agricultural Statistics Services, available at *https://www.nass.usda.gov/datasets/* (Livestock data from 1997–2017).

[21] USDA Census of Agriculture Historical Archive, USDA National Agricultural Statistics Services, available at *https://agcensus.library.cornell.edu/* (National-level statistics from 1978–2012); USDA Census of Agriculture 2017, USDA National Agricultural Statistics Services, available at *https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/* (National-level statistics for 2017) (Analysts obtained the total number of operations with sales for each animal size class from historic national-level statistics from 1978–2017. Analysts summed the number of operations of every class other than the largest size class for each animal species, compared to the largest size class; and excluded the very smallest size class in each summary because the smallest size is not likely to receive slaughter services by regulated entities).

Figure 3: Change in Number of Farm Operations: 1978 - 2017



Note: Decreases (left) in the number of farm operations from 2,000 to 500,000 broiler head produced annually (top), 10 to 499 cattle head (middle), and 25 to 999 hog head (bottom) coincided with increases in the number of the largest size class (right) for each animal operation from 1978 – 2017.

In the figure above, the intensity of shading indicates the magnitude of decrease (left) or increase (right), with shading intensity scaled individually to each map panel. Generally, the number of cattle and hog operations for every size class except the largest decreased in many counties across the U.S., while the number of operations for the largest size class increased in only a few counties. Owing to the limitations of available county-level data, the above map for cattle operations include both feedlot and cow-calf operations, of which only the first sell directly to packers in most instances. Feedlots and packers tended to locate closer to producers in the latter half of the 20th century. As feedlots became larger and more concentrated, the number of farms with fed cattle sales declined. For example, McBride found that from 1978–1992, as the distribution of cattle feedlots became geographically tighter, the number of counties contributing to half of cattle sales decreased from 73 counties in 1978 to just 44 counties in 1992, with a fourth

of sales coming from 13 counties. The number of feedlots declined from approximately 175,155 in 23 states in 1970 to 27,000 feedlots in 2020, with half of all fed cattle from just 132 of them.[22]

Data from Figure 3 clearly indicate a shift in livestock and poultry raising to larger farms. This shift has occurred in concert with an increase in bilateral and vertical contracting. Bilateral and vertical contracting facilitate the conditions in which discrimination and retaliation are more likely to restrict market opportunities of producers and cause them to earn less than the full value of their animals. It is harder to discriminate in the aggregated market of the stockyard than through bilateral contracting regimes. When producers are locked into long-term agreements with a single buyer, it is easier for buyers to discriminate on prohibited bases or retaliate in response to protected activities because they exercise considerably more leverage over producers. Buyer-seller relationships are more fixed, providing much less flexibility for producers. Furthermore, with the number of farms declining in number, the economic harms of discrimination and retaliation are more likely to be permanent as being denied a long-term contract may lead to permanent exclusion from the market. Smaller farms in particular may be more likely to be permanent casualties of discriminatory or retaliatory behavior in a consolidated farm context as buyers gravitate toward larger suppliers to more easily satisfy their volume requirements. Discriminatory or retaliatory behavior is more likely to harm producers economically because it is much harder to find alternative buyers in a world with fewer, bigger farms and fewer, bigger packers and live poultry dealers. This rule is not directly addressing consolidation at the farm level or concentration at the processor level, but in providing more protections to producers from discriminatory and retaliatory conduct, it is helping to prevent market exclusion.

A long-time scholar of these markets stated as early 2004 that the livestock and poultry markets appear to be by ''invitation only.'' [23] That statement underscores the power of incumbent entities to control access to the market and, in many ways, the destiny of what had been multigenerational successful operations of producers and smaller competitors.[24] This final rule addresses some of the ways that livestock and poultry markets unfairly exclude producers or otherwise limit their ability to obtain the full value of their animals. This final rule does not address all the factors contributing to market exclusion. However, it does address several practices that exclude producers and, in doing so, violate the Packers and Stockyards Act. AMS recognizes that creating inclusive and competitive markets with integrity requires multiple legal, regulatory, and programmatic strategies to mitigate the potential harmful effects of concentration and vertical contracting; build up alternatives through investments in regional meat and poultry processing; [25] and protect the rights of producers to develop producer organizations that advance farmer welfare, rural prosperity, and quality food. Thus, this rulemaking is one key piece to AMS's strong commitment to mitigating the factors that restrict market access for livestock and poultry producers.

B. Discrimination, Retaliation, and Deception

The P&S Act is a remedial statute enacted to address problems faced by farmers, producers, and other participants in the markets for livestock, meats, meat food products, livestock products in unmanufactured form, poultry, and live poultry; to protect the public from predatory practices; and to protect freedom for farmers and businesses to engage in the flow of commerce.[26] 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.'' [27] AMS interprets and implements the Act to achieve its core statutory purposes.[28]

AMS finds that current regulations under the Act do not sufficiently address the many unduly prejudicial, unjustly discriminatory, and deceptive practices in the livestock and poultry industry. As discussed above, the combination of increased concentration and use of vertical contracts in livestock and poultry markets enhances regulated entities' ability to unjustly discriminate against or deceive market participants and effect significant harm upon

[22] MacDonald, J.M., Dong, X., & Fuglie, K. (2023), Concentration and competition in U.S. agribusiness (Report No. EIB–256), U.S. Department of Agriculture, Economic Research Service, available at *https://doi.org/10.32747/2023.8054022.ers.* McBride, William D. (1997). ''Change in U.S. Livestock Production, 1969–92,'' Agricultural Economic Reports 262047, United States Department of Agriculture, Economic Research Service, available at *https://www.ers.usda.gov/webdocs/publications/40794/32767_aer754fm.pdf?v=1657.7.* ''Final Estimates for 1970–1975,'' USDA (1978), available at *https://downloads.usda.library.cornell.edu/usda-esmis/files/sq87bt648/7w62fc32q/qf85nf445/cattleest_Cattle_-_Final_Estimates__1970-75.pdf.*

[23] 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/sites/default/files/atr/legacy/2007/08/30/202608.pdf.*

[24] See, *e.g.,* Jon Lauck, ''Toward an Agrarian Antitrust: A New Direction for Agricultural Law,'' 75 N. D. L. Rev. 449 (1999); Peter C. Carstensen, ''Buyer Power and the Horizontal Merger Guidelines,'' 14 U. Penn. J. Bus. L. 775 (2012); Peter. C. Carstensen, ''Buyer Power, competition policy, and antitrust: the competitive effect of discrimination among suppliers,'' The Antitrust Bulletin: Vol. 53, No. 2/Summer 2008; Kenneth E. Boulding, ''Towards a Pure Theory of Threat Systems,'' The American Economic Review, May, 1963, Vol. 53, No. 2, 424–434.

[25] *https://www.usda.gov/media/press-releases/2023/04/19/usda-announces-funding-availability-expand-meat-and-poultry.*

[26] *Stafford* v. *Wallace,* 258 U.S. 495 (1922). *Bruhn's Freezer Meats of Chicago, Inc.* v. *U. S. Dep't of Agric.,* 438 F.2d 1332, 1337–38 (8th Cir. 1971) (quoting H.R. Rep. No. 1048, 85th Cong., 1st Sess. (1957), U.S. Code Cong. & Admin. News 1958, p. 5213). Public Law 99–198, 99 Stat. 1535, 7 U.S.C. 1631 (Section 1324 of the Food Security Act). Fed. Trade Comm'n, Report of the Fed. Trade Comm'n on the Meat-Packing Industry, Part I (Extent and Growth of Power of the Five Packers in Meat and Other Industries); Fed. Trade Comm'n, Report of the Fed. Trade Comm'n on the Meat-Packing Industry, Part II (Evidence of Combination among Packers); Fed. Trade Comm'n, Report of the Fed. Trade Comm'n on the Meat-Packing Industry, Part III (Methods of the Five Packers in Controlling the Meat-Packing Industry) (1919) (Finding that the purpose of the combination of Big Five packers was to ''monopolize and divide among the several interests the distribution of the food supply not only of the United States but of all countries which produce a food surplus, and, as a result of this monopolistic position, to extort excessive profits from the people not only of the United States but a large part of the world'').

[27] 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.'').

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

producers. With bilateral contracts where one side has significant market power, regulated entities can target specific individuals, whether because of their personal characteristics (prejudice) or because of they have engaged in certain activities (retaliation). With market concentration, producers have limited options in the marketplace with which to avoid the harms. Vertical contracts where regulated entities have greater control over producers' operations also enable certain forms of discrimination, such as in the provision of inputs, as live poultry dealers particularly have heightened control and involvement in the growers' poultry operations. The provision of accurate and not misleading information also takes on heightened importance in these markets. In markets where producers are exiting, it is especially difficult for producers to reenter after being excluded, and the harms from exclusion are significant.

i. Discrimination and Prejudice

Discrimination and prejudice harm market participants and overall market integrity and efficiency. Discrimination is economically inefficient.[29] The prejudicing entity that pays a producer below market value for his or her cattle or hogs because the producer belongs to a protected class causes that producer to not receive the full economic value of his or her animals; this discrimination also prevents the market from reaching an optimal allocation of wages and labor, contributing to a deadweight loss for the economy at large.[30] Likewise, a regulated entity's refusal to buy from a producer of a protected class offering animals of comparable quality to those being sold by other producers to that same buyer in the same time-frame may cause that disfavored producer to exit the market.[31] If an entity refuses to purchase product from a producer of a particular class who offers identical product, such as cattle, that disfavored producer may face a lower price, resulting in a loss to the producer that may discourage the producer from continuing to operate or would-be producers of that class from entering the market.[32] Using non-economic characteristics of the livestock or poultry producers to dictate patterns of production thwarts efforts by producers to accurately assess market conditions and make sound business decisions.

In comments to the proposed rule, multiple organizations spoke of the widespread economic harms resulting from discrimination and prejudice in livestock and poultry markets.[33] A producer advocacy organization reported that ''discrimination, retaliation, and deception have become common features of livestock and poultry markets, leading to widespread fear and anxiety among producers.'' [34] Another commenter wrote, ''The current ability to exclude marginal competitors and exploit covered producers, rather than producing meaningful price discovery and transparency in the production and sales of livestock, meat and poultry, has greatly injured not only those involved in production but has restricted consumers from accessing reliable, affordable sources of protein.'' [35] We acknowledge that these comments addressed what commenters viewed as a range of discrimination that could be covered by the proposed rule, and some that we are not addressing in this rule. Comments relating to these topics are discussed further in Section V—Changes from the Proposed Rule, and in Section VII—Comment Analysis.

As previously noted, this rule does not address every form of discrimination or prejudicial exclusion or disadvantage in the marketplace but focuses on providing clarity regarding certain specific discriminatory and prejudicial practices that AMS has identified in this final rule as essentially unjust, which offer no benefits to the competitive market or producers, and which undermine competition on the merits of the products and services that producers offer. Additionally, although the descriptive analyses set forth below do not address the prevalence or degree or prejudice for each and every prohibited basis, owing to the limitations of available data, AMS believes that leaving out any of the bases listed in this rule would be inappropriate. Not only would that be inconsistent with the Department's approach toward discrimination in other contexts, as repeatedly endorsed by Congress, but the resulting uncertainty could also open the door to those forms of discrimination in livestock, poultry, and related markets under the Act, which would be contrary to the purposes of this regulation and

[29] Stiglitz, J. ''Approaches to the Economics of Discrimination,'' *American Economic Review,* vol. 63/2, May 1973: 287–295 (Discussing how discrimination in markets produces an economic inefficiency: ''If all firms are profit maximizers, then all will demand the services of the low-wage individual, bidding their wages up until the wage differential is eliminated. Why does this not occur?'').

[30] Ibid.

[31] U.S. Department of Justice & U.S. Department of Agriculture, Public Workshops Exploring Competition in Agriculture, Livestock Industry Agenda, August 27, 2010, Fort Collins, Colorado, available at *https://www.justice.gov/media/1244701/dl?inline; https://youtu.be/Ygerhjjp0Is?si=2L7OQh0I87fc1n1I&t=1885* (Producers described how packers could ''pick . . . large entities'' as part of marketing agreements to procure supply. In turn, this drove up an excess supply and drove down prices for producers or suppliers who did not receive such an agreement in the cash-negotiated market. One producer said that this discrimination had the effect of ''controlling . . . inventory;'' another said that this conduct had the effect of ''tens of thousands of independent producers being purged out of the business or going into bankruptcy . . . exited out of agriculture'').

[32] U.S. Department of Justice & U.S. Department of Agriculture, Public Workshops Exploring Competition in Agriculture, Livestock Industry Agenda, August 27, 2010, Fort Collins, Colorado, available at *https://www.justice.gov/media/1244701/dl?inline; https://youtu.be/Ygerhjjp0Is?si=2L7OQh0I87fc1n1I&t=1885* (Producers described how packers could ''pick . . . large entities'' as part of marketing agreements to procure supply. In turn, this drove up an excess supply and drove down prices for producers or suppliers who did not receive such an agreement in the cash-negotiated market. One producer said that this discrimination had the effect of ''controlling . . . inventory''; another said that this conduct had the effect of ''tens of thousands of independent producers being purged out of the business or going into bankruptcy . . . exited out of agriculture'').

[33] Government Accountability Project, Comments on Proposed Rule: Inclusive Competition and Market Integrity, (AugJan. 20232), available at *https://www.regulations.gov/comment/AMS-FTPP-21-0045-0427* (''Many of these Vietnamese growers were enticed to sell profitable businesses and family homes and take out huge loans to enter broiler production contracts. Bearing all the same burdens of other broiler producers, they were further victimized by language barriers, cultural differences, and blatant mockery and exploitative behavior. In some cases, to keep their contracts, Vietnamese growers were asked to do additional work that was not required of white counterparts. Many of the Vietnamese farmers we have spoken to have likened the abusive and threatening behavior of their integrators to the communist government from which they fled'').

Rural Advancement Foundation International—USA, Comments on Proposed Rule: Inclusive Competition and Market Integrity, (AugJan. 20232), available at *https://www.regulations.gov/comment/AMS-FTPP-21-0045-0437* (''They don't have to cut you off, they can just bleed you dry. The barn we're sitting in here hatched flocks with salmonella issues. They can send those compromised flocks to growers they want to bleed.'' ''My main concern is that [my integrator] operates on fear and threatening tactics to make every grower they have scared they are going to lose their contract every single day. No human being should have to live every single day in fear that their livelihood and only source of income can be taken away from them. I am sick of it, someone needs to do something to help us! I love to grow chickens and feed the world, but I do not like to live as if under a dictatorship.'' ''When I filed a complaint with the Packers and Stockyards Division about a weight issue, in which I was proven right, I was punished with bad tournament grouping for a year. Also, I have been told by my integrator, after receiving a really bad flock of birds, that they would be sure to not let it happen next time—so they know how to make it happen!'').

[34] Food & Water Watch, ''Comment on AMS–FTPP–21–0045: Inclusive Competition and Market Integrity Under the Packers and Stockyards Act,'' (Jan. 2023), available at *https://www.regulations.gov/comment/AMS-FTPP-21-0045-0423.*

[35] Rocky Mountain Farmers Union, ''RMFU Comment for the Proposed Rule Inclusive Competition and Market Integrity Under the Packers and Stockyards Act'' (Jan. 2023), available at *https://www.regulations.gov/comment/AMS-FTPP-21-0045-0441.*

the Act, which prohibits ''undue prejudice . . . in any respect.''

a. Discrimination and Prejudice on Personal Characteristics and Status

AMS (including its predecessor agencies) has received complaints over the years of discrimination against producers, in particular in the poultry industry, and especially on the basis of race. The Agency has not always been able to act on these complaints for a variety of reasons. The Agency also believes that some complaints may have been suppressed due to the risks of retaliation, which are discussed below. As highlighted below, comments to this rulemaking affirmed the prevalence and remaining challenge of discrimination on prohibited bases.

Researchers have documented the history of discrimination against racial and ethnic minorities in agricultural markets. Multiple factors have contributed to the decline of non-white-owned farms, specifically to the decline of Black-owned farms, including the Homestead Act of 1862, the Morrill Land Grant Act of 1862, lack of legal protections for heirs' property, and limited access to capital through discriminatory lending practices.[36] For example, in the earlier part of the 20th century, the Federal government and agricultural landholders restricted land sales, engaged in predatory and fraudulent lending practices, and denied farm support programs to Black farmers and ranchers,[37] which has resulted in the loss of Black economic security and land loss.[38] [39] [40] [41] A 1959 paper reported ''significant market discrimination'' against Black American producers in the Southern United States.[42] Discrimination by the Federal government and private sector also caused Hispanic people and American Indian people farming on reservations to lose farmland and decline in number.[43] [44] More recently, some news reports have documented that companies may present contract terms to non-native English speaking immigrant communities who may not understand them, and have spotlighted the treatment of Asian American and Pacific Islander poultry growers in particular.[45]

Researchers have also documented some of the adverse outcomes, including economic outcomes, caused by discrimination. 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 a small fraction of livestock farms with production contracts are operated by Black, Asian, American Indian, or Native Hawaiian producers (Figure 1).[46] In Figure 1, the checkered bars represent the share of racial and ethnic groups among all livestock and poultry farms, and the colored bars indicate the share of production contracts received by each group. As indicated in Figure 1, American Indian, Black, Native Hawaiian, and Hispanic producers receive less than a proportional share of livestock and poultry production contracts relative to their respective populations. For example, Black producers and growers account for 1.6 percent of U.S. farms by race and ethnicity and receive a disproportionately lower 0.5 percent of livestock and poultry contracts. White producers and growers, meanwhile, represent 91 percent of all farms, but 98 percent of hog contracts and 97 percent of cattle contracts—a greater than proportionate share of livestock contracts, and at 90 percent, a lower than proportionate share of poultry contracts. Non-white racial and ethnic groups constitute a very small share of contracted livestock and poultry producers, which can be attributed to limited access to land and capital,[47] having on average smaller operations, and discrimination.

[36] McKinsey & Company. November 10, 2021. Black Farmers in the U.S: The Opportunity for Addressing Racial Disparities in Farming. Accessed at Black farmers in the US: The opportunity for addressing racial disparities in farming | McKinsey on 10/04/2023; and *https:/www.archives./gov/milestone-documents/morrill-act https://www.archives.gov/milestone-documents/morrill-act* (see, *e.g.,* ''People of color were often excluded from these educational opportunities due to their race.'').

[37] 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.

[38] 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).

[39] 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).

[40] 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.pdf* US Commission on Civil Rights. 1982. ''The Decline of Black Farming in America.'' *https://eric.ed.gov/?id=ED222604.*

[41] 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.

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

[43] Casey, Alyssa R. Racial Equity in U.S. Farming: Background in Brief 2021. Congressional Research Service. *https://crsreports.congress.gov/product/pdf/R/R46969* (Finding that the percent of American Indian and Hispanic producers increased by 1.3 and 2.4 percent between the early 1900s to 2017, compared to White producers which increased by 9 percent).

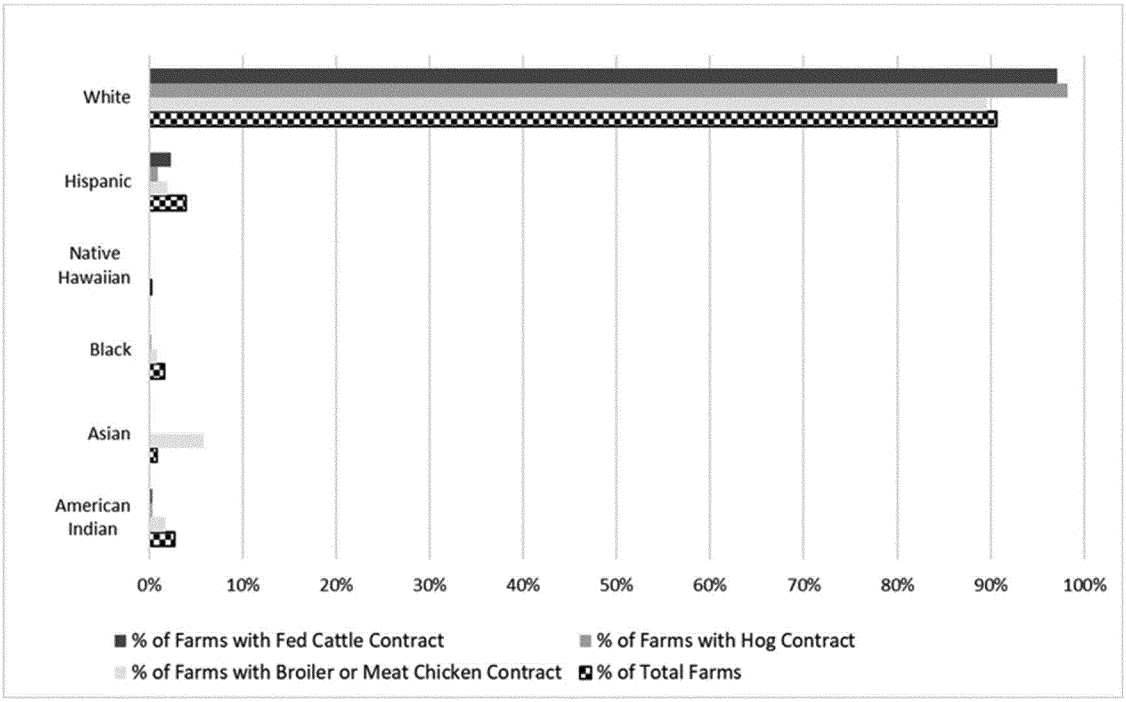
[44] Horst, M., Marion, A. ''Racial, ethnic and gender inequities in farmland ownership and farming in the U.S.'' *Agric Hum Values* 36, 1–16 (2019), available at *https://doi.org/10.1007/s10460-018-9883-3.*

[45] 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.*

[46] Most production contracts are held by poultry growers and less so by packers. A production contract, according to USDA NASS, ''is an agreement between a producer or grower and a contractor (integrator) setting terms, conditions, and fees to be paid by the contractor to the operation for the production of crops, livestock, or poultry.'' In contrast, many packers hold marketing contracts which, according to NASS, are ''based strictly on price.'' USDA NASS, No Date. ''Appendix B. General Explanation and Census of Agriculture Report Form.'' usappxb.pdf (*usda.gov*), accessed 8/12/23.

[47] See, generally, Congressional Research Service, ''Racial Equity in Farming,'' Nov. 2021, available at *https://crsreports.congress.gov/product/pdf/R/R46969;* Economic Research Service, USDA, ''Access to Farmland by Beginning and Socially Disadvantaged Farmers: Issues and Opportunities,'' Dec. 2022, available at *https://www.ers.usda.gov/publications/pub-details/?pubid=105395.*

Figure 4. Percent of Farms Owned by Race and Ethnicity Compared to Percent of Farms that Received Livestock and Poultry Contracts



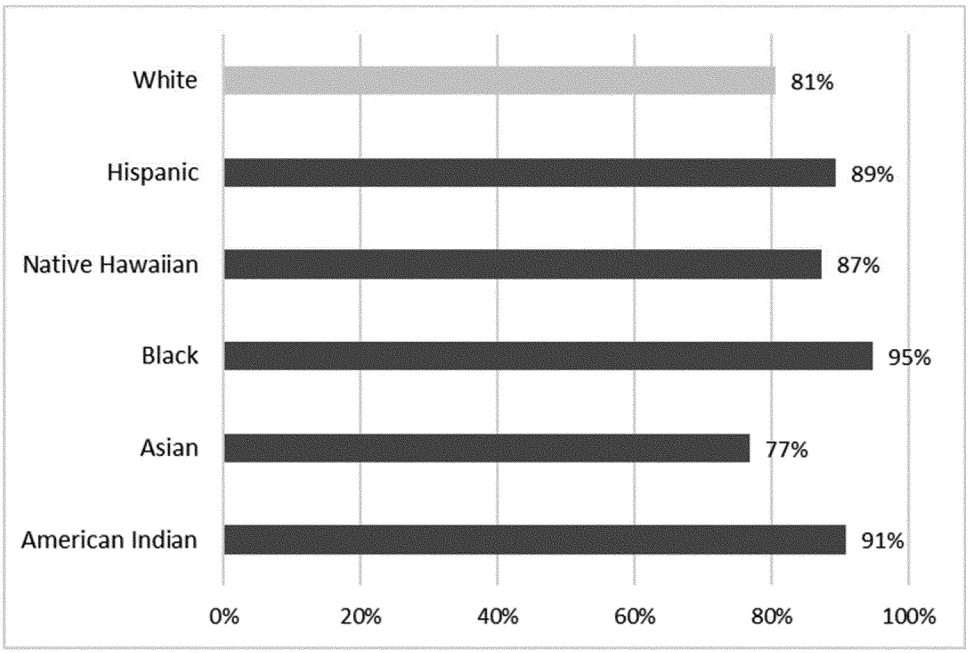
Data source: 2017 Agricultural Census, National Agricultural Statistical Service, USDA.

Disparities are also found in income across racial and ethnic groups. It is difficult to disentangle historical discrimination—whether that be prejudicial administration of USDA farm policies, racial segregation laws, or discriminatory private lending policies, from current discrimination practiced by livestock and poultry companies. Figure 5 shows the percentage of livestock and poultry farms (omitting nonfamily farms) by the reported race or ethnicity, and categorized by the lowest level of Gross Cash Farm Income (GCFI), which is annual income before expenses, including cash receipts, farm-related cash income, and government payments.[48] These data indicate that livestock and poultry farms with producers who identify as American Indian, Black, Native Hawaiian, and Hispanic are more likely to be in the lowest income category (measured by GCFI <$150,999) than their white counterparts. Those farms with producers who identify as Asian are less likely than their White counterparts to fall into the lowest income group, which might be a factor of being relatively recent immigrants and not facing past discrimination.[49] The fact that Black, Native Hawaiian, Native American, and Hispanic livestock and poultry farmers are more likely to be in the lower income GFCI category could be an effect of past discrimination, and it also could make such producers more vulnerable to current discriminatory behavior by packers. Markets dominated by one or a few large packers or live poultry dealers may also be less accessible to these lower income farms, which have limited financial or other economic resources with which to engage.

[48] USDA ERS, No date. Farming and Farm Income. Available at *https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/farming-and-farm-income/* (last accessed 9/8/23). GCFI income categories incude <$149,900, $150,000–$349,999, $350,000–$999,999, and ≥$1,000,000.

[49] Pew Research Center. June 19, 2012. The Rise of Asian Americans. Accessed at *https://www.pewresearch.org/social-trends/2012/06/19/the-rise-of-asian-americans/* on 10–13–23.

Figure 5. Percentage of Livestock and Poultry Family Farms by the Lowest GCFI Category (< $150,000), Race, and Ethnicity



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

Recent research conducted by the USDA's Office of the Chief Economist and presented at the Agricultural & Applied Economics Association [50] suggests that certain ethnic or racial groups are receiving lower prices compared to White producers from regulated entities in livestock and poultry contracts. In some cases, the research showed statistically significant differences in prices received for livestock (cattle and hogs) and broiler products across ethnic or racial groups after controlling for variables such as farm size, region, type of marketing contract or channel, organic certification status, distance to closest packer, and size of closest packer. Specifically, Black and American Indian cattle producers, Black contract broiler producers, and Black and American Indian hog producers all received lower prices for their livestock products relative to White producers. However, the effect of many animal quality variables, such as weight per animal, dressing percentage, and yield grade, cannot be controlled for under this analysis because the data is not in the Census of Agriculture or other data sets organized by race and ethnicity. Thus, endowment differences, such as better land and more capital, that represent the legacy of historical discrimination may account for a portion of these price differentials.

Differences in livestock and broiler prices could also be due, at least in part, to discrimination. Due to current data deficiencies, however, it is impossible to tell whether differences in prices received across ethnic or racial groups are due to current discriminatory practices, historic discrimination, or some combination thereof. These omitted variables may be correlated with race or ethnicity, and thus may account for a substantial portion of the price differentials. Additional data collection efforts may shed light on the role of omitted variables, such as animal size, thus helping to distinguish economic effects arising from current racial discrimination from disparate economic outcomes due to historical discrimination.

Gender is also a basis of discrimination in livestock and poultry markets. According to the 2017 Census, livestock and poultry operations where principal operators are female received significantly lower market value for the livestock and poultry they sell. Female principal operators in livestock and poultry earned 53 cents per operation for every dollar earned by male principal operators per operation. By comparison, in the broader U.S. population, females earn 77 to 82 cents for every dollar earned by men in 2022.[51] Figure 6 shows that the difference in livestock and poultry sales by gender is about $117,000 less per operation for female principal operators, or 47 percent less, compared to male principal-operated farms. Disproportionately more female operators are found in the lower income classes relative to males, and a disproportionately higher number of male operators are found in the highest income classes. The value of livestock and poultry production per total acres owned by males and females is $0.22 per acre for males and $0.18 per acre for females, or $0.82 per acre for female operators relative to every $1 per acre earned by male operators. Together, these data suggest that female

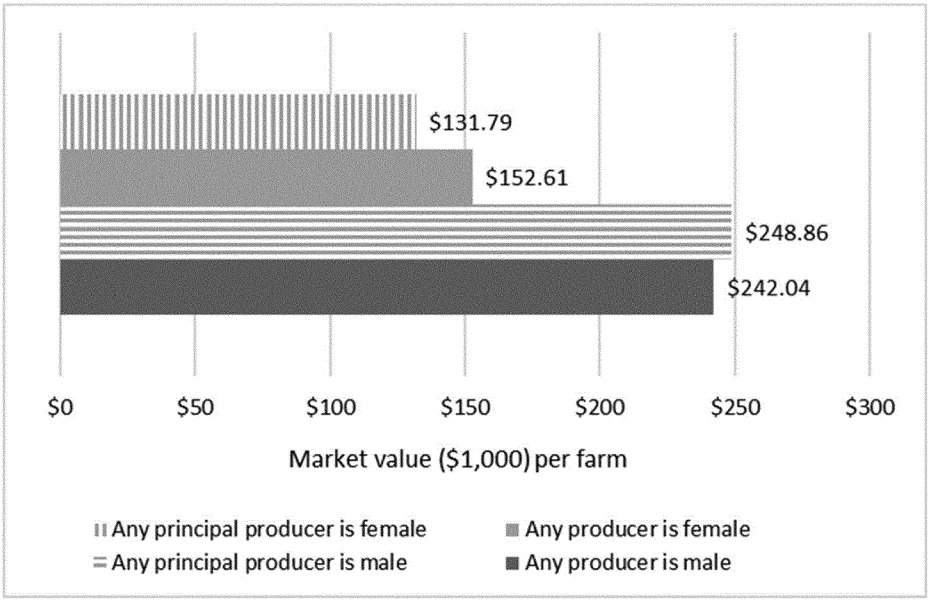
[50] Breneman, V., Cooper, J. Nemec Boeme, R. and Kohl, M., ''Competition and Discrimination—is there is a relationship between livestock prices received and whether the grower is in a historically underserved group?'' 2023 AAEA Annual Meeting, Washington, DC, July 23–July 25.

[51] The Pew Research Center. March 1, 2023. ''The Enduring Grip of the Gender Pay Gap.'' Accessed at *https://www.pewresearch.org/social-trends/2023/03/01/the-enduring-grip-of-the-gender-pay-gap/* on 09–25–2023, and World Economic Forum. July 2023. Global Gender Gap Report 2023 Accessed at WEF_GGGR_2023.pdf (*weforum.org*) on 09–225–2023.

producers—in livestock and poultry markets—achieve poorer economic outcomes than male producers.

markets—achieve poorer economic outcomes than male producers.

Figure 6. Market Value of Livestock, Poultry, and Their Products Per Farm by Gender



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

AMS also utilized a regression analysis showing support for disparities in income across different protected classes. Table 3 presents the empirical results of multivariate regression analysis of the 2017 Agricultural Census and other data by the USDA Office of the Chief Economist. Black and American Indian cattle and broiler producers, and Black and American Indian hog producers of owned hogs (hogs not sold under production contracts) all received lower prices for their livestock products relative to White producers. For example, Black and American Indian producers received around 5 percent lower broiler prices but no statistically significant decrease in payments for hogs delivered under production contracts. However, the effect of many animal quality variables, such as weight per animal, dressing percentage, and yield grade, cannot be controlled for under this analysis because the data is not in the Census of Agriculture or other data sets organized by race and ethnicity. Thus, endowment differences, such as better land and more capital, that represent the legacy of historical discrimination may account for a portion of these price differentials. Hawaiian contract hog producers received 68 percent higher prices even though producer location was controlled for in the analysis, but the analysis cannot control for some unknown factors associated with this relatively small cohort of producers that may account for this relatively large price effect.

Table 3: Impact of Personal Characteristics on the Price Received per Animal Delivered

Race, ethnicity, or gender of operators	Impact of race, ethnicity, or gender on price received per animal delivered			
	Broilers	All Hogs	Contract Hogs Only	Cattle
Black	-4.73%	-7.21%	0.00%	-2.53%
American Indian	-5.49%	-8.63%	0.00%	-4.08%
Hawaiian	0.00%*	0.00%	67.68%	0.00%
Asian	0.00%	0.00%	0.00%	0.00%
Female	0.00%	2.83%	0.00%	0.00%
Spanish Origin	0.00%	0.00%	0.00%	-2.55%
	Impact on price received with respect to age or experience			
Age**	-0.12%	-0.05%	N/A***	0.01%
Experience****	N/A	N/A	-0.24%	N/A

Source: 2017 Agricultural Census, National Agricultural Statistics Service, USDA

Notes: These results drawn from multivariate regression analysis assume all respondents (up to four) to the 2017 Agricultural Census survey have the personal characteristic in the row of the table. The Agricultural Census does not include information the size of the animals delivered or other quality characteristics. Hence, if these omitted variables are correlated with the personal characteristics of the producers, they can account for the impact of race/ethnicity/gender on prices. As such, it is impossible to separately identify price impacts of current ongoing racism from impacts associated with historic racism (e.g., price differences due smaller animals on account of lower financial endowments).

*If the underlying coefficient estimate used to make this estimate is of less than 10 percent statistical significance, the result in the table is set equal to zero.

**Average age of the individuals who were involved in the decisions of the farm operations and who responded to the Agricultural Census Survey.

***Average years of experience of the individuals who were involved in the decisions of the farm operations and who responded to the Agricultural Census Survey.

****N/A means the data is not available.

The results of an analysis presented in Table 3 found there is a statistically significant and positive relationship between female operators and price received for the owned-hog market, which includes producers of both contracted and owned hogs (the regression accounted for whether the producer was on a production contract or not through an explanatory variable), but which examines the price impact only on owned-hogs sold.[52] However, for the production contract-only hog market, which makes up about 70 percent of all hogs produced, this relationship becomes negative, though not at a statistically significant level (non-statistically significant results are shown as zero values in the table). From regression results not shown in Table 3, it appears that female contract hog producers who also produce owned hogs receive a higher price for owned hogs than female farmers who only produce owned hogs. This finding suggests that females with hog contracts face preferential prices relative to those females that do not hold contracts.

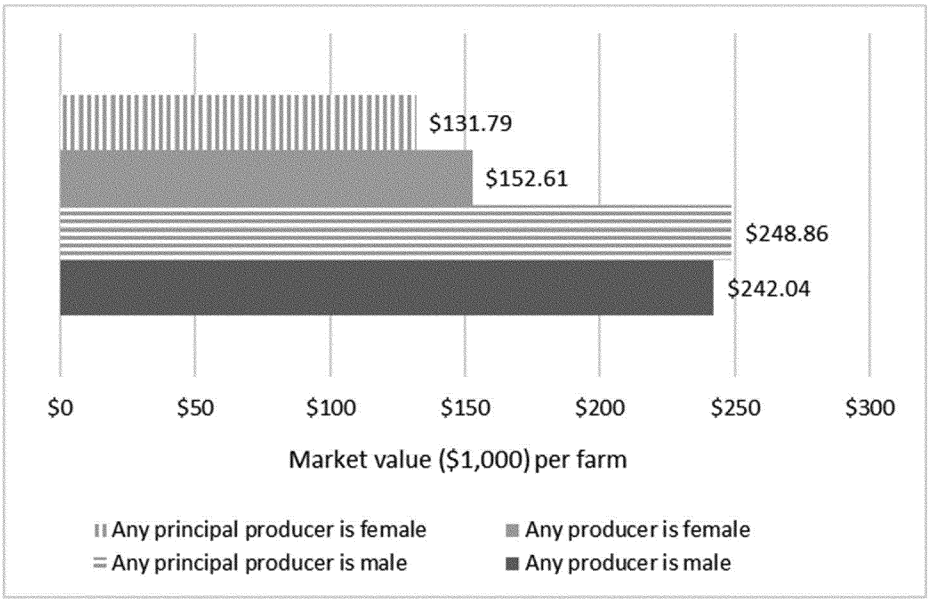
The regression analysis used above to study the effect of sex on prices received in livestock and poultry markets also found a statistically significant negative relationship between age of a farm operator and price received in poultry and owned-hog markets, as well as a statistically significant negative relationship between the experience of a farm operator and price received in the contract hog market. That is, as producers and growers age in the owned-hog and poultry markets and gain experience in the contract hog market, average price received declines. However, the same finding was not evident in cattle markets, where the relationship between increasing producer age and price is positive and statistically significant.

Gender is also a basis of discrimination in livestock and poultry markets. According to the 2017 Census, livestock and poultry operations where principal operators are female received significantly lower market value for the livestock and poultry they sell. Female principal operators in livestock and poultry earned 53 cents per operation for every dollar earned by male principal operators per operation. By comparison, in the broader U.S. population, females earn 77 to 82 cents for every dollar earned by men in

[52] From the Agricultural Census data, some farmers who produce under production contracts also report some owned production as well.

2022.[53] Figure 7 shows that the difference in livestock and poultry sales by gender is about $117,000 less per operation for female principal operators, or 47 percent less, compared to male principal-operated farms. Disproportionately more female operators are found in the lower income classes relative to males, and a disproportionately higher number of male operators are found in the highest income classes. The value of livestock and poultry production per total acres owned by males and females is $0.22 per acre for males and $0.18 per acre for females, or $0.82 per acre for female operators relative to every $1 per acre earned by male operators. Together, these data suggest that female producers in livestock and poultry markets achieve lesser economic outcomes than male producers.

Figure 7. Market Value of Livestock, Poultry, and Their Products Per Farm by Gender



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

Producers have also been targeted by processors that discriminate or retaliate against them for forming or being members of a cooperative because of the check on dominant firm bargaining power that cooperatives provide.[54] Growers and experts on agricultural cooperatives have reported numerous instances of live poultry dealers taking adverse actions against producers for their participation in agricultural cooperative activities.[55]

Regulated entity resistance to producer cooperatives is not difficult to understand—and indeed has been the basis for congressional action in the past. The increased bargaining power that cooperatives give to their members makes them a target for opposition or curtailment by regulated entities. In a market characterized by concentration of larger market intermediaries, cooperatives [56] can assist producers in promoting equal access to the market

[53] The Pew Research Center. March 1, 2023. ''The Enduring Grip of the Gender Pay Gap.'' Accessed at *https://www.pewresearch.org/social-trends/2023/03/01/the-enduring-grip-of-the-gender-pay-gap/* on 09–25–2023, and World Economic Forum. July 2023. Global Gender Gap Report 2023 Accessed at WEF_GGGR_2023.pdf (*weforum.org*) on 09–225–2023.

[54] USDA, Publications for Cooperatives, available at *https://www.rd.usda.gov/resources/publications-for-cooperatives* (See generally USDA's published research reports that document the history and importance of agricultural cooperatives that allow farmers to negotiate collectively for prices on product either sold or bought by input or buyer entities. For example, USDA in *Farm Bargaining Cooperatives: Group Action, Greater Gain* (1994) describes one harrowing instance in which members of a cooperative initially hesitated in bringing a complaint against a processor that allegedly punished them by refusing to buy their fruit due to their association with the cooperative; but eventually successfully brought the complaint and, after a lengthy legal process, won punitive damages and the processor's agreement to buy product); Vaheesan, S. and Schneider, N., 2019. Cooperative Enterprise as an Antimonopoly Strategy. *Penn St. L. Rev., 124,* p.1. Accessed at *https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1000&context=pslr* (Oct. 2023).

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

[56] 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)7 U.S.C. 291) or the Clayton Act (see 15 U.S.C. 17).15 U.S.C. 17).

and enhance the bargaining power of smaller producers. At the same time, cooperatives are responsive to the needs of regulated entities and the market for greater volume, as opposed to negotiating with many smaller producers.[57] Yet precisely that presence of enhanced bargaining power, which cooperatives give to their members, makes them a target for opposition or curtailment by regulated entities. Congress has affirmed that cooperatives are necessary to protect the marketing and bargaining position of individual farmers and that interference with this right is not only contrary to the public interest but damaging to the free market.[58] As stated in the Congressional Record ''. . . wherever waste and uneconomic practices are discovered they should be eliminated, and whenever improvement can be made by cooperative effort these improvements should be sanctioned and adopted by those interested in our marketing system. . . .'' [59]

Producers have indicated to AMS that increased use of cooperatives is necessary because of the rise of abusive conduct aggravated by concentration in the markets and the decline in marketing options for smaller producers. For example, small cattle producers have expressed their concern to AMS about packers' disparate treatment of large and small producers. Large packers have commonly shown limited interest in dealing with producers that operate on a smaller capacity. Packers often prefer to buy large numbers of animals at once to lower transaction costs,[60] and if a single producer is unable to meet such demand, that producer is unable to compete in the industry. Smaller livestock producers can join together through cooperatives to achieve scale and meet buyers' volume requirements. Thus, cooperatives can help smaller producers gain business they would otherwise be unable to compete for in light of the current market structure. Moreover, Congress has encouraged the formation of agricultural cooperatives and, under the AFPA, has provided enhanced protection for them in the marketplace. Given that policy and statutory judgment, AMS interprets the Act to reinforce that objective. Accordingly, discriminating against a cooperative, absent a legitimate basis set forth under this final rule, is unjust and violative of the Act.

Additionally, cooperatives counterbalance the ability of regulated entities to exert market power against smaller or more vulnerable producers. Facing the threat of such a counterbalance, regulated entities have over time stymied producers' ability to form and utilize cooperatives. AMS has heard numerous reports of regulated entities terminating growers' or producers' contracts for their attempts to form cooperatives, as well as reports of the chilling effect such action has on any future attempts to do so.[61] More recently, cooperatives in the cattle sector have been frustrated in their effort to negotiate collectively. In recent years, the number of livestock and poultry cooperatives has declined, as shown in the figure below. While many reasons for that decline are unconnected to the discrimination prohibited in this rule, AMS believes cooperatives serve a crucial function in the marketplace and need protection against unjust discrimination by regulated entities. This final rule will protect producers who wish to form cooperatives and will strengthen the marketing and bargaining position of smaller or more vulnerable producers by enabling them to pool resources, coordinate, compete more effectively, and negotiate for fair and appropriate terms in the open market without fear of prejudice or discrimination from larger market intermediaries.

[57] 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).

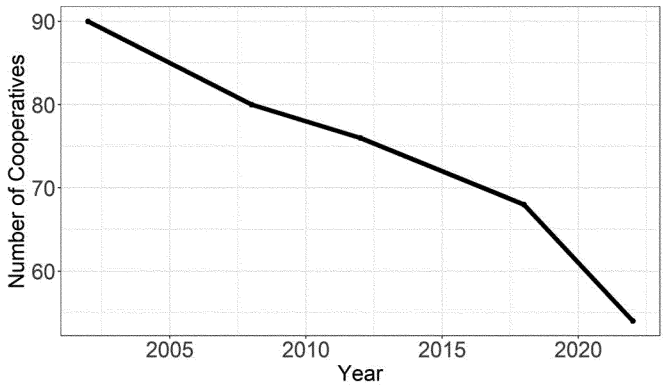
[58] 7 U.S.C. 2301.

[59] 61 Cong. Rec. 1882 (1921).

[60] 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*.

[61] United States Department of Justice, United States Department of Agriculture, Public Workshops Exploring Competition in Agriculture: Poultry Workshops, (2010), available at *https://youtu.be/8QJ_K06lp5M?si=VGhP8lzw3f6tdM4B&t=305; https://youtu.be/8CvEGyMQ9v8?si=_tvtJVtlNmWDxedQ&t=3675; https://youtu.be/8QJ_K06lp5M?si=VGhP8lzw3f6tdM4B&t=305* (In which poultry growers discussed numerous instances of regulated entities terminating their contracts, reducing the quality of their feed, or otherwise intimidating them for participating in cooperative activities).

Figure 8: Decline in the number of livestock and poultry cooperatives in 2000–2022



Data source: "Publications for Cooperatives," USDA Rural Development, available at https://www.rd.usda.gov/resources/publications-for-cooperatives (Number of livestock and poultry cooperatives, produced from compiling internal USDA records, including from directories and public documents from 2000 – 2022. Number summarized shows the number of active cooperatives in the 5-year interval, e.g.: for 1992, from 1990 to 1995; for 1997, from 1993 – 2000).

Numerous public comments on the proposed rule supported the prohibition of undue prejudice based on protected bases such as those described above. In expressing support for the proposed ''market vulnerable individual (MVI)'' approach to addressing undue prejudices, several agricultural advocacy groups recommended that AMS explicitly enumerate protected bases in its definition of MVI. MVI, as defined in the proposed rule, is 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. The organizations said these protected bases should include, but not be limited to, the protected classes of race, color, national origin, religion, sex, sexual orientation, disability, age, income derived from a public assistance program, and political beliefs.[62] An agricultural advocacy group commented in support of a protected-bases approach, saying that ''fair access to markets for growers, farmers, and ranchers should be based on their farming and business skills, not on their membership in any of the above groups.'' [63] Another advocacy group added that defining protected bases ''will be an appropriately flexible concept with which to enforce enhanced protections against discrimination in the marketplace.'' [64] The group continued: ''Given the history of discrimination that farmers of color have faced over the course of American history, these producers should not be made to relitigate their status as market vulnerable in any given complaint.'' [65]

Multiple commenters from the meat and poultry industry who opposed the MVI approach nevertheless indicated that they would support rules targeting discrimination on specific prohibited bases.[66] A livestock industry association said discrimination on these types of bases is ''reprehensible and should be remediated using the appropriate legal avenues.'' [67] Several national and State farm bureaus expressed support for the rule's action to protect producers facing undue prejudice and unjust discrimination.[68]

[62] Government Accountability Project, Comments on Proposed Rule: Inclusive Competition and Market Integrity, (AugJan. 2022), *https://www.regulations.gov/comment/AMS-FTPP-21-0045-042720232*), *https://www.regulations.gov/comment/AMS-FTPP-21-0045-0427* (Describing instances in which some producers described racially prejudicial treatment received from regulated entities, including requirements to do additional work, mockery, and exploitative behavior). Farm Action, Comments on Proposed Rule: Inclusive Competition and Market Integrity, (AugJan. 20232), *https://www.regulations.gov/comment/AMS-FTPP-21-0045-0435* (Listing Supreme Court and lower court cases finding these forms of discrimination to be essentially unjust).

[63] Agricultural Advocacy Group. ''Comment on AMS–FTPP–21–0045: Inclusive Competitive and Market Integrity Under the Packers and Stockyards Act'' (received Jan. 17, 2023), available at *https://www.regulations.gov/comment/AMS-FTPP-21-0045-0434. https://www.regulations.gov/comment/AMS-FTPP-21-0045-0434.*

[64] Agricultural Advocacy Group. ''Comment on AMS–FTPP–21–0045: Inclusive Competition and Market Integrity Under the Packers and Stockyards Act,'' available at *Regulations.gov.*

[65] Agricultural Advocacy Group. ''Comment on AMS–FTPP–21–0045: Inclusive Competition and Market Integrity Under the Packers and Stockyards Act,'' available at *Regulations.gov.*

[66] *See, e.g.,* Meat Industry Trade Association, ''Comment on AMS–FTPP–21–0045: Inclusive Competitive and Market Integrity Under the Packers and Stockyards Act'' (received Jan. 17, 2023), available at *https://www.regulations.gov/comment/AMS-FTPP-21-0045-0424; https://www.regulations.gov/comment/AMS-FTPP-21-0045-0424;* Industry Trade Association, ''Comment on AMS–FTPP–21–0045: Inclusive Competitive and Market Integrity Under the Packers and Stockyards Act'' (received Jan. 17, 2023), available at *https://www.regulations.gov/comment/AMS-FTPP-21-0045-04249; https://www.regulations.gov/comment/AMS-FTPP-21-0045-0424; https://www.regulations.gov/comment/AMS-FTPP-21-0045-0424* Live Poultry Dealer;, ''Comment on AMS–FTPP–21–0045: Inclusive Competitive and Market Integrity Under the Packers and Stockyards Act'' (received Jan. 17, 2023), available at *https://www.regulations.gov/comment/AMS-FTPP-21-0045-0419.*

[67] Industry Trade Association, ''Comment on AMS–FTPP–21–0045: Inclusive Competitive and Market Integrity Under the Packers and Stockyards Act'' (received Jan. 17, 2023), available at *https://www.regulations.gov/comment/AMS-FTPP-21-0045-0418.*

[68] *See, e.g.,* Farm Bureau, ''Comment on AMS–FTPP–21–0045: Inclusive Competitive and Market Integrity Under the Packers and Stockyards Act'' (received Jan. 17, 2023), available at *https://www.regulations.gov/comment/AMS-FTPP-21-0045-0426;* Other Association or Non-Profit, ''Comment on AMS–FTPP–21–0045: Inclusive Competitive and Market Integrity Under the Packers and Stockyards Act'' (received Jan. 17, 2023), available at *https://www.regulations.gov/comment/AMS-FTPP-21-0045-0416; https://www.regulations.gov/comment/AMS-FTPP-21-0045-0426;* Other Association or Non-Profit, ''Comment on AMS–FTPP–21–0045: Inclusive Competitive and Market Integrity Under the Packers and Stockyards Act'' (received Jan. 17, 2023), available at *https://www.regulations.gov/comment/AMS-FTPP-21-0045-0416; https://www.regulations.gov/comment/AMS-FTPP-21-0045-0416;* Other Association or Non-Profit, ''Comment

Continued

Discrimination on the bases of race, color, religion, national origin, sex (including sexual orientation and gender identity),[69] disability, marital status, or age is recognized throughout economic markets as impermissible, yet commonly occurring, bases for discrimination.[70] AMS recognizes the other Federal laws and authorities that justify these bases, finds that these bases are consistent with its understanding drawn from complaints and in the field, and accordingly adopts these bases as part of this rule.[71] Removing prejudicial barriers to the market will enhance producers' economic bargaining power, support investment in rural America, assure the next generation that taking over the farm can be a wise economic decision, and otherwise enhance economic opportunity and vitality in communities facing higher business and labor market concentration and the conduct addressed by this rule.

AMS finds that discrimination continues to occur through adverse actions described in the inexhaustive list offered in the final rule. The list includes offering contract terms that are less favorable than those generally or ordinarily offered, refusing to deal, performing under or enforcing a contract differently than with similarly situated producers, requiring modifications to contracts on terms that are less favorable than the existing contract with the covered producer or only offering to renew contracts on terms that are less favorable than those of the existing contract with the covered producer, and terminating or not renewing a contract.

As discussed further in Section VII—Comment Analysis, producers have indicated that regulated entities continue to engage in these types of discriminatory actions.

ii. Retaliation as Discrimination

Many producers across all animal species have expressed concerns about being retaliated against for engaging in legitimate business and advocacy activities inextricably linked to livestock and poultry markets. Contract poultry growers and hog producers have expressed to USDA that they have experienced—and consistently fear—retaliation from live poultry dealers and packers for communicating with each other, with their dealer's and packer's competitors, and with governmental officials, as well as for forming associations and cooperatives, exercising contract or legal rights, or being a witness in proceedings against the regulated entity.[72] Cattle producers have similarly expressed fear that packers will refuse to offer bids on livestock, or purchase livestock from disfavored producers, and they have highlighted other, more subtle retaliatory behaviors, like delaying delivery or shipment, for engaging in similar activities.[73] Producers believe the ability to communicate with others, to form associations and cooperatives, to exercise legal rights, and to witness against regulated entities are critical to free participation in the livestock and poultry markets. Inhibition of these freedoms jeopardizes producers' ability to obtain the full value of their livestock and poultry products and services. Indeed, producers have reported to AMS over the years that retaliation by regulated entities—or threat thereof—for producers' exercise of these rights is significant enough to place a producer's entire farm at risk. This reported conduct is the type of behavior AMS aims to prohibit through this rulemaking.[74]

This is a persistent problem. As recently as April 2022, threats and fear of retaliation interfered with witness testimony 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. . . .'' [75]

The 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.'' [76]

In response to the proposed rule, commenters expressed support and opposition for the proposal to establish prohibitions against retaliatory practices. Several industry associations opposed the proposed rule, indicating it is duplicative and therefore not necessary. These commenters contended the conduct addressed in the

on AMS–FTPP–21–0045: Inclusive Competitive and Market Integrity Under the Packers and Stockyards Act'' (received Jan. 17, 2023), available at *https://www.regulations.gov/comment/AMS-FTPP-21-0045-0441.*

[69] 140 S. Ct. at 1737, available at *https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf* (The Supreme Court has held that the prohibition on discrimination ''because of . . . sex'' covers discrimination on the basis of gender identity and sexual orientation).

[70] See, *e.g.,* U.S. Department of Justice, ''The Attorney General's 2021 Annual Report to Congress on Fair Lending Enforcement,'' available at *https://www.justice.gov/media/1259491/dl?inline.*

[71] 15 U.S.C. 1691; 7 U.S.C. 2301 *et seq.* (See below section, Provisions of the Final Rule—Undue Prejudice and Unjust Discrimination, that discusses the adoption of other Federally listed bases as part of this rule).

[72] 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)* (*https://youtu.be/j11GXzvA7u0?si=6YNtz2SJH5T81FJZ&t=2656; https://youtu.be/8QJ_K06lp5M?si=C1HA0i84opqaoIn8&t=1051*).

[73] U.S. Department of Justice & U.S. Department of Agriculture, Public Workshops Exploring Competition in Agriculture, Livestock Industry, August 27, 2010, Fort Collins, Colorado, Available at *https://www.justice.gov/atr/events/public-workshops-agriculture-and-antitrust-enforcement-issues-our-21st-century-economy-10* (*https://youtu.be/j11GXzvA7u0?si=6YNtz2SJH5T81FJZ&t=2656https://youtu.be/Ygerhjjp0Is?si=WMS4YGdAjNtIsBgH&t=1833; https://youtu.be/tF4Dr-O-l8s?si=BZJQYN-rkp-qqvjN&t=1158;* numerous producers, including the previous president of the Kansas Cattlemen's Association, discussed instances in which they experienced retaliation from the largest packers. For example, one producer described how they decided to allow other packer buyers first opportunity to buy cattle in response to the packer not selecting them for a contracting agreement. The producer said that the packer told ''his buyer to quit coming into our yard.'' Another producer agreed, describing an incident in which they perceived that one of the largest packers possibly retaliating against them for previous litigation: the producer described how the packer hung a ''No Trespassing'' sign on the producer's door and began offering a ''five-minute window'' to buy cattle).

[74] Lina Khan, ''Obama's Game of Chicken,'' *Wash. Monthly* (2012), *https://washingtonmonthly.com/magazine/novdec-2012/obamas-game-of-chicken/* (Recounting testimony by Tom Green, an Alabama farmer who contested a contract and lost their farm: ''We did not give up a fundamental right to access the public court . . . which is guaranteed by our Constitution, regardless of price. I had flown too many combat missions defending that Constitution to forfeit it. It was truly ironic that protecting one right, we lost another. We lost the right to property''). Isaac Arnsdorf, ''How a Top Chicken Company Cut Off Black Farmers, One by One,'' Propublica (June 26, 2019), *https://www.propublica.org/article/how-a-top-chicken-company-cut-off-black-farmers-one-by-one* (Describing how one farmer participated in the 2010 USDA–DOJ workshops and ''. . . never got another chicken after going to that meeting over there in Alabama. . . They put me slap out of business'').

[75] House Chair David Scott D–GA, opening remarks, U.S. House, Committee on Agriculture, ''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.*

[76] 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.*

proposed rule is not a widespread problem and is already prohibited under the Act. Other commenters supported the rule. One organization cited a recent anonymous survey of contract growers it had conducted. Multiple respondents had experienced retaliation from integrators and said integrators regularly terminate contracts with farmers who engage in whistleblowing activities. These contract terminations leave growers with substantial debt tied up in specialized, single-use structures built as a condition of their contractual agreements. Although comments in response to the proposed rule differ greatly regarding the need for this rule, commenters generally do not disagree that discriminatory and retaliatory conduct is harmful to producers and offers no procompetitive benefits. For these reasons, AMS needs to use its statutory authority to provide a regulatory framework for prohibiting retaliatory behavior by regulated entities against covered producers. Establishing regulatory protections to prohibit regulated entities from retaliating against producers engaging in lawful activity will help promote fair trade practices and competitive markets.

In recent years, producers have been increasingly vulnerable to harms from retaliatory behavior due to the market power afforded regulated entities under contracts that can reach further down into livestock and poultry production and/or are bilateral. This is in contrast to past circumstances where these relationships were intermediated through an institution such as a stockyard (auction) subject to heightened regulatory duties around nondiscrimination.

As regulated entities have obtained greater control over the input industries, particularly in poultry, producers are increasingly dependent upon regulated entities for success. That dependence, in combination with high levels of debt, leaves producers vulnerable to the retaliation that regulated entities can exact through input distribution and in other ways. Growers have for years reported punitive delivery of inputs to deter their exercise of a wide range of legal rights and remedies that would enable them to earn the full value of their services.[77] [78]

Based on complaints and industry experience, AMS is aware that retaliation by regulated entities may take many forms, such as canceling contracts, selectively enforcing contract terms, refusing to deal or negotiate, or otherwise impairing an individual's or group of producers' ability to operate.[79] In contrast, in more competitive markets, producers facing retaliation can more easily avoid or mitigate adverse impacts by simply finding other entities with whom to do business. Without choices, producers are at the mercy of the types of abuses the Act was designed to prevent—market abuses that inhibit producers' ability to get the full value of their products and services. Ultimately, regulated entities may retaliate for various reasons, but none have any role in or benefit to the competitive functioning of the market.[80]

As discussed below in Section VII—Comment Analysis, in response to the proposed rule, commenters expressed extensive agreement with the need to establish prohibitions against retaliatory practices.

iii. Deceptive Practices

The Packers and Stockyards Act has long recognized that integrity and honesty are vital to the marketing of livestock and, therefore, to the efficiency with which these markets supply meat to the American consumer.[81] This rulemaking is a response, in part, to the range of complaints lodged with USDA, Congress, and the media over the years regarding inaccurate, incomplete, or otherwise false or misleading statements, or omission of material information that affects decision-making or access to markets by producers. These complaints reflect, in part, changed industry contracting norms or a market environment where the prevalent norms result in more acute harms to producers. 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 are commonly given a take-it-or-leave-it offer to buy their cattle off of a pricing formula provided by the company.[82] Producers have complained they have been told that packers refuse to buy their cattle on the grounds they are not of sufficiently high quality or that formula market arrangements are necessary to incentivize such quality, when the cattle being offered were of no less quality than those the packer procured under other marketing arrangements.[83]

Poultry producers have complained to USDA 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. Producers have also complained to USDA of terminations, suspensions, or reductions in flocks on pretexts—*i.e.,* on the provision of false or misleading information such as claims of animal

[77] 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);* see also Lina Khan, ''Obama's Game of Chicken,'' *The Washington Monthly,* Nov. 2012, available at

[78] Oscar Hanke, ed., *American Poultry History,* 1823–1973 (Madison, Wisc., 1974), 384–85. Fite, Cotton Fields No More, 201; Peck, A, (2006), ''State regulation of production contracts.'' University of Arkansas National Center for Law Research and Information, available at *http://nationalaglawcenter.org/wp-content/uploads/assets/articles/peck_contractregulation.pdf;* Stephen F. Strausberg, *From Hills and Hollers: Rise of the Poultry Industry in Arkansas* (Fayetteville, Ark., 1995), 136; Heffernan, W. D., (1984), *Constraints in the U.S. poultry industry. Research in Rural Sociology and Development,* 1, 237–260 (Researchers have documented the increased incidence of producers' complaints and decreasing satisfaction in the industry beginning in the 1980s, which coincided with increasing concentration of the industry. Weinberg writes how, in 1960, 19 firms processed 30 percent of total US poultry processed and that producers who entered the business tended to achieve upward mobility. In the 1970s, only 8 firms processed the same percent of poultry. This trend accompanied an increased incidence of grower dissatisfaction. Gordy notes how ''loss of independence and lower incomes caused some growers to become disenchanted.'' Fite observed how poultry farmers were ''controlled and sometimes exploited by their suppliers.'' Peck notes how dissatisfaction by growers prompted State attorneys general to propose a 3-day right of review in a model producer protection act in the early 2000s. In 2010, the USDA and DOJ hosted a series of workshops in which growers raised concerns about retaliation in the industry. These trends, which occurred alongside increased productivity gains and use of technology, coincided with exits in the industry. As Weinberg documented, in Georgia, in 1950, 1176 Hall County farms sold 6.8 million chickens; in 1992, only 192 sold 44.3 million chickens).

[79] See, *e.g.,* 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 *https://youtu.be/8CvEGyMQ9v8?t=3135* (in which poultry growers described how companies seemingly arbitrary mandated expensive upgrades).

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

[81] *See, e.g., Midwest Farmers* v. *United States,* 64 F. Supp. 91, 95 (D. Minn. 1945); *In re: Frosty Morn Meats, Inc.,* 7 B.R. 988, 1020 (M.D. Tenn. 1980).

[82] Other Association or Non-Profit, ''Comment on AMS–FTPP–21–0045: Inclusive Competitive and Market Integrity Under the Packers and Stockyards Act'' (received Jan. 17, 2023), available at *https://www.regulations.gov/comment/AMS-FTPP-21-0045-0423.*

[83] C. Robert Taylor, ''Harvested Cattle, Slaughtered Markets,'' April 27, 2022, 7–9, 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/.*

welfare contractual violations—when other reasons may exist for the adverse actions, including the discrimination and retaliation noted previously, 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.[84] 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 financing for construction, which often comes from 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 whether the broiler houses have value.

As discussed in Section VII—Comment Analysis, comments underscored the need to address deceptive practices in this rulemaking.

III. Authority

Congress enacted the Act to promote fairness, reasonableness, and transparency in the marketplace by prohibiting practices that are contrary to these goals. AMS is issuing these 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.

Enacted in 1921 ''to comprehensively regulate packers, stockyards, marketing agents and dealers,'' [85] the 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.[86] 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.

Section 407 of the Act provides that the Secretary ''may make such rules, regulations, and orders as may be necessary to carry out the provisions of this [Act].'' (7 U.S.C. 228(a)) The Secretary has delegated the responsibility for administering the 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 Act. The current regulations implementing the Act are found in title 9, part 201, of the CFR. Therefore, based on the authority delegated to USDA by Congress to administer the Act, AMS is promulgating this rulemaking to amend part 201 to specifically clarify that discriminatory, deceptive, and retaliatory conduct, as defined in this rule, are violations of the Act.

Executive Order (E.O.) 14036, ''Promoting Competition in the American Economy'' (86 FR 36987, July 9, 2021), directs the Secretary to further the vigorous implementation of the Act. Accordingly, this final rule addresses the unfair treatment of farmers and improves competitive conditions in markets. This rule adds clarity to USDA's regulations concerning unjustly discriminatory practices, deceptive practices, and undue or unreasonable prejudices or disadvantages. E.O. 14036 underscored that ''it is unnecessary under the... Act to demonstrate industry-wide harm to establish a violation of the Act and that the 'unfair, unjustly discriminatory, or deceptive' treatment of one farmer'' violates the Act. Among other policy goals in the E.O., this final rule is specifically intended to address the unfair treatment of farmers and make it easier for them to garner the full value of their animals. The Act is a remedial statute enacted to address problems faced by farmers, producers, and other participants in the markets for livestock, meats, meat food products, livestock products in unmanufactured form, poultry, and live poultry; 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.'' [87] AMS interprets and implements the Act to achieve its core statutory purposes.[88]

IV. Summary of the Proposed Rule

In the October 2022 proposal, AMS proposed amending 9 CFR 201 by adding a new subpart O, titled ''Competition and Market Integrity,'' and containing §§ 201.300 through 201.390. AMS proposed adding a Definitions section, § 201.302, containing the terms *covered producer, livestock producer, market vulnerable individual,* and *regulated entity.*

AMS also proposed adding § 201.304, titled ''Undue prejudices or disadvantages and unjust discriminatory practices,'' to prohibit regulated entities from discriminating against a market vulnerable individual or a cooperative, detailing in proposed paragraph (a) types of prohibited actions. Paragraph (b) of the proposed regulation would prohibit regulated entities from retaliating against a covered producer because of the covered producer's participation in a producer association, protected activities, including assertion of rights under the Act, and lawful communication. Proposed paragraph (b) also provided examples of prohibited retaliatory actions. Proposed paragraph (c) included a requirement that regulated entities retain records of compliance with paragraphs (a) and (b) for no less than five years from the date of record creation.

AMS also proposed adding § 201.306, titled ''Deceptive practices,'' prohibiting a regulated entity from employing a false or misleading statement or omission of material information necessary to make a statement not false or misleading during contract formation,

[84] *Wheeler* v. *Pilgrim's Pride,* 536 F.3d 455 (5th Cir. 2008); United States Department of Justice, United States Department of Agriculture, Public Workshops Exploring Competition in Agriculture: Poultry Workshop May 21, 2010; Normal, Alabama, *https://www.justice.gov/sites/default/files/atr/legacy/2010/11/04/alabama-agworkshop-transcript.pdf,* last accessed 8/14/23.

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

[86] 7 U.S.C. 192(a).

[87] 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.'').

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

performance, and termination. Section 201.306 also proposed to prohibit a regulated entity from providing false or misleading information concerning a refusal to contract. The proposal was designed to prohibit regulated entities from specified deceptive practices in contracting, which are of particular concern because of the power of the regulated entities over their vertical contracting relationships. As stated in the proposal, AMS intended this proposed regulation to address broad areas of specific concern, not exhaustively identify all deceptive practices that would violate sec. 202(a) of the Act.

Finally, AMS proposed adding § 201.390, titled ''Severability.'' This provision was intended to inform reviewing courts that if any provision of subpart O was declared invalid, or if the applicability of any of its provisions, or any components of any provisions, to any person or circumstances was held invalid, the validity of the remaining provisions of subpart O or their applicability to other persons or circumstances would not be affected. Severability provisions are typical in modern AMS regulations. AMS regulations often cover several different topics in a subpart. This provision was added because the regulations in subpart O are designed to address several different types of violations under the Act. Because these violations address similar underlying developments in the livestock and poultry markets—namely, abusive practices facilitated by increased vertical integration and horizontal concentration—these violations were suitable for joining in a single rulemaking. However, each could be viewed as its own stand-alone rulemaking and therefore should be severable.

Upon consideration of public comments on the proposed rule, AMS modified some of its proposed provisions to derive this final rule. These changes are outlined below.

V. Changes From the Proposed Rule

AMS is making the following changes to the proposed rule based on the agency's analysis of the issues raised by commenters.

A. Market Vulnerable Individual (MVI) to Prohibited Bases

With respect to the proposed regulations regarding undue prejudice and unjust discrimination, § 201.304, several commenters expressed concern that the definition of ''market vulnerable individual (MVI)'' as the basis for prohibiting undue prejudice and discrimination was too broad and ambiguous and could lead to an avalanche of litigation. To simplify this section, the final rule uses a delineated set of protected bases against undue prejudice and discrimination that were discussed in the proposed rule: race, color, national origin, religion, sex, sexual orientation, gender identity, age, disability, and marital status. These delineated bases reflect the Statement of General Policy Under the Packers and Stockyards Act published by USDA in 1968 (9 CFR 203.12(f)) and USDA's Conducted Programs Statement, and reflect a general congressional policy as indicated in other statutory sources (discussed below).[89] The final rule retains status as a cooperative as a protected basis against undue prejudice and discrimination, which reflects the principles set forth in the Agricultural Fair Practices Act of 1967.[90] (For the avoidance of doubt, AMS notes that discrimination against a member of a cooperative is prohibited under the provisions of paragraph (b)(2)(iii).) Accordingly, AMS has removed the term *market vulnerable individual* from the list of terms defined for subpart O in § 201.302.

AMS is adopting the aforementioned specific bases, as opposed to MVI, because the specific prohibited bases offer clearer, more workable standards to achieve the same goal set forth and specifically articulated in the proposed rule, but in a manner that will facilitate compliance by regulated entities and better enable producers to exercise their rights under the Act. As AMS explained in the proposed rule, the principal purpose of the MVI approach was 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, color, religion, national origin, sex (including sexual orientation and gender identity), disability, marital status, or age, or on the basis of the covered producer's status as a cooperative. AMS initially adopted the MVI approach because it believed that the proposed rule's flexible approach to resolving marketplace vulnerabilities offered producers protection in an ever-evolving market. The proposed approach had the advantage of being responsive to the particular facts of given cases and particular markets over time.

As part of the rulemaking process, however, AMS sought comment on whether this was the best approach. AMS requested 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.'' (87 FR 60010, Oct. 3, 2022) AMS also sought comment on ''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.''

After considering the comments on both the MVI approach and on specific delineated bases, AMS determined that MVI is not sufficiently clear enough to meet the objectives of this regulation. The enumeration of specific prohibited bases provides more clarity and certainty by limiting the scope of the rule to prohibited adverse actions against all producers on the basis of their membership of a protected class, in line with existing civil rights requirements. Commenters, such as a meat industry trade association, a poultry industry trade association, and a live poultry dealer, criticized the proposed rule's MVI definition for being vague and ambiguous and potentially exposing their businesses to an unworkable standard that could potentially encompass a wide range of covered producers far beyond what the Agency appeared to be contemplating in the proposed rule. In contrast, these commenters indicated that an approach based on specific classes, such as race, sex, sexual orientation, or religion, would be clearer and would follow the precedent of civil rights laws already in place while protecting all producers.[91]

[89] 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.

[90] Public Law 90–288.

[91] *See, e.g.,* ''Comment on AMS–FTPP–21–0045: Inclusive Competitive and Market Integrity Under the Packers and Stockyards Act'' (received Jan. 17, 2023), available at *https://www.regulations.gov/comment/AMS-FTPP-21-0045-0424;* ''Comment on AMS–FTPP–21–0045: Inclusive Competitive and Market Integrity Under the Packers and Stockyards Act'' (received Jan. 17, 2023), available at *https://www.regulations.gov/comment/AMS-FTPP-21-0045-04249; https://www.regulations.gov/comment/AMS-FTPP-21-0045-0424;* ''Comment on AMS–FTPP–21–0045: Inclusive Competitive and Market Integrity Under the Packers and Stockyards Act'' (received Jan. 17, 2023), available at *https://*

Continued

Several meat and poultry industry commenters who opposed use of the MVI approach stressed that they do not engage in discrimination on the specific bases set forth in this final rule and oppose such discrimination.[92]

Multiple agricultural advocacy organizations also expressed approval of these protected classes as the prohibited bases for discrimination when responding to the proposed rule's solicitation of responses on this issue, saying discrimination against individuals in these groups should be clearly recognized so those individuals do not have to continually prove discrimination and prejudice against them based on the characteristic that makes them vulnerable in the market. AMS agrees that the bases adopted in the final rule reflect genuine vulnerability to market exclusion and have no competitive benefit.

AMS also notes that some commenters interpreted the MVI approach as potentially providing protection to small producers on the basis that small producers were vulnerable to discrimination in the form of the same kinds of adverse treatment proposed to be prohibited in this rule. While AMS is sympathetic to the plight of small producers' challenges in accessing fair markets, AMS did not intend this rule to address those concerns (as also discussed below in Section VII—Comment Analysis). Basing the rule on a term that gave rise to such disparate interpretations underlined the necessity of utilizing the more specific bases set forth in the proposed rule's alternative formulation.

Additionally, AMS notes that these prohibited bases are now widely accepted standards of non-discrimination at USDA and in the U.S. economy more broadly. AMS adopted many of these as part of its 1968 Statement of General Policy.[93] Together with the Agricultural Fair Practices Act of 1967, these bases also apply to AMS enforcement of the Equal Credit Opportunity Act (ECOA) under the Act, to USDA programs through its Conducted Programs Statement, and, more recently, to the terms of USDA's debt relief under section 22007 of the Inflation Reduction Act.[94] The terms are also widely accepted bases in other laws that prohibit discrimination, such as in housing and employment.[95] The prohibited bases defined in the final rule have become so widely accepted as prohibited bases of discrimination that it would be notable and arbitrary for the Agency to pick some of the terms and not others. Quite simply, ''*unjust* discrimination'' and ''*undue* prejudices'' cannot be read but to include these widely accepted non-discrimination terms.

Accordingly, to achieve the same goal that the Agency set forth in the proposed rule through both MVI and the alternative formulation, AMS is now adopting the alternative formulation: race, color, religion, national origin, sex (including sexual orientation and gender identity), disability, marital status, or age of the covered producer; or because of the covered producer's status as a cooperative.

B. Prohibited Actions Taken on a Prejudicial Basis

In § 201.304(a)(2), AMS made three changes to the provisions regarding prohibited actions taken on a prejudicial basis. First, in paragraphs (a)(2)(i) through (iii), AMS proposed to prohibit offering contracts that are less favorable than those generally or ordinarily offered, refusing to deal, and differential contract performance or enforcement, when each occurred on a prohibited basis. AMS is revising each of these provisions to provide clarity and uniformity across this final rule with respect to a comparison to similarly situated producers and also to ensure parallel language with the retaliation adverse actions under § 201.304(b)(3). Paragraph (a)(2)(i) is revised to read ''Offering contract terms that are less favorable than those generally or ordinarily offered to similarly situated producers; paragraph (a)(2)(ii) is revised to read ''Refusing to deal with a covered producer on terms generally or ordinarily offered to similarly situated covered producers''; and paragraph (a)(2)(iii) in the final rule is revised to read ''performing under or enforcing a contract differently *than with similarly situated covered producers*'' [emphasis added]. ''Similarly situated,'' is a phrase commonly used by commenters and by AMS in the proposed rule when discussing producer groups.[96] Including this concept in the final regulation provides more context for a comparison of what differential performance or enforcement would look like, and therefore provides more specificity to the regulation. This revision also mirrors a revision made to language in a similar provision in the retaliation section (§ 201.304(b)(3)(ii) and (iv)). The addition of ''with a covered producer'' in paragraph (a)(2)(ii)—Refusal to deal, is similarly designed to align with the parallel provision for paragraph (b)(3)(iv) as was set out in the proposed rule and retained in the final rule. The final rule adds ''on terms generally or ordinarily offered to similarly situated producers'' as well, in response to comments (as discussed below) to provide similar clarity of application that refusal to deal is not simply an absolute boycott or making a sham or nominal offer, but includes failure to bid, negotiate, and otherwise make a reasonable attempt to contract on terms generally or ordinarily offered to similarly situated producers *when done on the prohibited basis.*

Second, AMS is adding a new paragraph (a)(2)(iv), which prohibits—when it occurs on a prohibited basis—''requiring a contract modification or renewal on terms less favorable than similarly situated covered producers.''[97] The new provision expands on the concept encompassed in paragraph (a)(2)(i), which prohibits ''offering contract terms that are less favorable than those generally or ordinarily offered to similarly situated covered producers.'' The new provision prohibits regulated entities from making contract terms less favorable for producers once they are under contract and have incurred financial obligations because of that contract. The new provision mirrors a new provision

www.regulations.gov/comment/AMS-FTPP-21-0045-0419.

[92] See, *e.g.,* National Cattlemen's Beef Association, ''Comment on AMS–FTPP–21–0045: Inclusive Competitive and Market Integrity Under the Packers and Stockyards Act'' (received Jan. 17, 2023), available at *https://www.regulations.gov/comment/AMS-FTPP-21-0045-0418* (Deception, discrimination, or retaliation on the basis of race, ethnicity, sexual orientation, gender identity, ability, religion/spirituality, nationality and/or socioeconomic status is reprehensible and should be remediated using the appropriate legal avenues, including legislative changes where necessary).)

[93] 9 CFR 203.12(f).

[94] USDA, Discrimination Financial Assistance Program, ''Eligibility,'' *https://22007apply.gov/eligibility.html* (last accessed Oct. 2023) (''This program covers discrimination based on different treatment you experienced because of: Race, color, or national origin/ethnicity (including status as a member of an Indian Tribe); Sex, sexual orientation, or gender identity; Religion; Age; Marital status; Disability; Reprisal/retaliation for prior civil rights activity'').'')

[95] See, generally, DOJ, Civil Rights Division. The Attorney General's Annual Report to Congress on Fair Lending Enforcement (2021), available at *https://www.justice.gov/d9/pages/attachments/2022/11/14/ecoa_report_2021_final_0.pdf* (In 2001 to 2021, there were 496 fair lending referrals to DOJ, of which 163 were on the basis of race and national origin. Other noted referrals, and then cases, in 2019 and 2020 were discrimination based on age and gender.)

[96] *See also Central Railroad Co. of New Jersey* v. *United States,* 257 U.S. 247 (1921) (''They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination, as where a lower joint rate is given to one locality than to another similarly situated'').

[97] Proposed paragraph (a)(2)(iv), which prohibited termination or non-renewal of a contract on a prohibited basis, is renumbered in the final rule as paragraph (a)(2)(v).

added to the retaliation section (§ 201.304(b)(3)(iii)) in response to public comment on the proposed retaliation regulations. AMS also uses a similar approach in the retaliation section on refusing to deal (§ 201.304(b)(3)(iv)), as requested by public commenters, by adding ''with a covered producer on terms generally or ordinarily offered to similarly situated covered producers'' after ''deal,'' for the same reasons—this language helps prevent evasion. Commenters requested that AMS provide more protection so that regulated entities cannot formulate new ways of harming producers in contracting—a crucial component of a producer's financial well-being. Commenters suggested an additional provision regarding specific contract terms, including contract modification, be added to the regulations. While AMS did not adopt the suggested provision in whole, AMS recognizes the importance of specifically prohibiting unfavorable contract modifications or renewals that occur on a prohibited basis, considering the detrimental financial impact this can have on producers already under contract. In making these changes, the final rule provides a greater degree of specificity regarding the type of conduct the rule prohibits. AMS will review the facts and circumstances of each case and the regulated entity's justifications for any modification or renewal to determine whether the regulated entity has violated this rule.

Third, AMS is adding a new paragraph (a)(2)(vi), which prohibits regulated entities from taking ''any other action that a reasonable covered producer would find materially adverse.'' This provision represents a logical outgrowth from the proposed rule, which had indicated that the ''prejudice or disadvantage with respect to paragraph (a)(1) of this section includes the following actions.'' As AMS explained in the proposed rule, AMS believes that the type of harm to a producer will not be difficult to identify when it occurs based upon the facts and circumstances, and thus provided an exemplary list to aid in identification and enforcement under the rule. Such a list was not intended to be all encompassing. However, in response to comments, AMS has recognized that such an open-ended approach may create too much uncertainty and undermine compliance and enforcement. AMS is replacing the use of ''includes'' with an additional, more flexible provision that provides a broader yet not unlimited range of possible harms. AMS's approach is in response to comments that adverse treatment of producers by regulated entities can occur outside the confines of the contractual relationship. Such conduct could include, for example, interference by a regulated entity into regulatory matters of significant material importance to producers. Several public commenters wanted more producer protections incorporated into § 201.304(a)(2). This provision provides a broad and flexible approach to these prohibitions and allows for ''material'' to be determined by the facts and circumstances of each case while staying within the scope of the proposed rule's intent around harms to producers under unjust discrimination and undue prejudice deriving from adverse actions.

C. Exceptions to the Prohibited Bases

Commenters suggested that AMS include exceptions to the prohibition on undue prejudice and unjust discrimination. In response to these comments and the shift from MVI to identifying specific prohibited bases, AMS decided to provide specific exceptions from the prohibition in two circumstances. New § 201.304(a)(3) states that the following actions by a regulated entity do not prejudice, disadvantage, inhibit market access, or constitute adverse action under § 201.304(a)(1): (i) fulfilling a religious commitment relating to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry; (ii) a Federally-recognized Tribe, including its wholly or majority-owned entities, corporations, or Tribal organizations, performing its Tribal governmental functions.

In shifting from MVI toward specific prohibited bases, AMS identified the need to provide certain exceptions from the prohibition. The proposed MVI was a flexible standard that permitted the Agency to evaluate the facts and circumstances of a particular case and whether the exclusion or disadvantageous contracting arrangement was based on the characteristics of the producer. Specifying delineated prohibited bases provides greater clarity, yet in doing so, it eliminates a degree of flexibility that could be valuable in a small set of circumstances. Accordingly, the Agency is adopting two specific exceptions to recognize circumstances that do not give rise to unjust discrimination. AMS asked questions about both areas in the proposed rule, highlighting to commenters that the Agency recognized the potential for additional adjustments to be made in those areas.

First, AMS is providing a specific exception to recognize the important role ritual slaughter plays in certain religious traditions and ensure that religiously significant meats—such as kosher, halal, and Amish meats—are not impacted by the rule's prohibition on discrimination on the basis of the producer's religion. According to AMS subject matter experts, halal slaughterers, for example, express a legitimate, religiously grounded preference for livestock and poultry raised by operators of faith, *e.g.,* the Muslim or the Amish Christian group, that maintain particular animal husbandry practices. In adopting its prohibition on prejudice on the basis of religion, AMS is principally focused on access to the broad livestock markets for persons where religion has no legitimate business purpose. In contrast, where religion is relevant to the livestock and meat itself, AMS is not seeking to disturb the religiously based determinations in what is a relatively discrete market segment. Therefore, when administering the Act, AMS must allow discriminatory conduct directed toward fulfilling religious commitments surrounding livestock care and meat production.

To ensure clarity in its application, this rule respects longstanding jurisprudence surrounding Tribal sovereignty and the political relationship that a Tribe has with its members that secures the right for Tribal entities to preference Tribal members. To ensure that it is not read in contradiction with existing jurisprudence, the rule explicitly specifies that Tribal governments can engage in practices related to livestock, poultry, and meats with respect to non-Tribal entities or non-Tribal descendants. The prohibition on discrimination on the basis of race or color would be read to protect a person from discrimination for being of Native American descent, but not on preferential treatment given to Tribal members based on their political classification. This matter was specifically raised by, and is responsive to, Tribal governments during the Tribal consultation that AMS conducted and is described below under ''VII.C.—Executive Order 13175—Consultation and Coordination with Indian Tribal Governments.''

AMS recognizes that this rulemaking cannot foresee the range of unique or extenuating circumstances that may present in agricultural markets. Commenters stated that rapidly changing livestock and poultry markets may require an exception to the prohibition against undue prejudice or disadvantage on a protected basis. However, AMS did not identify, from the comments or based on its

experience, any other specific circumstances in the livestock and poultry industries where a prejudice against a producer on a prohibited basis was justified under the Act. To the extent that unforeseen circumstances could arise that would justify creating the need to allow for additional exceptions to this rule, AMS believes that those circumstances are likely to be rare and tailored to narrow circumstances. Accordingly, AMS believes that prosecutorial discretion will provide it with adequate flexibility to offer relief on a case-by-case basis. Of course, if following implementation of this rule it becomes evident that additional exceptions should exist in regulation, AMS may amend this regulation through the ordinary rulemaking process.

D. Retaliation Provisions

AMS proposed in § 201.304(b)(1) to prohibit retaliation against a covered producer that occurs because of the covered producer's participation in protected activities ''to the extent that these activities are not otherwise prohibited by Federal or state law, including antitrust laws.'' In the final rule, AMS modified the language of this provision to move the exception for Federal or State law, including antitrust laws, to paragraph (b)(2) and to add Tribal law to the types of law identified in this exception. AMS is adding this language to make explicit the applicability of Tribal law in this circumstance. Additionally, AMS changed ''because of'' to ''based upon'' both in response to comments and to align with its approach in § 201.304(a) and embodied in § 201.304(c). AMS proposed ''based upon'' in § 201.304(a) and ''by employing'' in § 201.304(c) to capture actions where the prohibited bases form a material part of the action—discrimination or prejudice, or as part of the deceptive practice. Section 201.304(b) is designed to achieve the same goal. AMS also received comments recommending broad protections for covered producers from retaliatory actions, including where the retaliation was a part of the decision to take an adverse action. AMS further underscores that ''based upon the covered producer's participation in an activity . . .'' covers threats that would reasonably dissuade or chill a covered producer from participating in the activities.

Under proposed § 201.304(b)(2)(i), AMS proposed to establish as a protected activity a producer's communication with a government agency on matters related to livestock, meats, or live poultry or petitions for redress of grievances before a court, legislature, or government agency. Commenters requested that AMS clarify that this protection covers communication with any sector or level of government, including State governments. AMS intends for this regulation to include protections for communications with any level of government, including any government committee or official. In this final rule, AMS is aligning the use of the terms ''court, legislature, or government agency'' and simplifying the language to say, ''government entity or official.'' This change ensures that protected communications may occur with any of the three branches of government, any level of government, and with individual government officials, including committees and members of a legislature.

AMS requested public comment on whether the final rule should protect producers who choose not to participate in protected activities. In response to public comment supporting this proposal, AMS has revised § 201.304(b)(2)(ii) to protect a producer's right to refuse a regulated entity's request to engage in communication with a government entity or official that is not required by law, and § 201.304(b)(2)(iii) to protect a producer's right to form or join, or to refuse to form or join, a producer or grower association or organization. Proposed § 201.304(b)(2)(ii), which protected a producer's assertion of any of the rights granted under the Act or this part, or assertion of contract rights, is renumbered as paragraph (b)(2)(vii) in the final rule.

AMS proposed in § 201.304(b)(2)(v) to protect producer communication or negotiation with a regulated entity for the purpose of exploring a business relationship. In response to public comment, AMS added in the final rule protection for communicating; negotiating; or contracting with a regulated entity, another covered producer, or with a commercial entity or consultant; for the purposes of exploring or entering into a business relationship. Commenters asserted that, as proposed, the protected activity was ''unreasonably narrow'' and that expanding this protection would ''help ensure that covered producers may *explore* all their business opportunities.'' [98] The Act is intended to ensure an inclusive market to protect and promote the ability for covered producers to compete.[99] Such competition may also take the form of exploring or entering into opportunities for enhanced price discovery through market intermediaries, such as listing cattle for competitive bidding on a publicly transparent exchange or selling at an auction barn or through a cooperative or other commercial entity that facilitates the marketing of livestock by the covered producer. The provision covers both the ability to negotiate or contract with the commercial entity or consultant serving as an intermediary or other facilitating the marketing or platform for marketing, such as the exchange or auction barn; and also the ability to negotiate or contract with other packers during the exchange or auction process. This is protected because both elements may be necessary parts of securing those opportunities to engage in price discovery and enhance the choice and competitive opportunities for covered producers to earn the full market value of their goods and services. The provision also covers consideration of alternative uses for farm property. As with all protected activities under this final rule, the regulated entity may not present an obstacle to engaging in these activities, whether written in a contract, verbally asserted, or otherwise, as those are impermissible under the Act.

Under proposed § 201.304(b)(3), AMS identified types of prohibited retaliatory conduct. Commenters expressed concern regarding the lack of clarity of these proposed prohibitions, with some saying the prohibitions were too broad, some arguing that the rule should provide even more flexibility, and some supporting the introduction of a ''catch-all clause'' to provide additional protection against retaliatory behavior. The final rule adds language to paragraph (b)(3)(ii) to prohibit performing under or enforcing a contract differently than with *similarly situated producers* [emphasis added]. This language, ''similarly situated,'' was commonly used by commenters and AMS in the proposed rule when discussing producer groups. The addition of ''similarly situated'' language provides greater specificity regarding the scope of the regulation by providing more context for a comparison of what differential

[98] ''Comment on AMS–FTPP–21–0045: Inclusive Competition and Market Integrity Under the Packers and Stockyards Act,'' available at *https://www.regulations.gov/comment/AMS-FTPP-21-0045-0423.*

[99] See, *e.g.,* U.S. Department of Justice, ''Justice Department Files Lawsuit and Proposed Consent Decree to Prohibit Koch Foods from Imposing Unfair and Anticompetitive Termination Penalties in Contracts with Chicken Growers,'' Nov. 9, 2023, available at *https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decree-prohibit-koch-foods-imposing.*

performance or enforcement would look like.

The final rule also revises the provision prohibiting a regulated entity from refusing to deal with a covered producer by adding the language, ''on terms generally or ordinarily offered to similarly situated covered producers'' (paragraph (b)(3)(iv) in the final rule). In response to comments, AMS agrees that the rule as proposed provided too great a latitude for a regulated entity to engage in retaliation because a regulated entity could, for example, satisfy the proposed rule by simply offering highly unfavorable terms to the covered producer. AMS believes that this revision provides broader coverage regarding the most common circumstances that producers may encounter in their business dealings in which regulated entities may attempt to exact retaliation. It would also cover circumstances where the ''similarly situated producer'' was the covered producer's own prior status quo circumstance with the regulated entity before the covered producer engaged in the protected activity. AMS is also aligning refusal to deal under paragraph (a)(2)(ii) to address the similar risk of evasion.

Similarly, commenters requested that AMS add a regulation regarding contract modification, or contract renewal. AMS has amended proposed § 201.304(b)(3) to add a new paragraph (b)(3)(iii) to clarify that requiring a contract modification or a renewal on terms less favorable than for similarly situated producers is covered.[100] This provision covers any adverse change to the covered producer's contract terms if they are done in retaliation to a producer's engaging in protected activities. Additionally, in response to comments requesting AMS clarify that prohibited adverse actions ''includes but is not limited to'' the list in proposed § 201.304(b)(3), AMS has added a new paragraph (b)(3)(vi) to prohibit ''any other action that a reasonable covered producer would find materially adverse.'' AMS designed this rule to protect producers broadly from adverse actions based upon the rule's prohibitions. The regulatory text of the proposed rule set forth an exemplary list, specifically denoting that ''retaliation includes the following actions'' (paragraph (b)(2). Several public commenters wanted more producer protections, such as discriminatory conduct against producers by regulated entities through means outside of contractual devices. AMS agrees that adverse, retaliatory treatment of producers by regulated entities can occur through a wide range of means, including outside the confines of contractual devices, or through contractual means that are not easily delineated in a specific list. Such conduct could, for example, include interference by a regulated entity into regulatory matters of significant material importance to producers. Based on AMS's regulatory experience, regulated entities may interfere in covered producers' water rights, which are exemplary of harms that would be considered retaliation even if they occur outside the confines of contractual relationships. Or, conduct could include retaliation during the contracting process for protected activities that occurred prior to the covered producer's attempt to form a business relationship with the regulated entity. Such examples might not be clearly covered under §§ 201.304(b)(3)(i) through (v) of the proposed rule's protections relating to contracts but were covered within the scope of the proposed rule's intent around broad-ranging adverse actions that harm producers. AMS also intends the list of retaliatory activities to be broad enough to capture the fullest range of materially adverse harms encompassed under unjust discrimination and undue prejudice—including in comparison to either their prior circumstances or to similarly situated producers—and threats of such harms that are designed to deter or punish producers from participating in the activities protected by this final rule. Therefore, § 201.304 (b)(3)(vi) has been added to the final rule to cover other types of adverse treatment. This provision provides a broad and flexible approach to these prohibitions and allows for ''material'' to be determined by the facts and circumstances of each case.

In making these changes, the final rule provides a greater degree of specificity regarding the type of conduct the rule prohibits. AMS is not, however, providing the degree of specificity requested by commenters regarding unfavorable contract terms because it is impractical to name every action a malicious actor could use to retaliate against a producer, and providing this level of detail is not necessary to enforce the rule.

E. Technical Changes

AMS made editorial changes to the text of several proposed regulations to improve clarity and readability. For instance, in the definition of *livestock producer,* AMS revised the proposed definition by removing multiple prepositions, so that the definition in the final rule reads more simply: from ''*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'' to ''*Livestock producer* means any person, except an employee of the livestock owner, engaged in the raising of and caring for livestock.'' Additionally, AMS revised the syntax of several proposed regulations. For example, in § 201.304(b)(3)(i), which lists prohibited retaliatory actions, AMS revised the phrasing of the prohibition from ''Termination of contracts or non-renewal of contracts'' to ''Terminating or not renewing a contract'' to place emphasis on the action being prohibited rather than the subject of that action.

AMS also made several non-substantive clarifying changes to the wording of prohibited contractual deceptive practices in paragraphs (b) and (c) of § 201.306—Deceptive practices. These changes are identical under *contract formation, performance, and termination* and include the removal of the phrase ''pretext'' and ''fact'' and the inclusion of the term ''information'' in place of ''fact.'' The term ''pretext'' was removed because it is not needed to accomplish the objectives of § 201.306. The conduct this rule aims to prohibit is more directly defined through use of the following language: ''*false or misleading statement or representation, or omission of material information.*'' By changing the term ''fact'' to ''information'' certain conduct that may not be considered or defined as ''factual'' under the Act, yet is still deceptive, will be covered.

Lastly, AMS made a technical change to the table of contents for subpart O. To avoid confusion, AMS is including §§ 201.303 and 201.305 in the table of contents as reserved sections to indicate the gaps between §§ 201.302, 304, and 306 are deliberate and that sections have not been inadvertently omitted.

VI. Provisions of the Final Rule

Under the authority of the Act, this rule adds a new subpart O to AMS's regulations in 9 CFR 201, titled ''Competition and Market Integrity,'' and consisting of §§ 201.300 through 201.390. This section summarizes the substantive provisions of the new subpart.

A. Definitions (§ 201.302)

Section 201.302 defines three terms for subpart O: *covered producer, livestock producer,* and *regulated entity.*

[100] Proposed paragraphs (b)(3)(iii) and (iv) are accordingly renumbered as paragraphs (b)(3)(iv) and (v) in the final rule.

A *covered producer* is defined as a livestock producer (as defined in § 201.302) or swine production contract grower or poultry grower as defined in section 2(a) of the P&S Act (7 U.S.C. 182(8), (14)). Under section 2(a) of the Act, swine production contract grower means any person engaged in the business of raising and caring for swine in accordance with the instructions of another person. A live poultry grower is defined under section 2(a) of the Act as any person engaged in the business of raising and caring for live poultry for slaughter by another, whether the poultry is owned by such person or by another, but not an employee of the owner of such poultry. AMS is adopting this definition to facilitate a focus in this rule on protecting livestock producers (and other parties included in the definition of covered producer) because the harms of discrimination, retaliation, and deception that are addressed in this rule are directed toward and experienced by those persons. Therefore, even though the Act does not contain a definition for livestock producers, AMS has included livestock producers under the definition of *covered producer;* and provided a definition for the term *livestock producer* in this section.

Livestock producer is defined for the purposes of subpart O as being any person, except an employee of the livestock owner, engaged in the raising of and caring for livestock. AMS aligned its definition of the term *livestock producer* with phrasing used in the Act for the terms poultry grower and swine production contract grower. In response to comment to the proposed rule, AMS revised its definition by removing unnecessary and potentially confusing phrasing. Employees are specifically excluded as they typically lack direct financial interest in the livestock themselves.

AMS defines *regulated entity* as 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). A swine contractor is defined in the Act as any person engaged in the business of obtaining swine under a swine production contract for the purpose of slaughtering the swine or selling the swine for slaughter, if (a) the swine is obtained by the person in commerce or (b) the swine (including products from the swine) obtained by the person is sold or shipped in commerce. Live poultry dealers, the vast majority of whom are organized in a vertical structure with common ownership interest in inputs, often referred to as poultry integrators, are defined in the Act as any person engaged in the business of obtaining live poultry by purchase or under a poultry growing arrangement for the purpose of either slaughtering it or selling it for slaughter by another, if poultry is obtained by such person in commerce, or if poultry obtained by such person is sold or shipped in commerce, or if poultry products from poultry obtained by such person are sold or shipped in commerce. A packer is defined in the Act as any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter; or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce; or (c) of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer, or distributor in commerce.

B. Undue Prejudice and Unjust Discrimination (§ 201.304(a))

Section 201.304(a) addresses the unique and often difficult to prove discriminatory conduct that has long existed in the agricultural sector by prohibiting specific bases of prejudicial action. Paragraph (a) also lists prohibited actions taken on a prejudicial basis and provides clarification on the types of actions that do not constitute prohibited action taken on a prejudicial basis. In doing so, AMS is clarifying the application of the Act, better empowering producers to protect themselves, and encouraging companies to adopt more robust compliance practices to snuff out conduct prohibited by the Act in its incipiency, before it can distort markets in the aggregate. In particular, this rule addresses the longstanding and often difficult to counter forms of exclusion that have plagued the agricultural sector for decades. AMS intends for this rule to support positive trends toward inclusivity in the marketplace. Prejudices and disadvantages based upon the producer's protected characteristics or status as a producers' cooperative have no place in today's modern agricultural markets.

The Act, through section 202(a) and (b), broadly prohibits certain practices or devices, including undue or unreasonable prejudices and disadvantages and unjust discrimination. Section 202(a) and (b) of the Act identifies several 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. In this rule, AMS is prohibiting specific undue and unreasonable prejudices and disadvantages, and unjust discrimination against any covered producer on the basis of certain categories of characteristics or attributes broadly and firmly established as unjust in a modern economy. This regulatory action implements Congress's intent, expressed through the Act, to stop unjust discrimination and undue prejudice by packers and live poultry dealers against livestock producers and poultry growers.

In enacting the Act, Congress cast a wide net to capture all acts of unjust discrimination and undue or unreasonable prejudice against any particular person. There is no indication that Congress intended to exempt any discriminatory conduct taken by regulated entities against producers covered under the Act.[101] The Act's prohibition of unjustly discriminatory or unreasonably prejudicial actions against a particular person was not a new statutory concept, as the Interstate Commerce Act of 1887 (or ICA) also banned unreasonable prejudices and unjust discriminatory practices well before the enactment of the Act. While the ICA does not define the scope of the 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 4 below.

In *Mitchell* v. *United States,*[102] the Supreme Court of the United States held that the ICA prohibited discrimination based on race; such discrimination was ''essentially unjust.'' The Court held that ''it is apparent from the legislative history of the ICA 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.'' [103] Further, the Court isolated a section of the ICA 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.' '' [104] The Court found that unreasonable prejudice against an individual based on race was a violation and concluded that, ''the Interstate Commerce Act expressly

[101] *See* 7 U.S.C. 193. *C.f. Mitchell* v. *United States,* 313 U.S. 80, 94 (1941).

[102] 313 U.S. at 94.

[103] *Id.* at 94.

[104] *Id.* at 95 (emphasis added).

extends its prohibitions to the subjecting of 'any particular person' to unreasonable discriminations.'' [105]

The Act contains similar, but broader, language than sec. 3 of the ICA. Section 202 of the Act 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 4 illustrates where the text between the two acts is similar, and also how the Act is broader.[106]

Table 4: Comparison of the Interstate Commerce Act and the Packers & Stockyards Act[107]

Interstate Commerce Act (1887 text), Section 3	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,	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:
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.**	(a) Engage in or use any unfair, unjustly **discriminatory**, or deceptive practice or device; or
Every common carrier subject to the provisions of this act... **shall not discriminate in their rates and charges between such connecting lines[.]** (emphasis added)	(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 4, unlike the ICA, the Act in secs. 202(a) and (b) prohibits undue or unreasonable prejudices or disadvantages *as well as* deception *or* unjust discrimination (without limitation to discrimination in rates and charges in particular). In this rulemaking, AMS applies the language from sec. 202 to prohibit acts of unreasonable prejudice and to prevent unjust discrimination including, but not limited to, the race discrimination that the Court found to be violative of the ICA in *Mitchell.*

This rule sets forth specific prohibitions on prejudicial or discriminatory acts or practices against individuals that are sufficient to demonstrate violation of the Act without the need to further establish broad-based, market-wide prejudicial or discriminatory outcomes or harms. The prohibitions in this rule on regulated entities adversely treating individual producers address the types of harms the Act is intended to prevent. AMS finds that adverse acts on these bases are essentially unjust and unduly prejudicial, and actionable at the individual level. Moreover, AMS

[105] *Id.* at 97.

[106] For more on the relationship between the Interstate Commerce Act and the 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.''

[107] Bolded text highlights where the ICC and Act use similar language. Italicized text identifies areas where the language of both statutes is the same.

believes that preventing broad-based exclusion, and therefore promoting competitive markets, is most effectively enforced at the individual producer level when the conduct is in its incipiency.[108] To further allow for effective enforcement of the statute, AMS is also including a recordkeeping requirement to support evaluation of regulated entity compliance.

In determining the bases for protection against discrimination under the Act, AMS drew insight initially from the Statement of General Policy Under the Packers and Stockyards Act published by the Secretary in 1968 (Statement of General Policy) (9 CFR 203.12(a)), which states that the Act provides that all stockyard services furnished at a stockyard ''shall be reasonable and nondiscriminatory and stockyard services which are furnished shall not be refused on any basis that is unreasonable or unjustly discriminatory.'' [109] Additionally, AMS interprets the Act consistently with the regulations governing USDA-conducted programs; ECOA, which is enforced in part by AMS under the Act; a series of statutes identifying producers that Congress has determined face special disadvantages, are underserved, or are otherwise more vulnerable to prejudices; and the Agricultural Fair Practices Act (AFPA) of 1967.

The Statement of General Policy reflects the current USDA policy on the enforcement of the Act. The Statement of General Policy provides in part that it is a violation of secs. 304, 307, and 312(a) of the 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. In 1964, USDA prohibited discrimination on the basis of race, color, and national origin in its Federally conducted activities by adopting Title VI principles.[110] USDA then expanded the protected bases for its conducted programs to include religion, sex, age, marital status, familial status, sexual orientation, disability, and whether any portion of a person's income is derived from public assistance programs.[111] Most recently updated in 2014, the general regulatory prohibition offers a more current interpretation of antidiscrimination standards.[112] The 2014 rule aimed to ''strengthen USDA's ability to ensure that all USDA customers receive fair and consistent treatment, and align the regulations with USDA's civil rights goals.'' [113] 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. In that rulemaking, USDA identified areas where discrimination against a producer is an unacceptable denial of access to USDA's services. This prior rulemaking provides a helpful reference to what constitutes unjust discrimination under the Packers and Stockyards Act.

AMS interprets the Act in light of legislative mandates that emerged over the last 30 years directing USDA to make extra efforts to ensure that members of the aforementioned groups have equal access to USDA's services and agricultural markets generally.[114] Congress adopted numerous statutes seeking to remedy market exclusion 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 being 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.[115]

The definitions and coverage in these statutes vary to some extent. Some focus principally on members of groups that have experienced racial or ethnic prejudices, while others address gender prejudices. Overall, these statutes and Congressional deliberations provide useful reference for USDA to most effectively carry out the Act, which outlaws undue prejudice against any person in any respect. For example, in the congressional hearings preceding the Act's passage, opposing members argued against the Act because producers were already protected by the ICA, which guaranteed ''equal rights on the railroads to every man, woman and

[108] ''[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).

[109] Statement of General Policy Under the Packers and Stockyards Act. U.S. Department of Agriculture: Washington, DC, 1968.

[110] *https://www.federalregister.gov/documents/2014/07/16/2014-16325/nondiscrimination-in-programs-or-activities-conducted-by-the-united-states-department-of-agriculture* (See 29 FR 16966, creating 7 CFR part 15, subpart b, referring to nondiscrimination in direct USDA programs and activities, now found at 7 CFR part 15d). (assessed 01–30–2024)

[111] *https://www.federalregister.gov/documents/2014/07/16/2014-16325/nondiscrimination-in-programs-or-activities-conducted-by-the-united-states-department-of-agriculture* (assessed 01/30/2024)

[112] 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).

[113] USDA. 2014. 7 CFR part 15d RIN 0503–AA52 Nondiscrimination in Programs or Activities Conducted by the United States Department of Agriculture, p. 41407. 2014–16325.pdf (*govinfo.gov*) (assessed 02/01/2024).

[114] 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.*

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

child,'' and the ''enforcement of the antitrust act . . . give[s] every man a fair show.'' [116] Most recently, Congress provided partial compensation for producers who suffered discrimination in USDA's programs, which USDA implemented on a set of protected bases similar to that in this final regulation.[117]

Additionally, in crafting the final rule, AMS was informed by the provisions of two additional laws that fall under the enforcement of USDA with respect to livestock and poultry. The first is ECOA. ECOA prohibits a creditor from discriminating in the provision of credit on the basis of race, color, religion, national origin, sex (which includes sexual orientation and gender identity), marital status, or age, because the applicant's income derives all or in part from a public assistance program, or because the applicant has in good faith exercised any right under ECOA.[118] The Secretary enforces ECOA under the Act, with respect to activities under the jurisdiction of the Act.[119]

Secondly, AFPA protects producers from retaliation by certain market intermediaries, defined as handlers, for being members of a cooperative or seeking to form a cooperative.[120] The Secretary has delegated enforcement of the AFPA to AMS, which implements the law through the Packers and Stockyards Division. Congress has long protected the rights of agricultural cooperatives, acknowledging their important role in helping farmers meet the economic demands of the market. One year after the passage of the 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.[121]

AFPA 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. As noted previously, the 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.[122] Thus, protections for cooperatives against discrimination were contemplated at the time of the Act's passage.[123]

In interpreting the Act in light of the aforementioned policy direction, AMS has sought to stamp out market exclusion on prohibited bases. This final rule establishes a prohibition of undue prejudice or unjust discrimination against covered producers on the bases of race, color, religion, national origin, sex (including sexual orientation and gender identity), disability, marital status, or age; or because of the covered producer's status as a cooperative. Transitioning from the proposed rule's use of the more flexible ''market vulnerable individual'' to the more specific list of delineated terms, the final rule interprets the Act consistent with the antidiscrimination mandates in other related statutes, including the ECOA, which is already enforced by AMS for markets subject to the Act,[124] and the AFPA. AMS also references the Equal Employment Opportunity Commission (EEOC) definitions (described below) for clarification regarding which characteristics a producer must possess to be considered a member of one or more protected classes. It is appropriate for the Secretary to consider these other authorities in effectuating the purposes of the Act as they effect a similar purpose to this final rule.[125]

The EEOC has described racial discrimination as discrimination based on an ''immutable characteristic associated with race, such as skin color, hair texture, or certain facial features.'' Although race and color may appear indistinguishable, they are not. According to the EEOC, ''color discrimination occurs when a person is discriminated against based on the lightness, darkness, or other color characteristic of the person.'' [126] Race discrimination involves treating an individual differently because of his or her race. National origin as a protected class is defined as disparate treatment because an individual is ''from a particular country or part of the world, because of ethnicity or accent, or because they appear to be of a certain ethnic background (even if they are not).'' [127] Ethnicity is covered under national origin.[128] Religion as a protected basis is defined as discrimination based upon a person's religious beliefs. EEOC reports that the law protects people in recognized ''organized religions,'' but also those ''who have sincerely held religious, ethical or moral beliefs.'' [129] Sex as a protected basis includes discrimination based upon a person's status as pregnant, one's sexual orientation, and one's gender identity.[130] The EEOC

[116] *See e.g.,* 61 Cong. Rec. H1872 (1921).

[117] Section 22007 of the Inflation Reduction Act (Pub. L. 117–169). USDA implementation available at *https://22007apply.gov/*. This program covers discrimination based on different treatment an individual experienced because of race, color, or national origin/ethnicity (including status as a member of an Indian Tribe); sex, sexual orientation, or gender identity; religion; age; marital status; disability; reprisal/retaliation for prior civil rights activity.

[118] 15 U.S.C. 1691(a).

[119] 15 U.S.C. 1691c.

[120] 7 U.S.C. 2301 *et seq.*

[121] *Nat'l Broiler Mktg. Ass'n* v. *United States,* 436 U.S. 816, 825–26 (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.'').

[122] 7 U.S.C. 182(1).

[123] H.Rep. No. 85–1048, 1957.

[124] 15 U.S.C. 1691c(a)(5) (''(a) Enforcing Agencies. Subject to subtitle B of the Consumer Protection Financial Protection Act of 2010withthe requirements imposed under this subchapter shall be enforced under:. . . (5) The Packers and Stockyards Act, 1921 [7 U.S.C. 181 *et seq.*] (except as provided in section 406 of that Act [7 U.S.C. 226, 227]), by the Secretary of Agriculture with respect to any activities subject to that Act.'')

[125] 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/*.

[126] U.S. Equal Employment Opportunity Commission (EEOC), No date, Facts about Race/Color Discrimination, available at *https://www.eeoc.gov/fact-sheet/facts-about-racecolor-discrimination.*

[127] U.S. Equal Employment Opportunity Commission (EEOC), National Origin Discrimination, available at *https://www.eeoc.gov/national-origin-discrimination.*

[128] Ibid.

[129] U.S, Equal Employment Opportunity Commission (EEOC), Religious Discrimination, available at *https://www.eeoc.gov/religious-discrimination.*

[130] U.S, Equal Employment Opportunity Commission (EEOC), Sex, available at *https://www.eeoc.gov/youth/sex-discrimination#:~:text=EEOC%20enforces%20two%20laws%20that,sexual%20orientation%2C%20and%20gender%20identity.*

defines disability as follows: ''Has a physical or mental condition that substantially limits a major life activity;'' a ''history of disability,'' and ''is subject to an adverse employment action because of a physical or mental impairment the individual actually has or is perceived to have, except if it is transitory (lasting or expected to last six months or less) *and* minor.'' [131]

ECOA defines marital status as the ''existence, absence, or likelihood of a marital relationship between the parties,'' and so marital discrimination would be upon those bases.[132] Age discrimination is defined as discrimination against those individuals 40 and older on the basis of their age.[133] Cooperatives are described as ''producer and user-owned businesses that are controlled by, and operate for the benefit of, their members, rather than outside investors.'' [134] As explained above, in formulating this rule, AMS principally drew on its expertise and comments gathered from market participants about how undue discrimination manifests in markets, and considered the relevant references that concern this type of discrimination. These include the above referenced EEOC, ECOA, and AFPA-related approaches because these approaches: first, align with the intent of the Act to prohibit all instances of unjust discrimination and undue prejudice; second, effectuate the purposes of the final rule to clearly prohibit that discrimination; and third, promote more inclusive competition by protecting the individuals who participate in the market.

Because of the Act's broad applicability (as discussed in section III—''Authority''); 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 concludes that producers who have been subjected to discrimination, prejudice, disadvantage, or exclusion on the specific bases set forth in this final rule should be covered by the prohibitions against undue prejudice or disadvantage and unjust discrimination as enumerated by sec. 202 of the Act.

To stamp out unjustly discriminatory and unduly prejudicial conduct and support a more inclusive marketplace, AMS, in § 201.304, lays out the protected bases against which undue prejudices or disadvantages and unjust discrimination are prohibited, and then describes the specific conduct that, when initiated against a producer belonging to one of the protected bases, is prohibited. Paragraph (a)(1) prohibits a regulated entity from prejudicing, disadvantaging, inhibiting market access, or otherwise taking an adverse action against a covered producer on the basis of the covered producer's (i) race, color, religion, national origin, sex (including sexual orientation and gender identity), disability, marital status, or age; or (ii) the covered producer's status as a cooperative. The sources of these bases are discussed above. Paragraph (a)(1)'s prohibition as ''based upon'' is intended to be broader than ''but for'' causation and so capture when the protected characteristics or status are a material, or non-trivial, element of the decision to take an adverse action against a covered producer. AMS expects that fact-finding tribunals will establish the necessary processes for proving these elements, with an eye toward the protections for covered producers and for open, inclusive markets that this rule is designed to provide.

Though this regulation prohibits prejudice or disadvantage against a covered producer on the basis of the specified statuses, AMS notes that regulated entities may decline to do business with covered producers for justified economic reasons. 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 its business decision.

Section 201.304(a)(2) describes the actions that prejudice, disadvantage, inhibit market access, or are otherwise adverse under paragraph (a)(1). These actions were chosen because they relate to fairness in contracting, which is a consistent concern among producers; and are actions that PSD has determined are a recurring problem in the industry, directly impacting producers' financial well-being. In response to the proposed rule, many commenters noted the financial repercussions of lack of fairness in contracting.[135] Under § 201.304(a)(2), regulated entities may not prejudice or disadvantage covered producers on the basis of a protected status by: (i) offering contract terms that are less favorable than those generally or ordinarily offered to similarly situated covered producers; (ii) refusing to deal with a covered producer on terms generally or ordinarily offered to similarly situated covered producers; (iii) performing under or enforcing a contract differently than with similarly situated covered producers; (iv) requiring a contract modification or renewal on terms less favorable than similarly situated covered producers; (v) terminating or not renewing a contract with a covered producer; and (vi) any other action that a reasonable producer would find materially adverse.

Paragraph (a)(2)(i) prohibits the offering of less favorable contract terms to covered producers on the basis of their status as members of a protected class. In the Agency's experience, offering less favorable contract terms than those generally or ordinarily offered to similarly situated covered producers is a means through which regulated entities can prejudice or disadvantage producers. For example, the Agency has received complaints that the bidding on livestock by regulated entities occurs at a less advantageous time for certain producers on the basis of the classes protected under this rule resulting in lower prices or less favorable delivery terms. Similarly, in the Agency's experience, poultry growers have complained about being offered less favorable growing terms on the basis of the classes protected under this rule. This rule does not prohibit ordinary contracting for different prices on the basis of differences in product

[131] U.S. Equal Employment Opportunity Commission (EEOC). No date. Disability Discrimination and Employment Decisions. Accessed at *https://www.eeoc.gov/disability-discrimination-and-employment-decisions* on November 15, 2023.

[132] Equal Credit Opportunity Act (ECOA). No date. Access at *https://www.fdic.gov/resources/supervision-and-examinations/consumer-compliance-examination-manual/documents/5/v-7-1.pdf.*

[133] U.S. Equal Employment Opportunity Commission (EEOC). No date. Age Discrimination. Accessed at *https://www.eeoc.gov/age-discrimination* on 10–04–2023.

[134] Co-ops: A Key Part of Rural America, *Co-ops: A Key Part of Rural America,* USDA, available at *https://www.usda.gov/topics/rural/co-ops-key-part-fabric-rural-america.* See also AFPA § 2301. Congressional findings and declaration of policy.

[135] *See e.g.,* ''Discrimination and retaliation mean big profits for companies at the farmer's expense. While meatpackers rake in record profits during the pandemic, farmers make less, and eaters are left paying more at the grocery store. Farmers who complain about their pay or the fairness of their contracts run the risk of losing their contracts, putting their homes and livelihoods at risk.'', available at *https://www.regulations.gov/comment/AMS-FTPP-21-0045-0051;* see also, ''This rule is much needed so farmers can tell the truth about their contracts and so consumers can know what producers are actually doing to the earth, the animals, and the farmers.'', available at *https://www.regulations.gov/comment/AMS-FTPP-21-0045-0298.*

quality, service, transportation cost, or delivery terms.

Paragraph (a)(2)(ii) prohibits regulated entities from refusing to deal with a covered producer on terms generally or ordinarily offered to similarly situated covered producers. This refers to situations in which a regulated entity makes no reasonable effort to deal, bid, or negotiate with a covered producer on the basis of the covered producer's status as a member of a protected class. Such refusal to deal has no connection with the service or quality of product offered, but rather is due, in material part, to the personal characteristics or status of the producer and restricts the producers' ability to obtain the fair market value of their products and services. In today's highly vertically integrated and concentrated markets, refusal to deal by one regulated entity will often leave a producer with very few, if any, parties to contract with, unduly inhibiting the competitive marketplace when performed on the bases prohibited by this final rule.

Paragraph (a)(2)(iii) prohibits regulated entities from performing under or enforcing a contract differently than with similarly situated producers. A violation of this regulation would occur when a regulated entity—based upon the covered producer's protected characteristics—inconsistently enforces its contracts as it would with similarly situated producers. For instance, a selective information disclosure would represent a selective performance of contract when a regulated entity withholds materially relevant information from one covered producer that the regulated entity generally or ordinarily provides to other covered producers. In these instances, information-deprived producers will have an incomplete picture of their business relationships with regulated entities, and therefore will operate at an unreasonable disadvantage relative to producers who receive the pertinent information. Similarly, the Agency has received complaints over the years with respect to differential performance under poultry growing arrangements, such as the delivery to affected growers of flocks that are sick or otherwise known to be likely to perform poorly owing to the age of the hens. Those sick or poor performing chicks are likely to result in lower performance for the grower in a poultry grower ranking system, which results in lower pay for the grower. While that may occur from time to time per natural cycles, a repeated or intentional delivery of underperforming flocks has been commonly reported by producers as a principal means of adversely affecting grower earnings. Similarly, a regulated entity withholding or delaying delivery of feed would result in lower performance and profit for a producer. Accordingly, AMS has incorporated differential contract performance to capture those contractual performance-based means to prejudice or disadvantage producers. By clarifying in its final rule that the Act prohibits such conduct, AMS seeks to better protect producers who suffer, or are at risk of suffering, this type of harm.

Paragraph(a)(2)(iv) prohibits a regulated entity from, on the basis of a covered producer's protected status, requiring a contract modification or renewal on terms less favorable than those for similarly situated covered producers. The Agency has determined, based on producer complaints, that regulated entities sometimes prejudice or disadvantage growers by reducing numbers of flocks delivered, changing types of birds raised, or otherwise changing contract terms that result in lower incomes for growers. Poultry producers commonly experience these types of contract modifications. Livestock producers also experience modifications, such as a change from a cash negotiated contract to a negotiated grid contract or other purchase type that may be adverse from the perspective of the producer depending on the facts and circumstances. Therefore, in the final rule, AMS seeks to clarify that unfavorable contract modification or renewal by a regulated entity, on the basis of a protected class, amounts to a violation under the Act. This rule, by itself does not prohibit renegotiations or failure to renew a contract on the basis of changes in the market. However, while this rule does not distinguish modification for other reasons, many contract terms under the Act are not subject to modification during performance of the contract *at all* because any contract modification that serves to delay or reduce full payment is an unfair practice under sec. 202(a) of the Act.

Paragraph (a)(2)(v) prohibits regulated entities from terminating or not renewing a contract with a covered producer on the basis of a covered producer's status as a protected class. Contract termination can have devastating consequences for producers that have invested substantial sums in infrastructure that only meets the requirements of a particular integrator.

Paragraph (a)(2)(vi) prohibits regulated entities from any other action that a reasonable covered producer would find materially adverse. This provision provides a broad and flexible approach to these prohibitions and allows for ''material'' to be determined by the facts and circumstances of each case where producers were harmed.

Finally, § 201.304(a)(3) delineates two exceptions to the prohibition on prejudicial or discriminatory conduct against covered producers on a protected basis. In one, the regulated entity is fulfilling a religious commitment relating to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry; in the other, a Federally recognized Tribe, including its wholly or majority-owned entities, corporations, or Tribal organizations, is performing Tribal governmental functions. As discussed in Section V—Changes from the Proposed Rule, these exceptions were added in response to commenters' request that some exceptions be provided to the prohibition on undue prejudice and unjust discrimination. To safeguard the free exercise of religion, AMS has provided an exception to allow discriminatory conduct necessary to fulfill religious commitments surrounding livestock care and meat production. To conform with longstanding jurisprudence surrounding Tribal sovereignty, AMS has provided an exception to allow Tribal entities to preference their own Tribal members in the purchase and sale of livestock.

C. Retaliation (§ 201.304(b))

Section 201.304(b) establishes protected activities for covered producers and prohibits regulated entities from engaging in retaliatory conduct based on those activities. As noted previously, sec. 202(a) of the Act prohibits unjust discrimination. This regulation is designed to protect the essential activities producers must engage in to bargain effectively and exercise their economic rights, and in doing so obtain the full value of their livestock or poultry products or services. As a result, retaliation against producers because they have engaged in protected activities is disparate treatment that the Act intended to prohibit.[136] Retaliatory conduct is a way for regulated entities to exploit their market power. Increased concentration has facilitated the exercise of market power through various contracting practices. Moreover, because producers

[136] *See e.g.,* 61 Cong. Rec. H1860 (1921): ''However, their [packers] very organization has given them a power for evil as well as good, and evil practices should always be condemned.'' and ''. . . the right thing to do is to devise a law which, while maintaining and getting the advantage for the people of all of the fine workings of these great organizations, at the same time control them in such a way as to destroy the abuses that are connected with their operation.''

have few processor choices in these markets, threats of retaliation and market exclusion take on heightened credibility.

AMS determined the protected activities to include in § 201.304(b)(2) based on commonly recorded complaints from the industry, case law, USDA/DOJ workshops, conversations with AMS personnel, and a recently voiced concern from Congress. AMS also identified these types of activities because of their potential to mitigate certain ways that market power is exercised. The retaliatory conduct prohibited by this regulation covers a broad range of circumstances that AMS has determined occur commonly in connection with livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry. Free exercise of the protected activities facilitates a competitive and transparent market, ensuring producers can capture the full value of their livestock or growing services.

Section 201.304(b)(1) establishes that a regulated entity may not retaliate or otherwise take an adverse action against a covered producer based upon the covered producer's participation in protected activities. As described in Section V—Changes from the Proposed Rule,'' paragraph (b)(1)'s prohibition as ''based upon'' is intended to be broader than ''but for'' causation and so capture when the protected characteristics or status are a material, or non-trivial, element of the decision to take an adverse action against a covered producer. AMS expects that fact-finding tribunals will establish the necessary processes for proving these elements, with an eye toward the protections for covered producers and for open, inclusive markets that this rule is designed to provide.

Section 201.304(b)(2) lists the activities that are protected. Paragraph (b)(2) also provides a caveat that the protected activities must not otherwise be prohibited by Federal, Tribal, or State law, including antitrust laws. As outlined in the following paragraphs, these activities form an essential foundation for producers to receive the benefit of their bargained for exchange and the protections afforded under the Act itself. Acts of retaliation to chill or curtail these protected activities offer no competitive benefits to the market. Commenters to the proposed rule echoed these concerns.[137] The Act was designed to address market abuses and business practices that inhibit producers' ability to obtain the full value of their products and services.[138] Covered producers have complained to AMS over the years of having suffered retaliation or fearing retaliation for engaging in the conduct identified in this paragraph.

Specifically, paragraph (b)(2)(i) protects a covered producer's ability to communicate with a government entity or official or to petition a government entity or official for redress of grievances with respect to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry. A covered producer must be able to freely seek redress of grievances to ensure the protections afforded by the Act and its regulations have their intended effect. Government regulators must also have the ability to fully appreciate the views of market participants to ensure that the rules and regulations—and enforcement of those laws and regulations—are sufficiently responsive to market realities and divergent interests and business practices in the marketplace. Hindering the free flow of market information creates risks of market distortions and will impair the ability for those with less economic power to operate in the marketplace.

In paragraph (b)(2)(ii), AMS adds a new protection for a covered producer to refuse a regulated entity's request that the producer communicate with a government entity or official when that communication is not required by law. Just as covered producers have the right to communicate with government entities or officials to ensure their rights are protected, so too do they have the right to decide when and under what circumstances they engage in such communication. Based on its experience regulating the livestock sector, AMS is aware that regulated entities may coerce covered producers to contact the government on regulatory and policy matters and to espouse positions that the covered producers disagree with. AMS has received reports frequently in the past, and including within the last two years, of regulated entities pressuring producers to oppose regulations that the producers support, and covered producers reported similar concerns to AMS during earlier rulemaking initiatives as well. Indeed, regulated entities should not punish a covered producer for the producer's decision to talk to government agencies or not, regardless of the producer's reasons.

The lack of clarity around prohibitions on retaliation in agricultural markets—clarity which this rule aims to provide—impairs AMS's ability to investigate potential violations and effectively enforce the Act. Accordingly, AMS has added § 201.304(b)(2)(ii) to clarify that the rule protects a covered producer from retaliation if the covered producer decides not to engage in a communication with a government entity or official that is not required by law.

Paragraph (b)(2)(iii) protects a covered producer asserting the right to formor join—or to refuse to form or join—aproducer or grower association or organization, or cooperative, or the right to collectively process, prepare for market, handle, or market livestock or poultry. ''Asserting the right'' includes the preparatory steps necessary to form or join an association or cooperative. This provision protects two forms of producer interactions: cooperative and non-cooperative associations. The formulation ''to collectively process, prepare for market, handle, or market livestock or poultry'' refers to forming or joining a cooperative, tracking the language of the Capper Volstead Act.[139] Impeding the formation of cooperatives through retaliation harms competition as individual producers are deprived of the chance to mitigate market power abuse by bargaining collectively. The Agricultural Fair Practices Act explicitly protects the right of individual farmers to join cooperative organizations to preserve their marketing and bargaining position, stating that ''[i]nterference with this right is contrary to the public interest and adversely affects the free and orderly flow of goods'' (7 U.S.C. 2301).

Non-cooperative associations and organizations are also core activities under the Act deserving of protection

[137] *See e.g.,* ''Farmers should be able to participate in producer organizations and associations. Farmers have expressed concern that associations, organizations and the farmers who join them have repeatedly been targets of retaliatory behavior by meat companies. When farmers participate in these organizations it helps fill in the information gap for their business and keeps our economic markets competitive.

Farmers and Ranchers should be able safely participate as witnesses in any proceeding relating to violations of the Packers and Stockyards Act. Unfortunately, there are recent examples of cattle rancher witnesses who were threatened and intimidated so much that they decided not to testify before Congress at a hearing about cattle markets. The ability to testify without fear of retaliation is essential to promoting fair and competitive markets in the livestock and poultry industries.'', available at *https://www.regulations.gov/comment/AMS-FTPP-21-0045-0299; see also,* ''The ability to express an opinion and testify without fear of retaliation is essential to promoting healthy, fair and competitive markets in the livestock and poultry industries, as it is in all aspects of a free and fair democracy.'', available at *https://www.regulations.gov/comment/AMS-FTPP-21-0045-0297*.

[138] *See e.g.,* 61 Cong. Rec. H1860 (1921).

[139] 7 U.S.C. 291.

against regulated entity coercion because they afford covered producers the opportunity to combine their resources to potentially counteract market imbalances and capture opportunities at scale. For example, they provide a means for covered producers to share information regarding the production of poultry and livestock (within permissible scope of the Federal antitrust laws) even when a cooperative is not feasible. They also enable producers to potentially uncover and address problematic practices in the industry, including through working together to reduce the risk of seeking redress of grievances, among other benefits. Some producer associations also provide means for producers to obtain lower cost inputs, such as gasoline. 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 and realize full value of their livestock and poultry. An assertion of rights in both these contexts may involve expressing interest or intent to engage in these activities or engaging in these activities.

Paragraph (b)(2)(iii) also protects a covered producer's right to refuse to join a producer or grower association or organization. AMS added protection for refusing to form or join a producer or grower association or organization in response to public comment on the proposed rule, as commenters noted that producers have experienced pressures from regulated entities to join certain organizations that may express views or interests in the livestock or poultry industry that are contrary or not fully reflective of the producer's views regarding their own interests.

Paragraph (b)(2)(iv) protects a covered producer's ability to communicate or cooperate with a person for the purposes of improving production or marketing of livestock or poultry. ''A person'' is intended to be broad, and includes USDA's Extension and other academic experts, businesses and associations, advisors and associates of the covered producer, other covered producers, including someone under contract with the same regulated entity. This regulation protects a covered producer's ability to communicate or cooperate with other persons, including efforts to obtain higher or otherwise more appropriate compensation from regulated entities, to the extent permissible under Federal antitrust laws and cooperative laws. Protecting such communications enables the producer to obtain help to enhance their ability to compete in the market. Such communication may include, for example, communication with extension programs or with independent veterinarians and animal health experts. It would also include communications with persons—including other producers—relating to potential illegal market abuses, anticompetitive conduct, or otherwise illegal conduct by regulated entities, as that conduct would obstruct the covered producer's ability to secure the full value of their livestock or poultry product or services. AMS notes that communications on these matters when with the government would be protected by paragraph (b)(2)(i), and would include but not be limited to communications with: USDA; the U.S. Department of Justice; the Federal Trade Commission; a State or Tribal attorney general or agriculture department; or a Federal, State, or Tribal legislative office or committee or judicial tribunal.

Paragraph (b)(2)(v) protects a covered producer's ability to communicate, negotiate, or contract with a regulated entity, another covered producer, a commercial entity, or a consultant for the purpose of exploring or entering into a business relationship. The purpose of the provision is to preserve and promote the competitive position of the covered producer and ensure that a regulated entity's retaliation does not discourage a covered producer from seeking competitive alternatives. It affords producers the opportunity to realize the full market potential of their products and services and participate in the market fully, including through price discovery and competition between multiple regulated entities. For example, 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. Or, a covered producer may enter into a contract to sell livestock in the market or through an auction or exchange. Protecting these activities allows covered producers to freely compare potential business relationships and choose between several regulated entities, encouraging competition. As also discussed in Section V—Changes from the Proposed Rule, communications of this type can improve production efficiency and price discovery mechanisms. Restricting participation in these activities forecloses full market participation by producers.

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

Finally, paragraph (b)(2)(vii) protects a covered producer's ability to assert any of the rights granted under the Act or the regulations in 9 CFR 201, or to assert rights afforded by their contract. These rights include, for example, producers' rights to view the weighing of flocks, which is legally protected but which producers have complained is not practically enforceable. In the 2010 USDA–DOJ public workshop on the poultry market, a grower said he was retaliated against for asserting his right to view his flock being weighed; the integrator ''cut me off from growing business and cost me hundreds of thousands of dollars.'' [140] Although these rights are ostensibly protected by laws, regulations, or legal contracts, they lose their efficacy if covered producers suffer repercussions for asserting them.

Section 201.304(b)(3) enumerates the actions that are retaliation or an otherwise adverse action under paragraph (b)(1) of this section. The final rule intends to capture the widest range of conduct harmful to producers, where such harms are based upon activities protected by the rule. The focus in any inquiry under this final rule is whether the regulated entity has engaged in harmful conduct in whole or material part because a covered producer engaged in any protected activity. To provide examples of what activities are materially harmful to a reasonable covered producer, paragraph (b)(3) sets out that regulated entities are prohibited from (i) terminating or not renewing a contract with a covered producer; (ii) performing under or enforcing a contract differently than with similarly situated covered producers; (iii) requiring a contract modification or a renewal on terms less favorable than those for similarly situated covered producers; (iv) refusing to deal with a covered producer on terms generally or ordinarily offered to similarly situated covered producers; (v) interfering in farm real estate transactions or contracts with third

[140] Accessed at *https://www.justice.gov/media/1244676/* on 10/03/2023.

parties; (vi) taking any other action that a reasonable covered producer would find materially adverse.

Paragraph (b)(3)(i) prohibits terminating or not renewing a contract with a covered producer because the covered producer has engaged in protected activities. This practice can have devastating consequences for producers that have invested substantial sums in infrastructure that only meets the requirements of a particular regulated entity. Furthermore, in concentrated markets, losing a contract may put a producer out of business as the producer has few, if any, other livestock or poultry buyers to whom they can sell livestock or poultry.

Paragraph (b)(3)(ii) prohibits performance under or enforcement of a contract differently as compared to performance under or enforcement of contracts for similarly situated covered producers as retaliation for engaging in protected activity. Depending on the facts and circumstances of the case, the ''similarly situated producer'' could be the covered producer's own status quo prior to engaging in the protected activity. A violation of this regulation would occur when a regulated entity, in response to a producer engaging in protected activities, inconsistently enforces its contracts compared with contract enforcement for similarly situated producers. For instance, the Agency has received complaints over the years with respect to differential performance under poultry growing arrangements, such as the delivery to affected growers of flocks that are sick or otherwise known to be likely to perform poorly owing to the age of the hens, differential delivery of feed, or other differential treatment such as early or delayed harvest of birds. Those actions are likely to result in lower performance for the grower in a poultry grower ranking system, which results in lower pay for the grower. While that may occur from time to time per natural cycles, a repeated or intentional delivery of underperforming flocks has been commonly reported as a principal means of adversely affecting grower earnings. Accordingly, AMS has incorporated differential contract performance to capture those contractual performance-based means that a regulated entity may use to retaliate against producers for engaging in protected activities.

Paragraph (b)(3)(iii) prohibits requiring a contract modification or a renewal on terms less favorable than those for similarly situated covered producers as retaliation for engaging in protected activity. Depending on the facts and circumstances of the case, the similarly situated producer could be the covered producer's own status quo prior to engaging in the protected activity. In this final rule AMS seeks to clarify that unfavorable contract modification or renewal by a regulated entity, if it's the result of a producer engaging in a protected activity, is retaliatory conduct and amounts to a violation under the Act. This behavior is a common way for regulated entities to retaliate against producers by, for example, reducing the number of flocks or their density, changing types of birds raised, or otherwise changing contract terms that result in lower incomes for growers. As another example, if a regulated entity requires a capital investment from a covered producer as part of a contract modification or contract renewal that the regulated entity is not requiring of similarly situated producers, this requirement would be a violation of paragraph (b)(3)(iii) if the regulated entity is requiring the capital investment in retaliation for the covered producer's participation in a protected activity.

Paragraph (b)(3)(iv) prohibits refusing to deal with a covered producer on terms generally or ordinarily offered to similarly situated covered producers. A violation of this regulation could occur if a regulated entity makes no reasonable effort to bid or negotiate or fails to reasonably attempt to contract in good faith with a covered producer, due in whole or material part to a producer's prior, or current, participation in protected activities. In this context, the regulated entity's refusal to deal is not connected with the service or quality of the product offered, but rather is material in part due to the producer exercising his or her rights to engage in protected activities. A similarly situated producer may, depending on the facts and circumstances, be the producer's own prior status quo with the regulated entity before the producer engaged in a protected activity. This provision includes scenarios in which cattle producers operate in the cash market for livestock. While some cattle producers may only be in the cash market a few times a year, others may be in the cash market weekly. In the latter case, this provision would cover certain types of retaliation. If a producer sells cattle to a particular packer every week, and then one week the packer refuses to buy the producer's cattle or offers significantly less favorable terms after the producer engaged in a protected activity, this would constitute retaliation under this rule absent evidence of changed business conditions necessitating the packer's refusal to deal. AMS believes that retaliating against a producer in this way is conduct the Act seeks to remedy because it raises a barrier to competitive entry to the market by decreasing the number of parties a producer can do business with, which in effect is a market failure.

Paragraph (b)(3)(v)'s prohibition on interfering with a covered producer's farm real estate transactions or with their contracts with third parties is a prohibition against conduct that a regulated entity may engage in due to the unequal power dynamic that exists between producers and the few firms available for them to contract with. This conduct may take several forms but has been observed most commonly to occur when a producer attempts to sell its farm to a third party and in doing so must terminate or fail to renew their existing contract with a regulated entity. In these situations, the regulated entity may choose not to guarantee a similar contract, or any contract at all, to the prospective buyer. Without this guarantee, banks and prospective buyers are unlikely to enter the farm real estate transaction because the land is of little use to them without a contract to grow livestock or poultry. This is often seen in the poultry sector, where it is alleged that regulated entities use the potential transfer of farm real estate as an opportunity to require growers to make capital improvements in exchange for their guarantee to contract with the new grower. This becomes retaliatory because the unreasonable refusal to guarantee a future contract with a prospective landowner or operator dramatically lowers the value of the farm operation, to the point of obstructing the transfer of the real property by the landowner, and yet the debt burden on the farm is commonly incurred in response to the regulated entity's requests for additional capital investments. The seller of farm real estate faces an unjust extraction, or else they are unable to sell land, as the cost of capital improvements required by the regulated entity in exchange for a guarantee to contract with a new owner or operator is not a freely-determined agreement. Farm sales transactions are not, however, the only circumstance where a regulated entity can retaliate against a covered producer through contracts with third parties. For example, covered producers have sought to develop new marketing opportunities for their livestock and poultry through collectively processing their product. If the regulated entity sought to obstruct the sale of the meat or poultry products through distribution or retail chains as retaliation against a

covered producer with a material interest in the meat or poultry sales organization, that interference would be covered by this rule.

Paragraph (b)(3)(vi) prohibits any other action that a reasonable covered producer would find materially adverse. This regulation is designed to account for a broader scope of actions that are considered retaliatory. Under this provision any conduct would be considered prohibited retaliation if such conduct caused material harm to the covered producer relative to the covered producer's situation prior to the allegedly retaliatory conduct, or relative to conduct toward similarly situated producers. This provision provides a broad and flexible approach to these prohibitions and allows for ''material'' to be determined by the facts and circumstances of each case. As discussed under Section V—Changes from the Proposed Rule, some retaliatory activities may occur outside the confines of contractual relationship, for example, a regulated entity's interference in a covered producers' water rights. The provision also covers the act of making a threat to engage in an action where the threat can reasonably be foreseen to change the producer's conduct or where the threat delivers a reasonable possibility of material harm.

When regulated entities punish covered producers or deny them opportunities afforded to other covered producers for engaging in certain activities, it 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. Under § 201.304(b), AMS is providing greater clarity, specificity, and certainty as to how the Act applies with respect to retaliatory behavior. This will facilitate higher levels of compliance by regulated entities, enable AMS to better enforce the Act, and position producers to better assert their rights under the Act.

D. Recordkeeping (§ 201.304(c))

Paragraph (c)(1) of § 201.304 requires that a regulated entity retain all records relevant to its compliance with the prohibitions on discriminatory behavior contained in paragraphs (a) and (b) of this section. Records must be retained for no less than five years from the date of record creation. Paragraph (c)(2) states that relevant records may include 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.

Recordkeeping is a commonly used regulatory compliance and monitoring mechanism among market regulators.[141] The recordkeeping requirement in this rule is not new. AMS currently has the authority to require regulated entities to create, maintain, release to AMS, and dispose of records through the Act and its regulations, including sec. 401 of the Act and 9 CFR 201.94, 201.95, and 203.4. Section 401 of the Act requires regulated entities to keep ''such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business . . .'' (7 U.S.C. 221). Such records may include details of a single transaction, such as the name of the owner of the livestock or poultry, date, weight of livestock or poultry, number of head of livestock, and unit price; all elements necessary to recreate the total sum paid to the producer or grower by the regulated entity. Existing regulations under 9 CFR 201 require regulated entities to give the Secretary ''any information concerning the business . . .'' (§ 201.94) and provide authorized representatives of the Secretary access to their place of business to examine records pertaining to the business (§ 201.95). Section 203.4 is another relevant existing regulation with respect to the types of records to be kept by regulated entities and the timelines for disposal of these records by the regulated entities.

Existing gaps in both generally applicable agricultural and PSD-specific data collection make addressing widespread reports of discriminatory behavior difficult. Access to the types of records required by § 201.304(c) will assist AMS in assessing the effectiveness of a regulated entity's compliance with § 201.304(a) and (b). Therefore, this recordkeeping requirement is critical for AMS to fulfill its duties to prevent, and if necessary secure enforcement against, undue and unreasonable prejudice and unjust discrimination.

AMS believes that this recordkeeping approach—at both the regulated entity policy and procedural level, as well as at the transactional level—will enable the Agency to monitor and facilitate a regulated entity's approach to compliance. Recordkeeping will encourage regulated entities to adopt more robust compliance practices to stamp out conduct prohibited by the Act in its incipiency. It will also enable AMS to uncover conduct that violates the rule in any investigation—a deterrent which will also strengthen compliance. AMS underscores that the tone and compliance practices set by senior executives play a vital role in establishing a corporate culture of compliance, which is a critical first step toward more inclusive market practices. Thus, relevant records may include those at the highest levels, such as relevant accountability practices of the board of directors. In addition to the importance of policies and procedures in developing a corporate culture of compliance, this rule maintains that transactional records, where decision-making occurs, are also important records to keep and to help AMS understand why an adverse action was taken against a producer or grower by a regulated entity. These records may include the number and nature of complaints received relevant to this section; in addition to records already required to be retained under § 203.4, such as buyers' estimates; buying or selling pricing instructions and price lists; correspondence; telegrams; or teletype communications and memoranda relating to matters other than contracts, agreements, purchase or sales invoices, or claims or credit memoranda.[142]

AMS is requiring that records be retained for five years from their creation date 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. While providing the authority for regulated entities to keep certain records, sec. 401 of the Act does not provide guidance on when records can be disposed. Existing regulation at 9 CFR 203.4 provides for a disposal date of two years, with an exception for certain records that may be disposed of after one year. This rule extends the disposal date of most records from two years to five years to promote efficient USDA monitoring efforts. For some records, the current disposal date is one year, which could be extended to five years under this rule if they are deemed relevant to showing compliance with this rule. Most records, such as specified in sec. 401, ''such accounts, records, and memoranda as fully and

[141] *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).

[142] eCFR: 9 CFR part 203—Statements of General Policy Under the Packers and Stockyards Act.

correctly disclose all transactions involved in his business . . .'' are currently kept for two years and will be extended to five years. Other particular records that, if kept, will be required to be kept five years instead of the current one year, including, for example, buyers' estimates; buying or selling pricing instructions and price lists; correspondence; telegrams; or teletype communications and memoranda relating to matters other than contracts, agreements, purchase or sales invoices, or claims or credit memoranda.

E. Deceptive Practices (§ 201.306)

Section 201.306 is designed to broadly address deceptive practices in the marketplace by establishing four categories where deceptive practices commonly occur: contract formation, contract performance, contract termination, and contract refusal. Overall, the final rule addresses areas of concern regarding deception in contracting but does not exhaustively identify all deceptive practices that violate sec. 202(a) of the Act. Through this rule AMS aims to promote a marketplace that is free from the type of injury the Act was designed to prevent. False or misleading statements, or omissions of material information, during the contracting process or operation or termination of that contract, are prohibited deceptive practices because they prevent or mislead sellers or buyers from making informed decisions concerning their livestock or poultry operations. Deception puts honest businesses at a competitive disadvantage; and may even cause them to adopt deceptive practices.[143] To capture a range of longstanding approaches to deception that USDA has taken under the Act, AMS is prohibiting the use of false or misleading statements, or omission of material information during contract formation, performance (including enforcement or not enforcement of the contract), and termination. This rule also prohibits regulated entities from providing false or misleading information to a covered producer or a producer association concerning a refusal to contract. During this rulemaking process, AMS also considered the FTC's interpretation of sec. 5 of the FTC Act regarding deceptive acts or practices, ''FTC Policy Statement on Deception.''[144] Like sec. 202(a) of the Act, sec. 5 of the Federal Trade Commission (FTC) Act also prohibits deceptive practices. In 1983, the FTC adopted the aforementioned policy statement summarizing its longstanding approach to deception cases.[145] In this final rule, AMS references that policy statement because it offers useful guidance owing to the similarity of the statutory provision and case law history. In addition, AMS recognizes the benefits to the practical application of this final rule by grounding it on the well-understood principles of deception identified in the FTC policy statement.[146]

More than 100 years of history illustrate the types of conduct prohibited as deceptive by the Act, which provides a foundation for some of the specific deceptions that this rulemaking addresses. The regulations implemented by this rulemaking are not the first to prohibit deception. Current regulations under the Act require honesty in weighing (9 CFR 201.49 and 201.71), price reporting (§ 201.53), fees (§ 201.98), and business relationships (§ 201.67). Even when considering whether termination of a contract violated the Act, AMS currently considers the quality of the communication, and therefore considers its honesty (see § 201.217). 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.,*[147] a regulated entity is liable to anyone for the damages its deceptive practices cause, even if the entity is not a direct party to the transaction.

AMS aims to have regulated entities be truthful and straightforward—that is, not misleading—in their dealings with producers. With § 201.306, AMS seeks to uncover the true motive for a regulated entity's treatment of a producer with whom they are forming or have a contractual relationship. Whether contract language was clear and written in a language the producer understands will be part of any evaluation to determine whether a statement (including any omission) was false or misleading; that determination will be dependent on the particular facts and circumstances of the contract. Violations of the Act that would constitute deceptive practices include false statements or omissions that are material in that they prevent sellers or buyers from making an informed business decision.[148] 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 of material information necessary to make a statement not false or misleading are also prohibited. Prohibited omissions include failure to tell a business partner that the regulated entity was receiving a commission from a competitor,[149] sales records that omit relevant information,[150] or failure to have the required bond.[151] And finally, where regulated entities have close business relationships, kickbacks and bribes undermine the ability of producers and consumers to rely on an honest market and are therefore deceptive.[152]

Producers should not be misled with respect to their business decision-making with regulated entities. Deception can prevent producers from obtaining the full value of their products and services. In markets pervaded by deception, formerly honest businesses may be compelled to adopt deceptive practices if they are to remain competitive.[153] Moreover, in a concentrated market, if producers are misled regarding why regulated entities take certain actions, in particular refusing to deal with them, they cannot

[143] *FTC* v. *Winsted Hosiery Co.,* 258 U.S. 483 (1922) See also, ''Businesses that accurately represent the total amount consumers will pay up front are at a competitive disadvantage to those that do not,'' from FTC–2022–0069–6095 (describing harm to competition and honest businesses through price obfuscation). p. 77432, *https://www.federalregister.gov/documents/2023/11/09/2023-24234/trade-regulation-rule-on-unfair-or-deceptive-fees.*

[144] FTC Policy Statement on Deception, 1983. Available at *https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.*

[145] Ibid.

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

[147] 580 F. Supp. 1465, 1469 (N.D.N.Y. 1984).

[148] FTC Policy Statement on Deception, 1983. Available at *https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.* (''Third, the representation, omission, or practice must be a ''material'' one. The basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service.'').

[149] 9 CFR 201.61.

[150] 9 CFR 201.43; 9 CFR 201.99.

[151] 9 CFR 201.29.

[152] 9 CFR 201.56; 9 CFR 201.67; 9 CFR 201.71.

[153] 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* (''Subversion of normal market forces by fraud, deception, unfair conduct, or market manipulation undermines the integrity of the market and deprives producers of the true value of their livestock,'' p. 55.)

plan or mitigate the risks they may face. For these reasons, this final rule establishes a robust regulatory framework prohibiting deceptive practices in a range of contracting circumstances. Such a framework should provide a broad, although non-exhaustive, set of prohibitions to provide greater certainty for producers and regulated entities alike in the integrity of business dealings in the livestock and poultry markets.

Paragraph (a) of this section sets forth the scope of the prohibition on deceptive practices by establishing that the prohibitions contained in paragraphs (b) through (e) of § 201.306 apply to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry. This phrasing, which has been used in previous rules under the Act, points to the broadest possible interpretation of the Act's jurisdiction over regulated entities' conduct.

Section 201.306(b) prohibits a regulated entity from making or modifying a contract with a covered producer by employing a false or misleading statement, or omission of material information necessary to make a statement not false or misleading. Preventing false or misleading representations, express or implied, or failing to provide the necessary information necessary to make a representation not misleading during the contracting process, are some of the most basic protections of the integrity of the marketplace. ''By employing'' captures the materiality of the false or misleading representation in that the representation formed a material part of the action under making or modifying the contract. Case law applying the Act illustrates some of the forms of deception that regulated entities may take during the offering or formation of a contract with producers. While some consumer-focused cases under the Act have addressed false advertising—specifically bait-and-switch advertising that occurs through advertising on price when, in fact, the customer has to pay a higher price at the point of sale,[154] a regulated entity's failure to disclose information to a covered producer has also been held to be deceptive under certain circumstances. 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. Among the means employed to accomplish this purpose is the use of surety bonds. 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.[155] 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, in *Schumacher* v. *Tyson Fresh Meats, Inc.,* the court recognized that the Act prohibits a regulated entity from negotiating by using published prices it knows are inaccurate because using incorrect prices deceives the livestock seller. In *Schumacher,* the packer failed to disclose to sellers inaccurately reported boxed beef prices when it negotiated the purchase of cattle based on those prices. The court found that those deceptive practices violate the Act.[156] Likewise, *Bruhn's Freezer Meats of Chicago, Inc.* v. *U.S. Dept. of Agriculture,* affirmed that a variety of deceptive practices violate the Act, including short weighing, misrepresenting grades and cuts of meat, and false advertising in the selling of meat to customers.[157] The Agency's regulation with respect to deceptive practices in contract formation prohibits all these types of deception.

Section 201.306(c) prohibits a regulated entity from performing under or enforcing a contract with a covered producer by employing a false or misleading statement, or omission of material information necessary to make a statement not false or misleading. It is fundamental to the integrity of the marketplace and critical during the performance or enforcement of contracts that regulated entities are prohibited from making false or misleading representations—express or implied—and that they are prohibited from failing to provide the necessary fact or information necessary to make a representation not misleading. ''By employing'' captures the materiality of the false or misleading representation in that the representation formed a material part of the action under performing or enforcing the contract.

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), failure to pay for purchases, and pretextual refusals to deal.

False or inaccurate weighing has long been recognized as deceptive under secs. 202(a) and 312 of the Act.[158] 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. In all these cases, false weighing is a plain and straightforward instance of a false statement that is material to the reasonable producer. 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.[159] 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.[160]

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. A USDA Judicial Officer found a deceptive practice when 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.[161] 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.'' [162]

Payment violations can also be deceptive, especially issuance of

[154] *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).

[155] *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).

[156] *Schumacher* v. *Tyson Fresh Meats, Inc.,* 434 F.Supp.2d 748 (Dist. S.D. 2006).

[157] *Bruhn's Freezer Meats,* 438 F.3d 1337 (8th Cir. 1971).

[158] 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).

[159] *Parchman* v. *U.S. Dep't of Agric.,* 852 F.2d 858, 864 (6th Cir. 1988) (interpreting sec. 312 of the Act).

[160] *Garace,* 580 F. Supp. At 1470.

[161] *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).

[162] 397 F.3d at 1291.

insufficient funds checks. For example, regulated entities may withhold payment to prevent producers from commencing legal action or reporting otherwise unrelated violations to authorities.[163] Failing to pay for meat has also been found to be deceptive in numerous instances.[164] Under the similar language of secs. 312 of the Act, the Eighth Circuit explained that lack of 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.'' [165]

Section 201.306(d) prohibits a regulated entity from terminating a contract with a covered producer by employing a false or misleading statement, or omission of material information necessary to make a statement not false or misleading. Employing false or misleading representations, express or implied, or failing to provide the necessary fact or information necessary to make a representation not misleading—critical protections during the performance or enforcement of contracts—are similarly fundamental to the integrity of the marketplace. ''By employing'' captures the materiality of the false or misleading representation in that the representation formed a material part of the action under performing or enforcing the contract. AMS draws on its experience in establishing the need for this prohibition. 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. The potential loss includes not only the loss of production income but also a grower's farm or family home, since a production broiler house construction is often financed with mortgages on those assets. Pretextual cancellation, in the form of false or misleading representations or material omissions, may also 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.

AMS included the prohibition against false or misleading information or material omissions in paragraphs (b) through (d) to protect producers from conduct that employs deceit to disguise a regulated entity's genuine motive. A poultry producer stated in a public workshop that he relied upon cash flow statements provided by the integrator to secure a loan for his operation only to find out later ''that the document wasn't accurate from the first flock that I placed and set. The capital investment of these facilities, while they may be greatly benefiting the integrator, are not returning any value to us whatsoever.'' [166] In another public comment, a poultry producer asserted that he is ''not given a clear picture of the integrator's operating procedures until after a contract has been signed. The contracts are very biased and one-sided, giving the bulk of control and authority to the initiator of the contract and then, only after you have committed to playing their game you are then given the rule book.'' [167] The producer further stated that, ''the practices of the integrators are very calculated to ensure the integrators are protected legally while entrapping the farmer into modern day indentured servitude.'' [168]

Section 201.306(e) prohibits a regulated entity from providing false information to a covered producer or association of covered producers concerning a refusal to contract. Deception related to refusal to contract is an unlawful practice designed to exclude producers from livestock and poultry markets. For example, if a producer association is asking on behalf of its members why a regulated entity is not executing any deals in the cash market and the entity lies about why it is avoiding the cash market, this could impede market entry for the association's members. Owing to the risk of retaliation, even with this final rule in place, a covered producer may depend upon a producer association to obtain the necessary understanding why the regulated entity is engaging in certain practices in the market, such as refusing to contract with covered producers.

A regulated entity that refuses to contract on unlawful grounds may well choose to hide their motives with misleading or deceptive statements. This regulation recognizes false and misleading statements made as justification of a refusal to enter into a contract as ''deceptive'' within the meaning of the Act. However, when refusing to enter into a contract, a regulated entity is not required to explain its reasoning so long as it does not offer a false or misleading statement to a covered producer.

Producers and consumers cannot make rational decisions in a dishonest market, and honest competitors cannot compete when regulated entities deceive. With this rulemaking, AMS is adding § 201.306 to its existing deception regulations under the Act to provide a broad array of coverage regarding the general circumstances that encourage the provision of false or misleading information in contracting. This regulation does not provide an exhaustive list of instances of deceptive practices; rather, it establishes four categories where deceptive practices commonly occur. The intent is to provide guidance to covered producers on how to effectuate their rights under section 202(a) of the Act and to promote a marketplace that is free from the type of injury section 202(a) was designed to prevent. AMS will investigate any alleged violations of this regulation and its determination will depend on the facts and circumstances of each case.

F. Severability (§ 201.390)

AMS is adding § 201.390, ''Severability,'' to new subpart O to confirm that if any provision of subpart O, or any component of any provision, is declared invalid or if the applicability thereof to any person or circumstances is held invalid, it is AMS's intention that the validity of the remainder of this subpart or the applicability thereof to other persons or circumstances shall not be affected thereby with the remaining provision, or component of any provision, to continue in effect. Such a provision is typical in AMS regulations that cover several different topics and is included here as a matter of housekeeping.

This rule aims to address concerns around unduly prejudicial, unjustly discriminatory, retaliatory, and deceptive conduct in the livestock and

[163] *See, e.g., In Re: Mid-W. Veal Distributors, d/b/a Nagle Packing Co., & Milton Nagle,* 43 Agric. Dec. 1124, 1140 (1984).

[164] *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)).

[165] *Van Wyk* v. *Bergland,* 570 F.2d 701, 704 (8th Cir. 1978).

[166] United States Department of Justice, United States Department of Agriculture. May 2010. Public Workshops Exploring Competition in Agriculture, Poultry. Accessed at *https://www.justice.gov/media/1244676/dl?inline* on 10/03/2023. p. 366.

[167] Rural Advancement Foundation International (RAFI), ''Comment on AMS–FTPP–21–0045: Inclusive Competition and Market Integrity Under the Packers and Stockyards Act,'' available at *Regulations.gov*.

[168] *Ibid.*

poultry industry to the broadest jurisdiction of the Act. This new subpart has two sections that prohibit unduly prejudicial, unjustly discriminatory, and deceptive practices. This regulation is intended to take a series of regulatory actions, within this rulemaking, to address several different harms on the same or similar subjects but not prohibit identical conduct. The wrongful conduct addressed in the undue prejudice and discrimination, retaliation, and deception provisions are each different—the first focusing on adverse action on the basis of a personal characteristics or status of the producer, the second on certain protected actions by the covered producer, and the third focused on deception in contracting. AMS included these provisions based on the likelihood that conduct falling within one or more of these sections will stifle honest competition or exclude independent livestock producers, poultry growers, and swine contractors from the marketplace. Each provision could, however, have been implemented on a stand-alone basis without the others. Conduct that violates one provision is not dependent on protections put in place in other sections. For example, if a regulated entity discriminates against a producer on the basis of a protected class in an unduly prejudicial manner, AMS may enforce the regulation without alleging violations of retaliation or deception. These new provisions are written so that they are not mutually exclusive. Furthermore, the benefits of each provision of this rule are not diminished by the absence of a different provision. For example, the benefits of protecting producers against retaliation are not lost if the rule is held to fail to protect against deception or discrimination.

AMS intends that the severability provision operate to the fullest extent possible. AMS recognizes that—to a limited extent—not all the language of the rule is severable. For example, to find undue prejudicial discrimination under ''race, color, religion, national origin, sex (including sexual orientation and gender identity), disability, or marital status, or age of the covered producer,'' the prejudicial conduct must be ''on the basis of'' one of the specified protected bases. AMS recognizes that this causation requirement is not severable as it is integral to that specific provision of the rule.

However, AMS intends that all other portions and components of the rule may be severable without affecting the remaining portions of the rule, and that the rule remains workable and continues to serve the interests of the agency's policy goals. For instance, AMS intends that the invalidity or unenforceability of one of the rule's prohibited bases does not render the others invalid or unenforceable. The protected bases have different reasons for their appearance in the rule. For example, if the protected base of religion were found invalid or unenforceable, this does not negate the benefits of including protections for another protected base, like sex. Also, to further follow this example, the language in § 201.304(a)(1)(i) is severable from those included in the retaliation (§ 201.304(b)) and deception (§ 201.306) sections. Therefore, one or more provisions might be unenforceable as to an individual or a specific case, but AMS intends that the remaining provisions would still be enforced. Finally, if determining the necessity of an individual provision to the enforceability of its entire section, and the benefits of that section are still intact without an unenforceable provision, AMS would intend to retain the enforceable provisions.

VII. Comment Analysis

AMS received 446 public submissions in response to the proposed rule. Numerous comments to the proposed rule expressed concerns that concentrated, vertically integrated markets expose producers to exclusion from the market on bases unrelated to the quality of their products or services and that the markets in which the commenters operate lack sufficient honesty, integrity, and fair dealing. In addition, numerous comments stated that, except for very narrow justified circumstances, there are no competitive benefits to these practices when operating within a market where producers are less able to compare, negotiate, or change business relationships.

Other commenters were critical of the proposed rule. Some commenters expressed disagreement with the need for the proposed rule, arguing that it is duplicative of the Act and existing regulations, while other commenters stated that the proposed rule's vagueness would make compliance a challenge. Other commenters argued that the proposed rule would result in costly litigation and recordkeeping burdens and exceeded AMS's authority under the Act.

The public comments are summarized by topic below and include AMS's responses.

A. Definitions (§ 201.302)

AMS proposed to add definitions in § 201.302 for *covered producer, livestock producer, market vulnerable individual, and regulated entity.* AMS received comments about the proposed definitions of *livestock producer* and *market vulnerable individual.* Comments about the latter are addressed below in Section VII.C.i—Market vulnerable individual approach.

In § 201.302, AMS proposed to define *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. AMS proposed to add a new definition of *covered producer* to encompass livestock producers as defined in this section, along with swine production contract growers and poultry growers as defined in sec. 2(a) of the Act.

Comment: Several commenters noted the proposed definition of *livestock producer* could include individuals only tangentially related to livestock production, such as accountants working for feed yards, truck drivers hauling livestock owned by others, veterinarians, nutritionists, or consultants. The commenters contended the proposal opens the definition of *livestock producer* to an unlimited number of litigants beyond the scope of the Act.

Similarly, a meat industry trade association said AMS should withdraw or amend the definition of *livestock producer* because its vagueness potentially adds so many individuals to the covered producer umbrella as to be unworkable. Another association noted its confusion when reading the definition, given that the definition's wording explicitly excludes employees of the owner of livestock, but includes anyone who is not an employee of the owner of livestock that is engaged in raising or caring for livestock.

AMS Response: AMS is revising the definition of *livestock producer.* AMS intended that the term livestock producer be defined in a manner similar to other terms in the Act, so that the protections of the rule would fit violations that are described in this rulemaking. Under the final rule, *livestock producer* is defined as any person—except an employee of the livestock owner—engaged in the raising of and caring for livestock. As commenters noted, the proposed definition was vague and potentially confusing. The revised definition provides clarity by removing unnecessary and potentially confusing phrasing. In response to commenters' concerns that the term encompasses individuals only tangentially related to livestock production, AMS has revised

the proposed definition to focus this final rule on the Agency's traditional role in protecting the producer to the fullest extent possible under the Act—including but not limited to production and marketing. To the extent that the producer is harmed through acts that the regulated entity takes against an employee acting as agent for the producer or another entity that the covered producer utilizes or relies on for production or marketing, the producer could still fully benefit from the protections of this final rule. Whether the non-producer parties could benefit from the protections of the Act may depend upon particular facts and circumstances.

B. Applicability

AMS proposed in §§ 201.304 and 201.306 to apply its prohibitions on undue prejudice, retaliation, and deceptive practices to swine contractors and live poultry dealers as defined in sec. 2(a) of the Act and to packers as defined in sec. 201 of the Act. 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 ''market vulnerable'' producers. AMS requested comment on whether the prejudicial discrimination and retaliation provisions should be extended to all persons buying or selling meat and meat food products, including poultry, in markets subject to the Act.

Comment: An agricultural advocacy organization expressed support for AMS's proposal to extend protections to all covered producers who experience retaliation by regulated entities.

An agricultural advocacy organization said that if AMS adds aspects of regional concentration and aspects of contract growing arrangements, such as high debt load, to the definition of a market vulnerable individual, then the proposal to provide protection based on market vulnerable individual status is appropriate. This commenter noted that AMS's question regarding extension of the prejudicial discrimination and retaliation provisions highlights the need for a separate rule addressing enforcement of the Act's prohibition on undue preferences. According to this commenter, if AMS makes it clear that it intends to enforce the Act to stop companies from giving undue preferences to some sellers, everyone participating in these markets will have adequate protection.

AMS Response: AMS appreciates the comments regarding a broader definition of MVI to include all those impacted by the abusive conditions aggravated by market concentration. AMS recognizes that producers face challenges because of consolidated market power, including from types of conduct this rule aims to address. One of the purposes of this rule is to address adverse impacts of concentrated markets by ensuring inclusive competition free of unjust discrimination on the basis of race, color, religion, national origin, sex, disability, or marital status, or age or because of the covered producer's status as a cooperative, as well as to protect against retaliation and deception.

AMS underscores that the protections for cooperatives are intended, in part, to help producers gain market leverage in the face of concentrated markets. In 1922 Congress passed the Capper-Volstead Act providing legal protections for producers to collectively process, prepare for market, handle and market their products. Cooperatives enable smaller, disparate producers to band together, coordinate in ways that otherwise may not be permissible under the antitrust laws outside of a single company, and otherwise work together to obtain a better bargain from market counterparties with larger economic footprints. AMS will continue to work toward addressing problems associated with concentration through subsequent rulemaking. USDA is also utilizing other tools to address undesirable business practices born from market concentration that adversely impacts producers. USDA is investing $1 billion to support greater choice for producers through expanded local and regional processing capacity in meat and poultry. USDA has also announced enhancements to its antitrust enforcement partnerships, including investing in partnerships with DOJ through farmerfairness.gov and with more than 32 State attorneys general, updates to its meat and poultry labels that will better guard against misbranding that damages the signals that flow from consumers to producers, as well as other agency actions intended to address unfavorable behavior by regulated entities facilitated by concentration in the livestock industry.

However, addressing unjust discrimination solely on the basis of the size or indebtedness of the producer is outside the scope of this rule, and because of the complex economic implications of volume preferences and efficiencies, would be more appropriately considered in the context of a future update to undue preferences rules. In contrast, undue and unreasonable prejudice or disadvantage on the basis of the prohibited bases and protected activities adversely affects allocative efficiency and offers no competitive benefits. That is true irrespective of whether the unlawful conduct occurs in a concentrated market or not.

AMS has shifted away from its market vulnerable approach and has adopted a well-established standard in line with existing economic, civil rights, and other regulatory regimes that rely on protected bases for discrimination. Producers with high debt loads are not included in those well-established protections; therefore, AMS will not include them in its final rule.

C. Undue Prejudices and Unjust Discrimination (§ 201.304(a))

AMS proposed new provisions in § 201.304(a) that would prohibit regulated entities from prejudicing, disadvantaging, or inhibiting market access, or otherwise taking adverse action against a livestock producer, swine production contract grower, or poultry grower based on the producer's status as a ''market vulnerable individual'' or as a cooperative.

i. Market Vulnerable Individual Approach

AMS proposed to prohibit prejudicing, disadvantaging, inhibiting market access, or otherwise taking adverse action against covered producers based on their status as a *market vulnerable individual (MVI).* It proposed to define that term as 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 would include a company or organization where one or more of the principal owners, executives, or members would otherwise be a market vulnerable individual. When defining *market vulnerable individual* in its proposal, AMS listed a non-exhaustive list of protected classes that would be considered market vulnerable such as race, ethnicity, or sex or gender prejudices (including discrimination against an individual for being lesbian, gay, transgender, or queer), religion, disability, or age.

AMS requested comment on whether the regulatory protections provided by the prohibition on undue prejudices for market vulnerable individuals and cooperatives would assist those producers in overcoming barriers to reasonable treatment, or otherwise address prejudices or threats of prejudice in the marketplace. It further requested comment on whether specific

groups should be named as market vulnerable individuals, whether AMS should identify defined protected classes, or whether AMS should use a ''market vulnerable producer'' approach, which extends broad antidiscrimination protections to any producer belonging to a group subjected to or at heightened risk of adverse treatment. In addition, it requested comment on whether it should delineate specific examples of groups that are market vulnerable, as well as supportive evidence regarding historical adverse treatment of such groups. Finally, it requested comment on whether the undue prejudices provision of the proposed rule provides sufficient protection regardless of the covered producer's type of business organization.

Comment: Several commenters indicated proposed § 201.304(a) would provide necessary protections, consistent with the Act, against packers and processors who leverage their market power to injure marginalized farmers. Farm bureaus and other agricultural advocacy organizations also indicated the rule would protect producers from certain prejudices, unjust discrimination, retaliation, and deceptive practices.

Several commenters stated they preferred the market vulnerable producer approach to fighting discrimination over the traditional protected classes approach because it would allow for flexibility to address different markets and different forms of prejudice and discrimination that may develop. An agricultural and environmental organization stated the market vulnerable producer approach not only covers instances of discrimination based on protected characteristics such as race, national origin, sex, religion, gender identity, and disability, but can also apply to other forms of discrimination unique to livestock and poultry markets. This commenter said this approach is consistent with the Act, which prohibits ''any'' unjust discrimination, and ''any'' undue prejudice or disadvantage ''in any respect whatsoever.'' Several State attorneys general suggested that the proposed definition was preferable as proposed, without specifying traditional protected classes, because it would allow for flexibility among different markets and forms of prejudice or discrimination that may develop over time.

Several agricultural advocacy organizations said poultry and cattle producers operating in regions with monopsony or oligopsony conditions should qualify as market-vulnerable individuals. Similarly, an academic or research institution sought to add producers operating in monopsony conditions to the definition. A commenter suggested AMS use the regional Herfindahl-Hirschman index to indicate the market vulnerable status of producers in a region. Some commenters cited heightened risk of adverse treatment as a rationale for considering these groups to be market vulnerable or noted that monopsony power has been legally relevant in cases under the Act and there is judicial precedent for acknowledging monopsonist power as a factor in adverse impacts to competition, while others said these groups meet the criteria laid out by AMS in the preamble to the proposed rule explaining why historically marginalized groups are likely to be vulnerable to market abuses.[169] The latter commenter provided detailed evidence that these groups met each of the criteria AMS identified: their relative ''size, sales, and incomes;'' their ''exposure to concentrated market forces;'' their having ''fewer economic resources'' to ''counteract'' adverse market structures; and their ''isolation'' from economic networks such as sources of supply, other producers, and distribution.

Several commenters seeking protections for producers that are at increased risk of being disadvantaged due to highly concentrated regional markets cited Colorado cattle producers as an example, given the USDA has not publicly reported the State's fed cattle prices for several years because there are too few packers purchasing fed cattle in Colorado to overcome USDA confidentiality guidelines. Commenters noted, with few packers in the region, sellers in the region are vulnerable to unfair practices.

An agricultural advocacy association recommended that AMS expand the MVI definition to include covered producers whose geographic locations restrict their ability or willingness to sell and transport their livestock to two or fewer regulated entities. This commenter also said that it would be helpful for AMS to expand on and provide more ''definite form'' to the four socioeconomic factors presented in the rulemaking notice. The association reasoned that if producers can proactively demonstrate their status as market vulnerable, it would avoid the need for ad hoc microeconomic analyses or expert witnesses to make assessments on individual bases.

Several State attorneys general suggested AMS specifically address the vulnerability that small, rural farmers encounter due to their location or production size. The commenters stated small, rural farmers do not have enough local processors, and those processors give preference to packer-owned and contract livestock for the limited packing plant capacity available. An agricultural advocacy organization also said small, independent cattle producers meet many of the criteria for being considered market vulnerable, arguing for example that they are exposed to concentrated market forces because they do not receive forward contracting arrangements from packers; they are denied favorable bonus, financing, and risk sharing terms common with other arrangements; and they are required to sell their cattle to packers on at-will cash markets for lower aggregate compensation. Agricultural advocacy organizations also said independent cattle producers operating in cash-negotiated spot markets should be considered vulnerable because of their independent status. Other commenters recommended AMS expand market vulnerable individual status to include non-English speakers, people with limited education, producers in markets with limited buyers, and immigrant farmers.

Agricultural advocacy organizations recommended the definition of market vulnerable individual explicitly include, but not be limited to, race, color, national origin, religion, sex, sexual orientation, disability, age, marital status, family or parental status, income derived from a public assistance program, political beliefs, or gender identity. Commenters asserted individuals in each of these groups should not have to continually prove discrimination and prejudice against them based on the characteristic that makes them vulnerable in the market.

Agricultural advocacy organizations expressed support for including cooperatives in the prohibited bases under proposed § 201.304. These commenters recommended that AMS explain in the preamble to the final rule the relationship between the producer association protections under the Agricultural Fair Practices Act and the proposed new protections under the Act, noting regulated entities have unjustly discriminated against covered producers based on their membership in these cooperatives due to the increased market leverage these cooperatives or other producer associations provide.

An individual commenter urged AMS to explicitly prohibit discrimination based on sexual orientation and gender identity for those who voluntarily disclose such status. The commenter

[169] 87 FR 60020–21, October 3, 2022.

stressed AMS should not require LGBTQ producers to disclose their sexual orientation or gender identity in conducting business, citing privacy, and security concerns. Other commenters noted sexual orientation is different from gender identity, so both should be listed individually in the rule.

Some agricultural and environmental advocacy organizations expressed support for AMS's flexible ''market vulnerable individual'' approach, but also expressed concern that the proposed rule would impose a difficult burden of proof on covered producers, requiring, for example, a producer alleging discrimination based on their status as a member of a historically marginalized group (*e.g.,* a racial minority) to also demonstrate their status as a market vulnerable individual ''in relevant markets.'' Commenters indicated producers should not have to continually prove they are being discriminated against if they are members of a protected class or qualify as a market vulnerable individual. These commenters urged AMS to clarify the Act directly prohibits discrimination based on protected class status and to provide producers with guidance on how to demonstrate their market vulnerable status. Commenters recommended that AMS include in § 201.304 a non-exhaustive list of factors covered producers can rely on to demonstrate their market vulnerable status.

Similarly, agricultural advocacy groups recommended that AMS clearly identify the types of individuals the agency would consider to be market vulnerable, and the methodology AMS will use to make this determination. A commenter specified producers who derive a substantial percentage of their income from their livestock or poultry operation are more vulnerable to unjust practices than those who derive a small percentage of their income from those operations. A commenter suggested that AMS develop a method to assess regional concentration levels using information regarding market share, Herfindahl-Hirschman index, and price reporting systems to allow producers to show they operate in a region that qualifies them as market vulnerable individuals.

An organization urged AMS to revise proposed § 201.304(a)(1) to clarify that the rule bans discriminatory conduct based on disparate treatment or disparate impact, not just discriminatory intent. According to the commenter, while secs. 202(a) and (b) of the Act clearly establish that the determinative factor for whether conduct constitutes a violation is its purpose or effects, the proposed language in § 201.304(a)(1) potentially requires a covered producer to prove discriminatory intent. The commenter said that, by describing prohibited conduct using the verb forms of ''prejudice,'' ''disadvantage,'' ''inhibit market access,'' and ''take adverse action,'' this language suggests the proposed rule would only prohibit actions motivated by a prohibited basis. Therefore, the commenter recommended that AMS revise this section to use language that parallels the text of sects. 202(a) and (b) in clearly distinguishing the actions of regulated entities from their discriminatory nature or effects.

Some commenters who supported AMS's market vulnerable producer approach expressed concern that the proposed rule could place a heavy burden on producers to establish an intentional discrimination claim based on market vulnerable status, citing the DOJ, among others, in noting that successfully showing discriminatory intent can be extremely difficult.[170] According to the commenters, producers would have evidence of differential treatment, but they would not likely have evidence to show they were subject to adverse treatment because of their status as market vulnerable individuals. Therefore, these commenters urged AMS to require regulated entities to rebut a presumption of discriminatory intent once a producer demonstrates differential treatment. Specifically, the commenters recommended the final rule include provisions clarifying that, to prove an unlawful violation of § 201.304(a), producers must demonstrate that they meet the definition of a ''market vulnerable individual'' or are a member of a protected class, and that they were personally subject to disparate and adverse treatment. One commenter also said producers' burden here should include showing circumstantial facts plausibly suggesting a causal connection between their group identity and the treatment they received. The burden would then shift to the regulated entity to show that the producer's market-vulnerable status was not a motivating factor for its presumptively discriminatory conduct, and the same decision would have been made regardless of the producer's market vulnerable status. The commenters cited case law in asserting this burden-shifting approach is consistent with other antitrust and civil rights evidentiary frameworks developed by the courts to reduce the burden of proving discriminatory intent.[171]

A commenter also asked AMS to establish a separate liability standard and burden-shifting framework for discriminatory-effects claims. The commenter said AMS should introduce a framework analogous to the Department of Housing and Urban Development's (HUD) Discriminatory Effects Standard,[172] under which a covered producer would have the initial burden of demonstrating that a regulated entity's policy or practice causes or predictably will cause a discriminatory effect. The commenter said the burden should then shift to the regulated entity to show that the challenged practice is necessary to achieve a substantial, legitimate, and nondiscriminatory interest which could not be served by another practice with a less discriminatory effect. The commenter also provided further details about what would constitute a discriminatory effect or a legitimate interest under this standard.

A plant worker offered three factors to consider when determining market-vulnerable groups. These factors included being a member of any ''socially disadvantaged group'' as defined by the USDA Farm Bill,[173] working for a small producer (no formal definition of ''small producers'' was offered), or being in geographic areas with an ''ultra-high'' concentration of buyers that leads to increased buyer market power and reduced prices paid to producers.[174]

Some commenters expressed opposition to the proposed definition of market vulnerable individual on the basis that it was too vague. An association asserted the definition is ''so vague that neither party may be able to figure out whether the contract grower is indeed a 'market vulnerable individual.' '' Commenters said the proposed definition implicates the Due Process Clause, with commenters saying the definition as drafted is so open-

[170] U.S. Department of Justice, Civil Rights Division, *Title VI Legal Manual,* 5. *See also Price Waterhouse* v. *Hopkins,* 490 U.S. 228, 271 (1989) (''[D]irect evidence of intentional discrimination is hard to come by.'').

[171] *See Impax Labs., Inc.* v. *Fed. Trade Comm'n,* 994 F.3d 484, 497–500 (5th Cir. 2021); *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973).

[172] Reinstatement of HUD's Discriminatory Effects Standard, 86 FR 33590, June 25, 2021 (to be codified at 24 CFR part 100).

[173] According to the commenter: ''A group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities.''

[174] Matthew C. Weinberg *et al.,* ''Buyer Power in the Beef Industry,'' *https://equitablegrowth.org/grants/buyer-power-in-the-beef-industry.*

ended that it could potentially include any producer, thus giving processors inadequate notice of when they might be in danger of violating the proposed rule. Commenters suggested AMS intends for courts to flesh out the specifics on who the rule covers, noting this approach would lead to more uncertainty and confusion. Commenters also said the definition is vague because it incorporates inherently subjective concepts, such as whether a producer is a member of a group ''whose members are at heightened risk of adverse treatment.'' Commenters questioned what amount of risk constitutes ''heightened risk.''

Two cattle industry trade associations and a live poultry dealer contended that the ambiguity of the definition would create uncertainty for regulated entities when making market vulnerable-status determinations on a case-by-case basis, which could disincentivize bringing on new producers in the future. They argued that AMS could avoid this uncertainty if it introduced codified standards based on consistent immutable traits, such as protected classes.

Some commenters were opposed to explicitly including protected classes in the definition. A meat industry trade association noted that it can be difficult or impossible for regulated entities to ascertain all the demographic information for every producer they do business with to determine whether the producer they are contracting with is in a protected class and thus a market vulnerable individual. An agricultural association noted that regulated entities soliciting such demographic information could in and of itself give the appearance of discriminatory behavior.

Lastly, some commenters opposed the *market vulnerable individual* definition because they thought it would be too limiting. Two farm bureaus argued that it would create uncertainty for producers who do not meet the definition, and that protections should be available for anyone participating in the marketing of livestock. Other farm bureaus also suggested that *market vulnerable individual* be defined solely by economic factors, rather than social factors, to be consistent with the objectives of the Act.

AMS Response: AMS, in response to these comments, has decided not to use *market vulnerable individual* as the basis for the rule's prohibition on discrimination or undue or unreasonable prejudicial or disadvantageous action. AMS agrees that the term MVI may be too vague, ambiguous, and overly broad to serve as the prohibited basis for undue or unreasonable prejudice. Instead, this rule uses protected classes largely as defined by ECOA, plus disability and status as a cooperative, as the bases against which unjust discrimination or undue prejudice is prohibited because, as explained above in Section VI—Provisions of the Final Rule, this regulation incorporates the ECOA terms with respect to discrimination in the extension of credit because those terms reflect USDA policy against discrimination in conducted programs.[175] Protections against discrimination on these protected bases extend to all producers. AMS, incorporating feedback from producers and other stakeholders, decided to create its protected bases on the well-established ECOA standards, with some additions. Regarding the commenter's concern that regulated entities may not be aware of the demographic information of producers with whom they conduct business, in such cases AMS would not be able to prove discriminatory conduct because any adverse action taken against that producer could not have been on the basis of their status as a protected class.

AMS adopted several suggestions by commenters regarding the specific bases for protection against unjust discrimination. Principally, AMS's authority to clarify the protected bases stems from sec. 407 of the Act, which authorizes the Secretary to ''make such rules, regulations and prescribed orders as may be necessary to carry out the provisions of this Act.'' [176] The Act has incorporated provisions of other law (such as the FTC Act and the Clayton Act). The Act is a remedial statute that prohibits unlawful discrimination. To inform the scope and bases of unlawful discrimination and prejudice under the Act in this rulemaking, AMS has looked to other civil rights laws, which aid in determining the scope of discrimination and prejudice that is unjust and undue. AMS concludes here that discrimination and prejudice on the bases set forth under this final rule inhibit the ability of all to participate in the market, and that the clarifications set forth in this final rule are necessary to protect all market participants from unjust discrimination and undue prejudice. Furthermore, AMS has considered available relevant references to support the determination. These include USDA's Statement on Conducted Programs [177] and evidence of a general congressional policy found in ECOA that prohibits discrimination on the bases of race, color, religion, national origin, sex (including sexual orientation and gender identity), marital status, age, or disability. Additionally, AMS is including status of a covered producer as a cooperative as a prohibited basis of discrimination because Congress, through passage of the Capper-Volstead Act, has provided clear statutory support for cooperatives as an organizational form that allows farmers to achieve scale through coordination and thereby more effectively compete in agricultural markets and engage with other market participants. AMS is adopting the aforementioned specific bases, as opposed to MVI, because the specific prohibited bases offer clearer, more workable standards that will facilitate compliance by regulated entities and better enable producers to exercise their rights under the Act.

The use of those terms comes with well-established jurisprudence in other contexts, such as ECOA, which incorporates the Act's enforcement provisions, appropriately applied in the context of livestock and poultry markets. Additionally, the status of covered producer as a cooperative was added to the list of protected classes against which discrimination is prohibited. The prohibition on discrimination covers cooperatives consistent with and in furtherance of the Agricultural Fair Practices Act. Cooperatives enable smaller producers' ability to balance concentrated economic power through their ability to coordinate and negotiate.

AMS will not include degrees of market concentration within particular geographic locations in its list of protected bases. Doing so would give rise to difficult questions around whether the government should restrict the ability of regulated entities to seek efficiency based on production volume, which is outside of the scope of this rule.

Additionally, AMS will not include in its list of protected bases a size component for the same reasons that it is not incorporating market concentration or geographic location. Nor is AMS including a prohibition against discrimination in markets with limited buyers. In both cases, such a prohibition would likely result in an all-encompassing rule that would swallow this rule's intent to protect specific well-established classes and activities which are widely utilized across multiple

[175] 15 U.S.C. 1691c(a)(5).

[176] Packers and Stockyards. Act, 1921. Packers and Stockyards. Act, 1921 (Aug. 15, 1921, ch. 64, title I, § 1, 42 Stat. 159.) Section 407.

[177] USDA's Statement on Conducted Programs, accessed 1/30/2024.

economic and civil rights regulatory regimes to stop market exclusion and enable producers to realize the full value of their animals. AMS underscores that the agency is aware of and sensitive to the concerns that smaller producers face greater challenges in the face of concentrated markets, where, as commenters suggested, small rural farms are at a disadvantage when competing with larger operations in their sale of livestock to a limited number of packers.

In this rule, AMS does not address questions of discrimination based on the type of contract a producer has with a regulated entity for the sale of their livestock. Considerations raised in that type of discrimination, revolving around how livestock is marketed, are different from the considerations undertaken in this rule around whether the producer's personal characteristics are a prohibited basis of unjust discrimination. Nonetheless, AMS is aware that some producers may be under pressure to enter forward contacts or AMAs and that this may limit their access to markets. AMS is considering other rules that may be more appropriate for addressing those concerns.

Additionally, AMS intends for non-English-speaking producers and immigrant producers to be covered under the prohibition on discrimination on the basis of national origin or, in some cases, race if they are facing discrimination on those bases. Therefore, AMS need not expressly include non-English speaking producers in this rule. However, people with limited education are not included as protected bases because enforcement of such discrimination offers certain practical challenges and is not well defined in other areas of law.

In this final rule, AMS has expressly prohibited discrimination based on sexual orientation by adding that term as well as gender identity to the prohibited basis of sex. The Supreme Court in *Bostock* v. *Clayton County* recognized that to discriminate against a person based on sexual orientation or transgender status is to discriminate against that individual based on sex.[178] AMS has included the term sex as part of its prohibition on discrimination. By expressly adding ''including sexual orientation and gender identity'' to the rule text, AMS confirms that sex includes those forms of discrimination. Therefore, sexual orientation and transgender status are covered.

[178] *Bostock* v. *Clayton County,* 140 S. Ct. 1731 (2020).

Nor is disclosure a requirement for discrimination based on sex. If a regulated entity takes adverse action that amounts to undue prejudice against a person on the basis of sex, it is immaterial whether the decision is based on an accurate or inaccurate assessment of the actual gender or sexual orientation of the covered producer. In either instance, this prejudice is undue under the regulation.

In terms of concerns raised by commenters about the burden to establish a claim, producers will not have to prove their status as a market vulnerable individual as originally proposed as the bases of discrimination are now based on discrete types of protected classes. Therefore, as suggested by commenters responding to the proposed rule, AMS does not need to provide a non-exhaustive list of factors for covered producers to demonstrate their market vulnerable status.

Furthermore, because market vulnerability is no longer a consideration when assessing violative conduct, AMS is not using market vulnerability as a basis for assessing whether unjust discrimination has occurred in violation of the Act. As noted above, this final rule will not address discrimination on the basis of geographical location, regional concentration, or size of a producer's operation because this rule is focused on prohibiting adverse actions on bases for which there are no pro-competitive benefits. Differences in treatment based on geographic location, regional concentration, or size of the producer's operation all raise more challenging tradeoffs with respect to competitive benefits. To the extent that a covered producer suffers discrimination on those bases, AMS encourages the covered producer to report the concern to PSD, including through the tips and complaints portal *farmerfairness.gov,* for consideration on a case-by-case basis under the Act.

AMS is not establishing a formal burden-shifting framework in this rule, nor one specifically focused on discriminatory effects such as an analysis of disparate impact. Rather, AMS will leave the development of evidentiary proof to the facts and circumstances of specific cases and to the tribunals' processes and burdens for producing evidence. AMS has investigatory and enforcement capabilities to determine whether violative conduct has occurred under the Act. AMS's investigative powers are extensive and include the ability to examine regulated entities' records and compel testimony. AMS may investigate to determine whether a regulated entity's disparate treatment of a producer was on the basis of a protected class as specified in this regulation.

Moreover, as described in Section V—Changes from the Proposed Rule, subsection D—Retaliation Provisions, AMS changed ''because of'' to ''based upon.'' Paragraph (b)(1)'s prohibition as ''based upon'' is intended to be broader than ''but for'' causation and so capture when the protected characteristics or status are a material, or non-trivial, element of the decision to take an adverse action against a covered producer. AMS expects that fact-finding tribunals will establish the necessary processes for proving these elements, with an eye toward the protections for covered producers and for open, inclusive markets that this rule is designed to provide. AMS underscores that discriminatory intent is not an element of this final rule and need not be shown to establish a violation, for example, where the regulated entity cannot proffer a non-discriminatory business reason that fully justifies the adverse action, or where the producer can show that such reason offered was pretextual, a sham, or otherwise does not negate the presence of the prohibited bases as a material element of the action.

Comment: An academic institution expressed support for AMS's efforts to protect historically disadvantaged groups within the stockyard and packing industries but suggested it may be more effective to address the barriers to entry these groups face related to the specialized education and training required by these industries. The commenter recommended that AMS make agricultural and industry-specific training and education more accessible to minority populations.

AMS Response: This rule is designed to strengthen the regulatory protections afforded to producers by the Act. AMS intends to conduct education and outreach to producers to help them understand their rights under these acts. Additionally, greater access to specialized training and education could be helpful to stopping market exclusion of underserved producers. AMS and other USDA agencies conduct a range of programs to support producer education, with the goal of remedying market exclusion of underserved producers. However, providing specialized training oriented toward enabling members of historically disadvantaged groups to become more effective livestock producers is outside the scope of this rulemaking.

ii. Proposed Rule Is Unnecessary

Comment: Several industry associations contended the proposed rule is duplicative and therefore not necessary. According to these commenters, the conduct addressed in the proposed rule is already prohibited under the Act and existing regulations, citing the ''Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyard Act'' final rule (the 2020 Rule).[179] The commenters explained the 2020 Rule identifies factors for determining whether disparate treatment of similarly situated producers is justified. If the disparate treatment is not justified, it is likely to be deemed an undue or unreasonable preference. Commenters noted the proposed rule would prohibit several forms of disparate treatment of covered individuals, indicating proposed § 201.304(a)(2) would make it a violation for a regulated entity, in dealings with covered producers, to prejudice, disadvantage, inhibit market access, or otherwise take adverse action. Examples of prejudice or disadvantage specified in the proposed rule include offering less favorable contract terms than are customarily offered; refusing to deal; differential contract performance or enforcement; or termination or non-renewal of a contract. According to the commenters, these actions are already prohibited under § 201.211 because they are not justified based on cost savings, based on meeting a competitor's terms, or as a business decision.

An industry association asserted establishing antidiscrimination law under the proposed rule is unnecessary because civil rights laws already are well-established. The commenter also contended the proposed rule would not address the market inequities faced by producers not included in the protected classes, and the vague proposed definition of market vulnerable individual would likely result in litigation creating additional hardship for the individuals the rule seeks to protect.

An individual indicated the proposed rule would not be effective in addressing prejudices or threats of prejudice in the marketplace and instead recommended AMS take action to create more packers, which would facilitate greater market access.

AMS Response: AMS agrees with the commenters that the conduct at issue is prohibited under the Act and, in some circumstances, could be enforceable under existing rules and regulations. However, AMS disagrees with commenters who said this rule is duplicative of the 2020 Rule. In response to the proposed rulemaking that preceded the 2020 Rule,[180] AMS received numerous comments raising concerns regarding discriminatory and retaliatory practices; however, AMS stated that the 2020 Rule was published for the narrow purpose of establishing criteria to consider when assessing whether a violation of sec. 202(b)'s prohibition against undue preferences or unreasonable advantages occurred.

The 2020 Rule established four criteria the Secretary will consider when determining whether conduct by packers, swine contractors or live poultry dealers represents an undue or unreasonable preference or advantage. Those criteria include 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 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. However, as set forth in the rule itself, the criteria are not exhaustive and not determinative. The rule offers limited guidance regarding how it is to be applied.

The 2020 Rule did not include the prohibited bases of discrimination set forth in this rule because it asserted that they were undue prejudices, rather than undue preferences, which are distinct prohibitions in the statutory text.[181] Specifically, the 2020 Rule's preamble noted that discrimination on the basis of race, gender, and other such protected bases was unlawful and would be addressed under the Act's prohibition against undue prejudices.[182] In August 2021, AMS reiterated this policy in a series of Frequently Asked Questions (FAQs).[183] This final rule affirms that approach, in that the 2020 Rule clarifies undue preference while this rule clarifies undue prejudice. Moreover, this rule provides clarity, specificity, and certainty in the application of the Act, which will facilitate compliance and enforcement by regulated entities and better inform covered producers of their protections under the Act.

AMS is not aware of a separate Federal law or rule that would cover the circumstances outlined in this final rule. This rule sets forth how certain adverse actions by regulated entities give rise to unjust discrimination and prejudice that, on their face, are unjust and undue and undermine a competitive market. This rule addresses the unique and often difficult-to-prove discriminatory conduct that has long existed in the agricultural sector by prohibiting specific bases of prejudicial action. In doing so, AMS is clarifying the application of the Act, better empowering producers to protect themselves, and encouraging companies to adopt more robust compliance practices to snuff out prohibited conduct prohibited by the Act in its incipiency, before, in the aggregate, it can distort markets. In particular, this rule addresses the longstanding and often difficult-to-counter forms of exclusion that have plagued the agricultural sector for decades. AMS intends for this rule to support positive trends toward inclusivity in the marketplace. As noted above, all commenters, including industry commenters, affirmed that prejudices on the basis of race, color, religion, national origin, sex, age, disability, and similar bases have no place in today's modern agricultural markets.

Demographic information is seldom recorded in agricultural transactions; therefore, it is difficult to quantify discrimination, unlike in other sectors such as housing and banking. Furthermore, in highly concentrated agricultural markets with few minority participants, further defining the Act to include a list of prohibited bases of unjust discrimination helps ensure fair competition for all farmers. This rule will help all producers better understand their rights under the law and come forward when they recognize instances of unjust discrimination. This rule will help USDA to better enforce the Act. In addition, as AMS has determined not to use the market vulnerable individual approach in the final rule, commenter concerns that the definition for market vulnerable individual will lead to litigation are moot.

AMS acknowledges one commenter's recommendation that AMS take action to reduce concentration in the meatpacking industry and create more packers, with the goal of facilitating greater market access for livestock and poultry operations. This recommendation was made out of skepticism that the rule would change

[179] 85 FR 79779, December 11, 2020.

[180] 85 FR 1771.

[181] *Montclair* v. *Ramsdell,* 107 U.S. 147, 152 (1883) (Courts should ''give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed'').

[182] 85 FR 79787.

[183] USDA, Agricultural Marketing Service, ''Frequently Asked Questions on the Enforcement of Undue and Unreasonable Preferences under the Packers and Stockyards Act,'' August 2021, *https://www.ams.usda.gov/rules-regulations/packers-and-stockyards-act/faq.*

conduct by regulated entities and substantially enhance market access for covered producers. While not directly addressing this specific recommendation, AMS is including a recordkeeping requirement to support evaluation of regulated entity compliance and thus facilitate effective enforcement of the statute. The USDA has also taken a number of steps to support small meat processors, including through hundreds of millions of dollars invested to support competition in the processing market.

iii. Specific Challenges or Burdens Regulated Entities May Face in Complying With Proposed Undue Prejudices Provisions

AMS asked about specific challenges or burdens regulated entities may face in complying with the undue prejudice provisions of the proposed rule. It also requested comment on how the undue prejudices provisions differ from existing policies, procedures, and practices of regulated entities.

Comment: Industry commenters said the vague terms in the proposed rule present an additional challenge for compliance. Commenters cited unclearly defined terms such as ''inhibit market access'' and ''adverse action,'' saying they make it impossible for regulated entities to determine what constitutes a violation and how to comply with the proposed regulations. Similarly, commenters noted it is not clear how the regulated entity would determine whether contract terms are ''less favorable,'' or how contracts executed at different times, in different regions, or in different economic conditions would be compared.

AMS Response: ''Inhibit market access'' means excluding producers from livestock and poultry markets outright or erecting barriers to market access that prevent producers from earning the full value of their animals. AMS rejects the need to define ''adverse action'' because this would too greatly constrain the application of the regulation. Based on its regulatory experience, AMS believes regulated entities are fully aware of when their economic interactions with covered producers, including contracting, the operation of contracts, termination of contracts, or refusing to deal, result in adverse economic outcomes for producers. However, to provide greater clarity, the final rule provides greater specificity with respect to prohibited actions as set forth in § 201.304(a)(2), as described earlier.

The scope of prohibited conduct regarding adverse actions is clarified by the shift from market vulnerable individual to membership in a protected class as the prohibited bases of unjust discrimination; the focus of the inquiry should be on those bases. If a regulated entity offers a covered producer less favorable contract terms principally or substantially because the covered producer belonged to one of the protected classes, it violates the law and this rule.

iv. Sufficient Addressing of Concerns Regarding Tribal Members, Tribes, and Tribal Government Entities That Sponsor or Manage Regulated Entities

AMS requested comment on whether the provisions on undue prejudice adequately address concerns regarding inequitable market access for Tribal members and Tribes. It also requested comment on how it should handle Tribal government entities that sponsor or manage regulated entities. AMS asked whether it should permit compliance with proposed § 201.304(a) to be substituted for compliance with Tribal government rules, policies, or guidance governing equitable market access.

Comment: Commenters urged AMS to consult with Tribal organizations engaged in agricultural policy and livestock production projects, such as the Intertribal Agricultural Council and the Native Farm Bill Coalition.

AMS Response: AMS engaged in an extensive Tribal Consultation pursuant to USDA and Federal treaties governing U.S. relations with Indian Tribes. AMS's principal conclusion was that Tribal governments have important duties to serve their members that may require them to treat non-Tribal members less favorably. Accordingly, AMS has established a legitimate business justification as an exception to the prohibition of unjust discrimination against covered producers on the bases of protected classes (race, color, religion, national origin, sex (including sexual orientation and gender identity), disability, marital status, age of the covered producer or the covered producer's status as a cooperative) when the regulated entity is a Federally-recognized Tribe, including its wholly or majority-owned entities, corporations, or Tribal organizations, that is performing Tribal governmental functions. The agency describes its rationale for creating this exception in greater detail above, as well as below under the Tribal Consultation section.

v. Treatment of Private Industry Programs Aimed at Establishing Preferences Intended To Address Systemic Inequality

AMS requested comment related to private industry programs aimed at establishing preferences intended to address systemic inequality by partnering with Black producers or similar programs designed to address socially inclusive supply chains. It asked whether, if such programs were present in livestock and poultry markets, it should evaluate them and determine them to be undue preferences pursuant to the criteria in 9 CFR 201.211. It also requested suggestions on ways to address relevant concerns.

Comment: Agricultural advocacy organizations indicated this question relates to what is considered an ''undue'' preference. The commenters noted a program, practice, or policy that provides opportunities to producers who have been vulnerable to unfair market practices in the past may be a justified form of preference rather than an undue preference.

AMS Response: AMS takes note of the commenters' belief that a justified preference would likely apply in those circumstances and that this rule governs undue or unreasonable prejudices or disadvantages. As discussed above, the 2020 Rule establishes criteria for the Secretary to consider when assessing whether a preference is undue. To the extent that there may be situations where the 2020 Rule and this final rule would arguably both apply, AMS would take a facts-and-circumstances approach to decide which rule applies. Accordingly, AMS makes no change.

vi. Appropriateness of Proposed Rule's Protection for Cooperatives

AMS requested comment on whether the proposed regulation would provide appropriate protection for cooperatives, particularly with respect to the fact that their structure and organization varies across livestock and poultry markets.

Comment: A group of State attorneys general and an academic institution expressed support for the proposed protection for cooperatives, noting these protections will ensure small farmers can continue to compete in the market. Agricultural advocacy organizations recommended AMS revise the reference to ''cooperative'' in proposed § 201.304(a)(1) to refer to ''cooperatives or other association of producers'' because many producer associations designed to give covered producers more leverage in the market are not structured as cooperatives, noting this recommended change is consistent with

the producer association definitions related to the protections provided in the Agricultural Fair Practices Act.[184]

AMS Response: AMS has included cooperatives as a class protected against prejudice or unjust discrimination because cooperatives are an important tool for smaller producers to countervail the market power of regulated entities, whether due to market concentration or the inherent power imbalance that exists in livestock supply chains between a small number of processors and a much larger number of producers. This inclusion of cooperatives as a protected class reaffirms the strong statutory authority Congress has provided cooperatives in agricultural markets, as manifested by its passage in of the Capper-Volstead Act, which permits producer cooperatives to collectively process, prepare for market, handle, and market their products.

Adverse treatment at the hands of a regulated entity based on a grower exercising their right to join such an organization, including a cooperative or an association, is the exact conduct this provision addresses. However, the prohibition of regulated entities prejudicing a cooperative focuses on the cooperative's market interactions with the regulated entity compared to entities that are not cooperatives, and not on the formation or association of the cooperative itself.

Collectively, members of cooperatives are better able to gain access to markets, leverage negotiating power when dealing with regulated entities, and meet volume demands based on their ability to pool outputs. The rule supports covered producers in using procompetitive cooperatives to their fullest extent. This rule aims to ensure equal treatment of covered producers by regulated entities, regardless of whether or not a grower has exercised its right to join a grower organization or association. For these reasons, AMS has not changed § 201.304(a) to include ''or other association of producers.''

AMS notes that many producer associations are designed to give their members certain benefits, including some ability to negotiate with regulated entities around certain outcomes in the market. However, cooperatives are the only group of agricultural producers with explicit ability to cooperate and contract collectively with regulated entities, which includes Federal antitrust law exemptions not enjoyed by other types of associations. Nonetheless, AMS notes the importance of covered producers forming associations that may offer benefits to their members outside of collective contracting. To that end, the final rule in § 201.304(b)(2)(iii) provides important new protections against retaliation for forming or joining an association.

D. Specific Actions Constituting Prejudice or Disadvantage (§ 201.304(a)(2))

AMS proposed a non-exhaustive list of prejudicial actions that the regulation would prohibit, including offering less favorable contract terms, refusing to deal, differential contract enforcement, and contract termination or non-renewal.

i. Appropriateness of Specific Prejudicial Acts in Proposed § 201.304(a)(2)

AMS requested comment on the appropriateness of the specific prejudicial acts in proposed § 201.304(a)(2), as well as whether it should include any other forms of prejudicial conduct.

a. Offering Contract Terms Less Favorable Than Those Generally or Ordinarily Offered

AMS requested comment on whether offering contract terms less favorable than those generally or ordinarily offered should be considered a specific prejudicial or disadvantageous action against covered producers.

Comment: A cattle industry trade association and an agricultural advocacy organization proposed amending the prohibition of offering contract terms ''less favorable than those generally or ordinarily offered'' to reflect the fact that little is known about terms contained in forward contracts. They noted that it is unclear if the terms of forward contracts should be considered ''generally or ordinarily offered'' because, for example, atypical bonuses can be offered to a select number of preferred feedlots. If these bonuses are rarely offered, they may fall outside of the scope of ''generally or ordinarily offered,'' but would still disadvantage the other feedlots (market vulnerable individuals) that do not receive them. The commenters suggested AMS should instead compare specific terms of individual purchase agreements or contracts to determine violations.

AMS Response: Given the unique contract types in the cattle industry, AMS recognizes that certain premiums, discounts, and bonuses may not be ''generally or ordinarily'' offered. In this final rule, AMS is preserving the ability of regulated entities to be flexible in the types of contracts they offer to producers, with different producers having different contracts based on the particular quality and type of service provided for in the contract. Whether terms are generally or ordinarily offered is specific to the facts and circumstances of each case, including in comparison to similarly situated producers—a clarification which the final rule establishes. ''Generally or ordinarily offered to similarly situated producers'' is a fact-specific inquiry which looks to the contracting practices of the regulated entity, including how the regulated entity contracts for similar products or services with similar producers. While the rule does not guarantee any producer any particular contract terms, AMS underscores that the purpose of the rule is to prevent an adverse action based upon an unlawful basis. A refusal to offer a contract term *based upon* the producer's race, color, religion, national origin, sex (including sexual orientation and gender identity), disability, or marital status, or age would weigh heavily in any analysis, as it inherently implies that the regulated entity is in the market to contract with those terms by others in the market. Such a circumstance is different than refusing to offer a contract because the producer is unable to meet special contract requirements.

AMS recognizes the existence of information asymmetry between regulated entities and covered producers, including in relation to what contract terms are commonly offered or not. AMS notes the availability of other tools to address that challenge, including new initiatives such as AMS's Cattle Contract Library Pilot, which provides disclosure into contract terms offered by packers with greater than 5 percent of the national market share, including disclosure of any contract specifications on financing, risk-sharing, and profit-sharing.[185] AMS also operates a Swine Contract Library, which provides transparency into contract terms in the swine sector.[186] When in doubt, AMS encourages covered producers to contact PSD. AMS is making no changes to the regulation as

[184] 7 U.S.C. 2302(2).

[185] Final Rule, ''Cattle Contract Library Pilot Program,'' Agricultural Marketing Services, December 2022, 87 FR 74951. For more information, see also Agricultural Marketing Service, Cattle Contract Library Pilot, at *https://www.ams.usda.gov/market-news/livestock-poultry-grain/cattle-contracts-library* (last accessed Dec. 2023). Note, as of the date of publication of the Pilot in January 2023, no covered packers reported to AMS contract specifications with financing, risk-sharing, or profit-sharing.

[186] Agricultural Marketing Service, Swine Contract Library Information, at *https://www.ams.usda.gov/rules-regulations/packers-and-stockyards-act/regulated-entities/swine-contract-library* (last accessed Dec. 2023).

proposed in response to these comments.

b. Refusing To Deal

AMS requested comment on whether refusing to deal should be considered a specific prejudicial or disadvantageous action against covered producers.

Comment: A cattle industry trade association and an agricultural advocacy organization recommended including in the prohibition on ''refusing to deal'' instances where a producer who ordinarily markets their livestock in the cash market is denied a bid unless they enter a forward contract with the regulated entity.

AMS Response: AMS is aware that market concentration in the cattle industry has had a negative effect on negotiated cash markets and on the ranchers who choose to deal exclusively in those markets, but the impact of thinning cash livestock markets on the ability of producers to use cash markets and freely enter forward contracts with regulated entities is outside the scope of this rulemaking. AMS will further consider the commenters' recommendations in the context of other rulemaking initiatives such as rules focused on particular species of livestock and evidentiary patterns of abusive conduct. AMS is making no further changes to the regulation as proposed in response to these comments.

c. Other Comments on Appropriateness of Specific Prejudicial Acts

Comment: Two farmers unions and several organizations generally supported the appropriateness of the list of specific prejudicial acts, but also recommended adding the phrase ''including, but not limited to'' to provide flexibility in evaluating future acts of discrimination or prejudice. An academic institution also endorsed the non-exhaustive list of specific actions provided in this section, suggesting the listed actions would reduce uncertainty in the industry and make this section of the rule easier to enforce.

AMS Response: This rule is not intended to limit AMS's ability to enforce the Act. Instead, the rule aims to better define the Agency's enforcement authority so that enforcement actions are more successful. AMS agrees with the commenters that listing specific prohibited prejudicial acts will aid enforcement efforts. The agency also agrees that such a list is meant to be exemplary, not exhaustive. To this end, ''any other action that a reasonable covered producer would find materially adverse'' has been added to § 201.204(a)(2) to indicate that a variety of other adverse actions done on a prohibited basis against covered producers may violate this section. The facts and circumstances of each case will be assessed in light of these provisions when determining whether the conduct in question violates the Act.

Comment: A swine industry trade association said that the specific ''prejudicial or disadvantaging'' acts listed, as well as the proposed rule's intimation that the list is ''non-exhaustive,'' would result in a vague and overbroad definition of prejudicial conduct. The commenter argued that terms such as ''favorable'' and ''generally or ordinarily offered'' vary with market conditions over time and would have to be ironed out in courts through costly litigation.

AMS Response: AMS has adequately described the type of conduct prohibited under this rule by expressly stating that undue prejudice and unjust discrimination on specified prohibited bases constitutes a violation under the Act.

AMS addressed concerns of vagueness by further defining conduct that is prejudicial or disadvantageous to producers in the final rule (as described in section V—Changes from the Proposed Rule). In particular, AMS has made a number of changes to provide additional clarity, specificity, and certainty to market participants relating to the list of adverse actions set forth in § 201.304(a)(2). In response to the commenter's concern that ''generally or ordinarily offered'' is a concept that may vary with market conditions over time, AMS revised the regulation to state ''generally or ordinarily offered to *similarly situated covered producers.*'' Including this phrase in the final regulations provides more specificity with respect to the current market context in which the regulation would be applicable. Paragraph (a)(2)(vi) was added to limit the list to any other adverse action that a *reasonable* covered producer would find *materially adverse.* The final rule also adds two exceptions to the rule in new paragraph (a)(3), which provides further specificity to the rule by defining specific actions which are not considered prejudicial conduct under this rule.

Nevertheless, AMS reads the statutory term ''prejudicial'' to be a broad term, that covers all acts that cause harm to covered producers on a prohibited basis with respect to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry. While the term ''prejudicial'' encompasses a broad range of conduct, it is not vague. This rule does not prohibit all harms that may be inflicted on covered producers by regulated entities, rather, only those prejudicial acts related to livestock, meat and poultry that occur on a prohibited basis.

Comment: A cattle industry trade association said AMS should not prohibit the specific acts outlined in the rule because they are important tools that allow the free market to function. The commenter suggested that, while less favorable terms or contract terminations are unfavorable results for producers that experience them, they are important outcomes that incentivize producer innovation. If these specific acts are prohibited, the trade association argued, regulated entities would need to resort to ''vanilla'' standardized contracts that would degrade consumer outcomes and impair superior producers' profit opportunities.

AMS Response: AMS rejects the argument that discrimination on the basis of race, color, religion, national origin, sex (including sexual orientation and gender identity), disability, marital status, age of the covered producer, or the covered producer's status as a cooperative, or retaliation is a free market value. Engaging in that unjust discriminatory conduct would exclude participants from the market, rather than encourage them.

Moreover, the members of the trade association were mistaken even with respect to the original proposal protecting market vulnerable individuals. Regulated entities are free to use contracting tools to develop incentives. But a tool used to unduly prejudice the vulnerable does not incentivize; it oppresses. Any other conclusion is contrary to the plain meaning of the Act. This rule aims to create an inclusive, fair, and equal environment for farmers and ranchers to conduct business by preventing instances of unjust discrimination and undue prejudice. The key concept here is that there shall be no discrimination on the protected bases regarding the offering of ''general and ordinary'' contract terms. AMS concludes that the benefits of protecting farmers and ranchers from plainly unjustly discriminatory treatment outweigh the hypothetical prediction that such regulations will hamper efficiency or innovation. Inclusive markets breed innovation and efficiencies; they do not undermine them.

ii. Additional Forms of Prejudicial Conduct To Include

AMS requested comment on whether the four specific prejudicial acts are appropriate as proposed, or whether there are other forms of prejudicial

conduct that should be specified. Where other specific conduct is identified, AMS sought examples of how these actions have been used to target market vulnerable individuals or cooperatives.

Comment: An academic or research institution proposed adding a new specific action that would encompass ''information disclosure.'' The commenter defined information disclosure as failing to provide information materially relevant to a producer's operation while providing that information to one or more other producers. The commenter highlighted information asymmetry as a major fairness issue in livestock markets and suggested such asymmetry can heighten monopsony or oligopsony conditions. The commenter also cited the former Grain Inspection, Packers and Stockyards Administration's (GIPSA's) inclusion of information asymmetry in a 2010 proposed rule (the 2010 GIPSA Rule),[187] which defined undue or unreasonable prejudice or disadvantage as ''whether information regarding acquiring, handling, processing, and quality of livestock is disclosed to all producers when it is disclosed to one or more producers.'' The commenter encouraged AMS to use similar language in its final rule.

AMS Response: AMS is concerned about the negative impact information asymmetry, and the subsequent lack of transparency, has on producers. Information asymmetry could very well be used as a means of unjust discrimination if regulated entities preference certain producers over others through the information they choose to disclose. Such selective disclosure of information could cause those producers from whom information was withheld by regulated entities to lose out economically to those producers that received the information.

In the final rule, AMS has added paragraph (a)(2)(vi) to address any other action that a reasonably covered producer would find materially adverse. If a covered producer can show they are materially harmed by information asymmetry, they will have a recourse under this rule. Additionally, the prejudicial act of differential contract performance or enforcement (§ 204(a)(2)(iii)) covers selective information disclosure in many circumstances. Withholding materially relevant information from a contractee that it previously made available to the contractee or which it makes generally or ordinarily available as part of its contract performance to other contractees is de facto differential contract performance or enforcement. A producer is likely to operate in a less-than-optimal manner regarding financial renumeration when the regulated entity it is contracting with has withheld materially relevant information that has been disclosed to other contractees. Such behavior will thus lead to differential contract performance or enforcement.

AMS has not adopted the wide-ranging proposal on information asymmetry from the 2010 GIPSA Rule because it could inhibit the ability for regulated entities to select trusted partners with whom to engage in more complex, value-added production that may require specialized cooperation and information sharing.

Addressing information asymmetry and improving transparency in interactions between covered producers and regulated entities is a focus of AMS and will continue to be a priority in rulemaking. AMS made no further changes to the provisions regarding undue prejudices in response to this comment.

iii. Different Types of Purchase Arrangements That Could Be Employed in a Prejudicial Manner

AMS sought comment on whether there are other types of purchase agreements (outside of those generally or ordinarily offered), such as forward contracts, formula contracts, AMAs, or cash market purchases, that could be used in a prejudicial manner. AMS requested identification of these types and examples of how they have been used to target vulnerable individuals or cooperatives.

Comment: Several commenters argued that AMAs are predatory and should be prohibited under any name. An agricultural advocacy organization said that market vulnerable individuals are often excluded from participating in these agreements and bear negative market consequences from this exclusion. The individuals suggested that a firm base price for covered producers should be established instead.

AMS Response: This rule prohibits regulated entities from denying covered producers access to the purchase or sale of livestock on equitable terms, including through AMAs, on account of one of the rule's protected bases. AMS does not take a position in this rule on whether AMAs on principle are unfair or anticompetitive as such concerns are outside the scope of this rule.[188] AMS made no further changes in responses to the comment.

iv. Include Other Differential Contract Terms

AMS requested comment on whether other differential contract terms not listed in the proposed rule should be included when defining contract terms that are less favorable than those generally or ordinarily offered.

Comment: A cattle industry trade association urged AMS to consider three additions to differential contract terms:

1. Bonuses offered to select producers, which would disadvantage other producers who do not receive bonuses.
2. ''Cost-sharing.''
3. ''Cost-plus contracts'' where a regulated entity agrees to pay all the costs associated with purchasing and growing livestock, which disadvantages producers who do not receive cost-plus contracts.

AMS Response: This rule addresses undue prejudices that can exclude covered producers from the marketplace. As such, the rule focuses on terms that a regulated entity offers which are *less favorable* to those *generally or ordinarily* offered. To the extent that a regulated entity generally, commonly, or ordinarily offers bonuses, cost-sharing, and cost-plus contracts, then the denial of those terms to covered producers on the grounds of belonging to a protected class is covered by this rule as forms of differential contract terms. It is not, however, AMS's experience that those terms are generally, commonly, or ordinarily offered to producers, and based on the reporting in AMS's Cattle Contracts Library Pilot, are rarely if ever offered.[189] The rule does not prevent regulated entities from offering preferences to some producers, in particular for reasons relating to their choices in types of business relationships or how they incentivize quality of products or services delivered to them. This rule does not take a position on whether bonuses, cost-sharing, and cost-plus contracts may give rise to concerns of unfairness, undue preferences, or other concerns that are outside the scope of this rule.

[187] Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 FR 35338, 35352, June 22, 2010.

[188] See, generally, *https://www.afpc.tamu.edu/research/publications/710/cattle.pdf.* However, see also: *https://www.antitrustinstitute.org/work-product/aai-senior-fellow-peter-carstensen-responds-to-economic-research-on-marketing-of-beef-cattle-says-it-fails-to-address-market-power-and-buying-methods/.*

[189] See Agricultural Marketing Service, Cattle Contract Library Pilot, available at *https://www.ams.usda.gov/market-news/livestock-poultry-grain/cattle-contracts-library* (2023).

Accordingly, AMS made no change in response to this comment.

v. Include the Action of Offering Less Favorable Price Terms, Contract Terms, and Other Less Favorable Treatment in the Course of Business Dealings

AMS requested comment on whether AMS should 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.

Comment: A plant worker said AMS should avoid evaluating less favorable price or contract terms because each contract is based on varying circumstances that will inevitably result in different prices or terms. The commenter suggested that evaluating differential terms for discrimination will hamper regulated entities and producers' ability to bargain or negotiate for appropriate contract terms.

AMS Response: AMS agrees that contract prices commonly reflect a range of differences in circumstances between the contracting parties. To the extent that those prices reflect differences in product quality or service being provided, including transportation and delivery, parties are free to set prices in contracts as they wish. This rule focuses on exclusion or adverse actions on only the enumerated prohibited bases. Accordingly, AMS made no changes to the rule based on the comment.

vi. Allowance for Offering Less Favorable Price Terms, Contract Terms, and Other Less Favorable Treatment in the Course of Business Dealings for Legitimate Business Reasons

AMS requested comment on whether an allowance be made for offering less favorable price or contract terms, or other less favorable treatment due to legitimate business reasons.

Comment: A cattle industry trade association and agricultural advocacy organizations argued that legitimate business reason defenses should not be allowed because it would weaken the Act's purpose and allow continued harm to producers. A swine industry trade association and an industry company argued that exceptions should be provided for legitimate business reasons, and that AMS should: (1) provide clear examples delineating between legitimate and illegitimate forms of differential treatments, and (2) provide clarity on whose burden it is to prove that an act meets the legitimate business reason exception. The company asserted that without such an exception there would be frivolous litigation where regulated entities would have to defend legitimate behavior such as canceling contracts with producers who are found to have animal welfare violations. A plant worker agreed that legitimate business exceptions should apply, and pointed to California employment law's affirmative defense, which serves as a complete defense if a policy alleged to cause a disparate impact is found to be efficient for the business.

Commenters expressed concern that the proposed rule did not define legitimate business justification. Commenters expressed concern that the proposed rule fails to provide the industry with specific exceptions or justifications for disparate treatment of producers, stating there are multiple reasons why different (less favorable) terms may be offered to certain producers and not others, and that these reasons are not insidious in nature but instead a result of market forces and other nondiscriminatory factors. Additionally, several poultry industry commenters noted that AMS suggests in the preamble a legitimate business reason may justify disparate treatment, yet it never explains what constitutes a legitimate business reason. Several poultry industry commenters provided examples of reasonable business decisions that would result in differential treatment and may violate the proposed rule as written despite their reasonableness. These commenters urged AMS to add regulatory text similar to that in § 201.211 to expressly protect reasonable business conduct and specify how a company would demonstrate that an action was based on a reasonable business decision. The commenters also said that, due to the complicated nature of business relationships, business decisions should be presumed reasonable unless proven otherwise. A poultry industry trade association provided examples of complex fact patterns and asked, given each situation, how the regulated entity could demonstrate actions were taken for appropriate reasons.

An industry association contended proposed § 201.304(a) would eliminate the statutory requirement in 7 U.S.C. 192 that adverse actions against a market vulnerable individual are only prohibited if they are undue or unreasonable. The commenter noted the statute only prohibits ''undue or unreasonable'' advantages and disadvantages, meaning advantages or disadvantages that lack a reasonable business purpose. However, the commenter pointed out that, under the proposed rule, if the action is ''adverse'' and it impacts a market vulnerable individual, even if it was based on a legitimate business reason, the regulated entity would be in violation of the regulations. The commenter also noted that enforcing contract rights is often ''adverse against'' the other party, but ''adverse'' does not mean inappropriate or unfair. Commenters cautioned the proposed rule may result in regulated entities giving all producers the same contract terms to avoid litigation, which would eliminate the market competition the Act was intended to protect.

AMS Response: AMS agrees with commenters that legitimate business justifications exist for disparate treatment of producers. AMS does not agree, however, that there are many legitimate business justifications for prejudice or disadvantage on the basis of race, color, religion, national origin, sex (including sexual orientation and gender identity), disability, or marital status, or age of the covered producer. The rule seeks to prevent regulated entities from discriminating against producers on specific prohibited bases, retaliating against producers for exercising certain protected rights, and deceiving producers in the procurement of livestock. It does not limit the ability of regulated entities to make other business decisions, as long as they comply with the Act in that they are not unduly prejudicial or unjustly discriminatory. This includes terminating contracts for violating contractual provisions such as animal welfare policies. To clarify what types of conduct are allowed, the final rule delineates two specific legitimate justifications for discriminatory action by regulated entities against producers. Discriminatory conduct by a regulated entity falling in one of these categories is not prejudicial: (1) the regulated entity is fulfilling a religious commitment related to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry, and (2) a Federally-recognized Tribe, including its wholly or majority-owned entities, corporations, or Tribal organizations, that is performing Tribal governmental functions.

AMS is adopting the religious exception to recognize the important role ritual slaughter plays in certain religious traditions. AMS is also recognizing the important roles that Tribes play as governmental units and operators of economic enterprises. In those governmental activities, as interpreted by the Supreme Court as well as Federal laws governing Tribal affairs, Tribes may require the flexibility to only purchase livestock from or sell meat to their members. AMS believes that actions following these two

principles do not amount to undue or unreasonable prejudice, disadvantage, inhibition of market access, or adverse action. Through its review of public comments and based on its experience, AMS finds these are the only two appropriate exemptions from the rule's broad prohibition against undue and unreasonable prejudices and disadvantages.

AMS underscores that, in this rule, legitimate justification only applies to whether adverse actions against covered producers on a prohibited basis are still permissible. Where the adverse action is *not* on a prohibited basis or was not differential in its treatment of producers on the prohibited basis, then the question of there being a legitimate justification is not relevant.

AMS disagrees with the comment that § 201.304(a) would eliminate the statutory requirement that a prohibited prejudice, disadvantage, or discrimination is undue, unreasonable, or unjust. To the contrary, AMS finds that prejudice, disadvantage, or discrimination on the prohibited bases set forth in this final rule to be per se unjust, undue, and unreasonable. As commenters to this rule have acknowledged prejudicial treatment on the prohibited bases has no place in the market.

E. Retaliation (§ 201.304(b))

AMS proposed addressing retaliation by outlining 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 have prohibited regulated entities from retaliating against covered producers for participating in a protected activity by terminating contracts, adversely differential performance or enforcement of a contract, refusing to renew contracts, offering more unfavorable contract terms than those generally or ordinarily offered, refusing to deal, interfering with third-party contracts, or other actions with adverse impact to covered producers. These proposed regulations are adopted in this final rule.

i. Usefulness of Regulatory Protections To Protect Producers From Retaliation

AMS requested comment on whether the proposed prohibition on retaliation would assist producers in avoiding unjust market discrimination, accessing markets, obtaining meaningful price discovery, or preventing anticompetitive practices.

Comment: Several organizations and an academic institution expressed support for the proposed rule's retaliation provisions, saying that poultry and meat companies take advantage of unbalanced power to create a climate in which farmers and ranchers fear retaliation for exposing unfair industry practices. One organization cited a recent anonymous survey of contract growers it had conducted, in which multiple respondents described experiencing retaliation from integrators and said integrators regularly terminate the contracts of farmers who engage in whistleblowing activities, leaving them with substantial debt tied up in specialized, single-use structures built as a condition of their contractual agreements.

An agricultural advocacy organization said § 201.304(b) as proposed fits easily within the scope of the Act's prohibitions on undue prejudice and unjust discrimination, closes a key enforcement gap, and represents a solid first step toward prohibiting unfair retaliation. An agricultural and environmental organization expressed support for the proposed provision but urged AMS to strengthen the final version. The commenter said regulated entities have deeply embedded retaliation into their business practices, leaving producers too intimidated to expose industry abuses. The commenter also cautioned that meat processors and live poultry dealers may attempt to find novel ways to retaliate against producers that do not directly violate the proposed rule, suggesting AMS broaden the range of protected producer activities and of prohibited retaliatory behavior.

A poultry grower expressed support for the protections, saying integrators had taken measures, such as delivering poor inputs and imposing extended timeouts on flock placements, against him and other growers who spoke up against abusive integrator practices. This commenter also said cattle and pork producers take similar actions against producers who expose problematic practices. A meat industry trade association said the proposed rule would ensure that farmers and ranchers have access to a public forum necessary for open, transparent communication. Numerous individuals indicated support for the proposed rule's protections against retaliation, with many saying the proposed rule would allow farmers to engage in whistleblowing actions without facing repercussions and would thus promote consumer, environmental, and animal welfare concerns.

AMS Response: AMS takes note of the commenters' support for the usefulness of the provisions. AMS designed the provision on retaliation to cover the core activities of being a producer—that is, activities are essential or unavoidable for producers in terms of their abilities to enjoy the full extent of their bargain and protect their economic rights. AMS notes that the provision that protects a covered producer who communicates or cooperates ''with a person for the purposes of improving production or marketing of livestock or poultry'' is broad. This covers many different scenarios not specifically named in this rule. AMS expects the retaliation provision of this rule to provide a significant measure of protection to covered producers against prohibited conduct, and likewise provide opportunity for redress, both to stop particularized harmful conduct, and keep it from persisting and causing greater harm. AMS chose this list of prohibited retaliatory practices based on conduct the agency identified as most commonly relevant to regulated entities' practices that exclude or penalize producers. This list is based on AMS's experience fielding complaints from producers, from its expertise in the operation of the livestock and poultry markets and practices of market participants, as well as the numerous comments to this rule that identified similar practices. AMS acknowledges there may be other forms of retaliation that would violate the Act that are not specifically delineated under this rulemaking. Prosecutorial discretion will determine what conduct is in fact retaliatory based on the facts and circumstances of each case. AMS made no further changes in response to these comments.

Comment: An agricultural advocacy organization suggested AMS consider further developing the enforcement procedures for the retaliation provisions, as well as the evidentiary burdens associated with complainants and defendants. The commenter specifically recommended that AMS establish a burden-shifting approach which would establish that, once a complainant has made a *prima facie* showing that a covered producer was subjected to retaliation after engaging in protected activities, the regulated entity would have to show by clear and convincing evidence that they would have taken the same action in the absence of the producer's participation in protected activities. Shifting the burden to the regulated entity (who has the best access to proof about the underlying facts) once the complainant has met an initial threshold would reflect a public policy position against

retaliation. The commenter said this approach would track with that used in other Federal whistleblower protection regimes, such as the Criminal Antitrust Anti-Retaliation Act [190] and the Whistleblower Protection Act applicable to the Federal civil service,[191] and would draw on a key element of Title VII discrimination law that allows complainants to initiate proceedings without being forced to prove the respondents' state of mind.[192]

AMS Response: As described in Section V—Changes from the Proposed Rule, subsection D—Retaliation Provisions, AMS changed ''because of'' to ''based upon.'' Paragraph (b)(1)'s prohibition as ''based upon'' is intended to be broader than ''but for'' causation and so capture when the protected characteristics or status are a material, or non-trivial, element of the decision to take an adverse action against a covered producer. AMS expects that fact-finding tribunals will establish the necessary processes for proving these elements. Moreover, AMS expects that evidentiary presentation may often follow those approaches to proving retaliation in other contexts as a function of the natural course of any litigation. AMS underscores that the rule is designed to protect producers' ability to engage in such covered activities, with the clarity provided by the rule specifically designed to assist producers in identifying and acting in a manner to effectuate their rights. AMS further notes that the prohibition on adverse actions taken on pretext are prohibited under 9 CFR 201.306 as established by this rule.

Comment: An organization said the proposed anti-retaliation provisions should cover violation disclosures made within the chain of command or as part of the producer's job duties because farmers and ranchers often report issues internally as a first step in drawing attention to them before reporting them to regulators or going public with them.

AMS Response: The rule as written protects covered producers from retaliation for protected activities, which include the assertion of contractual rights. Violation disclosures made within the chain of command or as part of the covered producer's contractual duties fall within the operation of the contract between the covered producer and the regulated entity, and as such may be expected to be covered by the rule. Accordingly, AMS made no change to the rule.

Comment: Several industry trade associations said the retaliation provisions are not necessary because the ''conduct'' at issue is already prohibited by existing laws, such as 9 CFR 201.211 identifying the criteria used to determine whether an action is an undue or unreasonable preference or advantage.

AMS Response: AMS agrees with the commenters that the retaliatory conduct at issue is prohibited under the Act and could be enforceable under existing rules and regulations, including criteria set forth in 9 CFR 201.211.[193] Compared to general criteria and interpretive guidance, this rule provides greater clarity, specificity, and certainty to how the Act applies, which will facilitate higher levels of compliance by regulated entities with the Act, broader enforcement of its provisions by AMS, and more informed producers, who will be in a better position to assert their rights established by the Act. Additionally, unlike § 201.211, this rule focuses on preventing undue prejudices and disadvantages and does not focus on preferential treatment that is not discriminatory. Accordingly, AMS made no change to the rule.

ii. Appropriateness of Specific Acts of Retaliation Listed in Proposed § 201.304(b)(3)

AMS requested comment on whether the specific retaliation acts listed in the proposed rule are appropriate. AMS also sought comment on whether there are other forms of retaliatory conduct that should be specified.

a. Termination or Non-Renewal of Contracts

AMS requested comment on whether termination or non-renewal of contracts is appropriate as a specific retaliation act listed in the proposed rule. It noted that covered producers have expressed fear of this type of retaliation through communication with AMS personnel and in comments on previous related rulemakings.

Comment: Numerous individuals said they are concerned about the prospect of farmers losing their contracts and their livelihoods if they raise issues with their treatment by poultry and meat companies.

AMS Response: AMS takes note of the commenters' support for the usefulness of the provisions. AMS made a range of adjustments in the final rule to enhance the final rule's protections for covered producers.

b. Interference in Farm Real Estate Transactions or Contracts With Third Parties

AMS requested comment on whether interference in farm real estate transactions or contracts with third parties is appropriate as a specific retaliation act listed in the proposed rule.

Comment: A swine industry trade association said the proposed rule describes the retaliatory conduct too vaguely, making it difficult for a regulated entity to determine whether its actions would be prohibited.

AMS Response: AMS believes that some degree of generality is necessary to capture the range of conduct that could give rise to a violation of the rule. However, the rule is not designed to prohibit every instance where a regulated entity's contracting decisions are unfavorable to a covered producer. For example, the rule would not apply where a regulated entity was engaged in unrelated business around the purchase or sale of farmland, or where a regulated entity chose for unrelated reasons not to continue a contract in the course of a covered producer's attempts to sell its farm. AMS believes that the wording of proposed § 201.304(b)(3)(iv)—''[i]nterference in farm sale transactions or contracts with third parties''—is appropriately specific to prohibit regulated entities from *retaliating* against covered producers for engaging in protected activities. This is because the focus of an AMS inquiry would be to determine the reason for the interference. AMS would determine whether a regulated entity interfered in a farm sale or third party contracting; if such interference occurred, whether it was harmful to the covered producer; and whether the interference occurred because the covered producer engaged in protected activity. Additionally, in response to this comment, AMS has included explanatory language in the retaliation section (Section VI.C—Provisions of the Final Rule, Retaliation) discussing the adverse effects that interference with the transfer of farm real estate by a regulated entity has on producers.

iii. Delineation of Additional Forms of Retaliatory Conduct

AMS requested comment on whether the specific acts of retaliation in the proposed rule are appropriate, and whether there are other forms of retaliatory conduct that should be specified.

[190] *See* 15 U.S.C. 7a–3(b)(2)(C).

[191] *See* 5 U.S.C. 1221(e)(2).

[192] *See, e.g., Young* v. *United Parcel Service, Inc.,* 575 U.S. 206, 206–07, 228–30 (2015)

[193] USDA, Agricultural Marketing Service, ''Frequently Asked Questions on the Enforcement of Undue and Unreasonable Preferences under the Packers and Stockyards Act,'' August 2021, *https://www.ams.usda.gov/rules-regulations/packers-and-stockyards-act/faq.*

Comment: Several commenters, including a farmers' union, a group of State attorneys general, and several other organizations urged AMS to explicitly state that the list of specific prohibited acts of retaliation is not meant to be exhaustive, with several commenters suggesting AMS add the phrase ''including, but not limited to'' to the introductory clause of § 201.304(b)(3). Commenters said establishing that prohibited activities are not limited to those listed would allow for future flexibility in addressing specific acts of retaliation that may arise.

AMS Response: As explained in Section V—Changes from the Proposed Rule, subsection D—Retaliation Provisions, in response to these comments, AMS has added a new paragraph (b)(3)(vi) to prohibit ''any other action that a reasonable covered producer would find materially adverse.''

Comment: A non-profit or other organization said the final rule should prohibit regulated entities from retaliating against any covered producers for any form of association, broadly defined, because allowing farmers to freely associate and to use a range of different communications platforms is necessary for the sector to flourish. An organization said the final rule should prohibit the offering of contract terms that are less favorable than those generally or ordinarily offered.

AMS Response: Proposed § 201.204(b)(2)(iii) provided broad protection against retaliation for a producer to form or join a producer or grower association and would cover all aspects of associations and cooperatives relevant to the business of livestock and poultry. Further, AMS acknowledges the importance of the freedom of association generally but underscores that the protections of the Act have limits. The Act is designed to protect covered producers in the business of livestock and poultry. AMS is not in a position to know or evaluate the full range of associations that individuals who are producers may join, and it would not be appropriate for AMS to be involved in encouraging or discouraging such associational activities, including whether regulated entities should be required to do business with covered producers that engage in those activities. Some associational activities unrelated to the business of livestock and poultry may expose regulated entities to reputational or other risks in the marketplace.

Comment: An academic institution recommended that AMS include language making it clear that the prohibited retaliatory activities would encompass coercion or intimidation, such as threats to take one of the prohibited actions.

AMS Response: This rule is intended to establish broad prohibitions against retaliatory activities that in AMS's experience have significantly inhibited producers' ability to freely compete and secure the full value of their products and services. AMS agrees that intimidation or coercion that would dissuade or coerce covered producers from engaging in the prohibited activities are covered under ''retaliate or otherwise take an adverse action against a covered producer.'' In particular, intimidating or coercive conduct that credibly threatens retaliation prohibited by this rule would rise to the level of actionable adverse conduct under by this rule—which the Agency underscores further through its addition of Paragraph (b)(3)(iii) and (v) under the list of adverse actions. For example, if a regulated entity were to communicate to a producer stating, ''if we were you, we would not report to the government'' with the implication that the regulated entity might not renew their contract on favorable terms, AMS views this as a form of prohibited retaliatory conduct in its incipiency that this rule is intended to stop.

iv. Protection of Producers Who Choose Not To Participate in Protected Activities

AMS requested comment on whether prohibitions on retaliation should protect producers who choose not to participate in protected activities. AMS provided the example of whether the provision should prohibit giving premiums or discounts for joining or not joining livestock or poultry associations.

Comment: A cattle industry trade association said these prohibitions should expressly protect producers from coercive conduct that directs them to either join or not join a particular producer association. An agricultural advocacy organization said the retaliation provisions should cover circumstances in which regulated entities reward producers who do not join a producer association. An agricultural advocacy organization noted that the freedom to refrain from associating is as important as the freedom to associate and represents the other side of the same coin.

AMS Response: AMS agrees that protected activities include the decision not to participate in such an activity. Based on its experience regulating the livestock sector, covered producers may be coerced by regulated entities to participate in associational activities or contact the government on regulatory and policy matters even when they may not agree. As recently as AMS's proposal on ''Transparency in Poultry Growing Contracts and Tournaments,'' covered producers reported to AMS potentially coercive pressure by regulated entities on poultry growers to oppose the regulation. AMS also notes commenter statements that regulated entities have pressured and may continue to pressure covered producers to join associations to support industry stances with which they disagree. Accordingly, AMS has added § 201.304(b)(2)(ii) and revised § 201.304(b)(2)(iii) to clarify that the decision not to participate in the protected activities, respectively, of engaging in a voluntary communication with the government or of forming or joining an association are also covered by the rule's protections against retaliation.

v. Appropriateness of Bases of Protected Activities

AMS requested comment on whether the bases of protected activities were appropriate, including the criteria for selection and application of those criteria. It further sought comment on whether the bases of protected activities are too broad, are too narrow, or should be changed in any other way. Comments received in response to this general inquiry are outlined below.

a. Communication With a Government Agency With Respect to Matters Related to Livestock, Meats, or Live Poultry or Petitions for Redress of Grievances

Comment: AMS requested comment on whether communication with a government agency on matters related to livestock, meats, or live poultry or petitions for redress of grievances is appropriate to include as a protected activity under § 201.304(b)(2).

Several agricultural advocacy organizations said AMS should make clear that the proposed rule would protect producer communication with any sector or level of government by including all three branches of government in this provision, with one commenter also recommending AMS specify this provision applies to both State and Federal government.

Several commenters recommended revised text as follows:

''(i) A covered producer communicates with a government agency, *court, or legislature* 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.''

AMS Response: AMS agrees with the commenter and intends that the rule should include protections for communications with any of those entities, including any committee or member official of those entities. In this final rule, AMS is aligning the use of the terms ''government agency, court, or legislature'' and simplifying the language to ''government entity or official.'' This change ensures that protected communications may occur with any of the three branches of governments and with individual government officials, including committees and members of a legislature. As proposed, the rule did not limit its protection to communication with the Federal government. By using the words ''government entity or official,'' the rule's plain language applies equally to communications with all levels of government—Federal, State, Tribal, and local—with respect to the matters indicated.

b. Assertion of Rights Granted Under the Act, 9 CFR Part 201, or Contract Rights

AMS requested comment on whether assertion of rights granted under the Act, 9 CFR part 201, or contract rights is appropriate to include as a protected activity under § 201.304(b)(2).

Comment: A group of State attorneys general said the proposed rule may inadvertently leave out protections for farmers who communicate their concerns directly to regulated entities, suggesting AMS target this gap by expanding § 201.304(b)(2)(vii) (§ 201.304(b)(2)(ii) in the proposed rule) to include notification by a producer to the regulated entity of a potential breach of contract. An academic institution said protected activities should include the assertion of any civil right held by the producer, to the full extent feasible within the scope of AMS's authority. The attorneys general said that, while the proposed rule covers rights granted under the Act, the proposed rule, and contract rights, it does not encompass other rights a producer may have, such as whistleblower or other rights conferred by Federal or State law. An organization said the proposed rule should clarify, given the imbalance of power in contracting, that producers cannot waive the rights covered by this provision by any agreement, policy form, or condition of employment, including by a pre-dispute arbitration agreement.

AMS Response: With respect to the suggestion that AMS revise § 201.304(b)(2)(vii) to include notification by a producer to the regulated entity of a potential breach of contract, the regulation as proposed protects producers' right to assert their contract rights, their rights under 9 CFR 201, and their rights under the Act. The language of this protection necessarily encompasses the act of communicating with regulated entities, including to prevent a potential breach of contract; otherwise, a producer would be unable to exercise their contract rights. Accordingly, there is no need to add further notifications by the producer to the regulated entities to the list of protected activities in § 201.304(b)(2).

With respect to the assertion of any civil right, the protected activities enumerated in § 201.304(b)(2) were chosen because of their nexus to the business relationship between regulated entities and covered producers with respect to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry. To the extent that a contract between a regulated entity and a covered producer includes representations and warranties, including implied ones, relating to either party's compliance with other Federal or State laws, such as labor, health, and safety practices, this provision would extend to communications relating thereto. AMS notes that the protection afforded in § 201.304(b)(2)(vi) covers supporting or participating as a witness in any proceeding with the regulated entity. The rule does not change any additional protections that may be provided under other Federal or State anti-retaliation laws.

With respect to the request that AMS revise the rule to clarify that producers cannot waive rights covered by the rule, AMS believes that the commentors are mistaken about the structure of the Act and its regulations. AMS enforces this rule. Irrespective of any agreement between the contracting parties, AMS does not waive its responsibilities to enforce the Act. The Act and regulatory scheme are designed to vindicate the public interest in fair and honest markets. Thus, AMS regularly brings its own enforcement actions to sanction companies that violate the provisions of the Act, irrespective of the contracting parties' waivers of liability. A regulated entity that seeks a waiver from a producer through undue prejudice, retaliation or deception still violates the general provisions of the Act by using a deceptive, unfair, or unjustly discriminatory practice.

To the extent that individuals waive their rights, AMS points the commenter to existing regulations at 9 CFR 201.218, which limit the use of mandatory arbitration clauses, as mandated by Congress in the 2008 Farm Bill (Pub. L. 110–246). Specifically, those regulations require that the regulated entity offer the producer or grower a specific disclosure regarding the ability to decline a mandatory arbitration clause and indicate that failure to accept or decline the arbitration clause will be treated as if the clause is declined. Additionally, the regulation sets out criteria governing the reasonableness of the arbitration clause. Arbitration is a procedural forum that some parties may utilize to adjudicate substantive rights; arbitration clauses cannot waive substantive rights under contracts or the Act.

Accordingly, AMS is making no changes to the rule in response to these comments.

Comment: A swine industry trade association said the broad language of this provision could be read to mean that the proposed rule extends to the point that carrying out the terms of a contract is considered a protected activity.

AMS Response: AMS agrees with the comment. The assertion of rights under a contract includes the covered producer's ability to assert contract performance. Accordingly, AMS is making no changes to the rule in response to this comment. However, as the commenter notes, asserting rights under a contract is not a protected activity under the Act and it is not the intention of AMS to incorrectly assert this false presumption through this rulemaking.

c. Assertion of Right To Form or Join a Producer Association or Collectively Process, Prepare for Market, Handle, or Market Livestock or Poultry

AMS requested comment on whether assertion of the right to form or join a producer association or collectively process, prepare for market, handle, or market livestock or poultry is appropriate to include as a protected activity under § 201.304(b)(2).

Comment: An academic institution said the proposed rule should extend its protection of communications associated with asserting the rights named in proposed § 201.304(b)(2)(iii) to also cover producers engaging in talks about these activities. The commenter said this change would ensure that retaliation protections clearly include the initial communications and negotiation process for producers taking steps to form or join a producer association or collectively process, prepare for market, handle, or market livestock or poultry.

A whistleblower advocacy organization said it supported the

proposed rule's protection of the right to associate because retaliation would limit producers' ability to exchange information and engage in pro-competitive collaboration.

Multiple individuals said participation in producer organizations and associations helps provide farmers with more access to information relevant to their businesses and promotes competition by enabling the production of better-quality products. A former trade association CEO said the social and informational benefits of association membership are especially important in the farming industry because of its potential for isolation. This commenter further suggested large agricultural companies would do well to appreciate the benefits of producer participation in such organizations, such as opportunities to make progress on solving problems, develop industry consensuses for presenting to government, and hear the perspectives of members with opposing views. An individual said producer organizations often act as a barrier between individual producers and consumers, and the proposed rule would prevent producer organizations from retaliating against producers who try to change this behavior and provide truthful information about the conditions under which their products are grown or raised. The commenter said this would protect farmers' right to organize to improve their pay and working conditions.

AMS Response: AMS believes that the act of forming or joining an association clearly encompasses the act of communicating about the formation or joining, including examining the decision whether to form or join an association. All such activities are covered by the final rule. Therefore, AMS does not make any changes to the rule on those grounds.

Additionally, AMS appreciates that producer organizations may at times be at odds with their producer members. However, producer organizations are not considered regulated entities under this rulemaking, and thus retaliatory conduct at the hands of such organizations is not covered. Producers have the choice to join or separate from such organizations based on their individual feelings surrounding the costs and benefits such membership brings. If producers feel as though their membership of an organization is serving as a barrier between them and consumers, thus preventing transparency regarding growing conditions, producers may find it advantageous to disassociate. Often producers do not have this luxury in their relationship with packers and integrators due to their reliance on these regulated entities and the absence of alternative buyers due to regional concentration.

Comment: A swine industry trade association said § 201.304(b)(2)(iii) is overly broad, arguing that any covered producer that joins an industry association or seeks to do so would then have the means—based on that membership—to make a claim against a regulated entity for engaging in perceived retaliatory behavior.

AMS Response: AMS disagrees with the commenter's assertion. The regulation protects the covered producer from retaliation for forming or joining an association or choosing not to join an association. It does not protect the covered producer from other acts that the association may take. This rule does not condone, for example, associational behaviors that violate the Sherman Act. Nor does this rule otherwise restrict the relationship between regulated entities and covered producers, whether the association may support or condemn particular acts or practices. Nor, additionally, does it suggest that the mere fact of forming or joining an association garner absolute protection from adverse actions by the regulated entity which are unrelated to forming or joining an association. Therefore, AMS has made no changes to the regulation as proposed.

d. Communication or Cooperation for Purposes of Improving Production or Marketing of Livestock or Poultry

AMS requested comment on whether communication or cooperation for purposes of improving production or marketing of livestock or poultry is appropriate to include as a protected activity under § 201.304(b)(2).

Comment: A swine industry trade association said this provision is too broad because it could be read to mean that many communications related to a producer's business are protected.

AMS Response: AMS fully intends to protect many of the communications a producer makes in the ordinary course of business, so that the producer may freely operate in the market without fear of retaliation. Therefore, the regulation protects lawful communications and cannot, and does not seek to, absolve covered producers from unlawful communications. Section 201.304(b)(2) makes this clear by underscoring that the producers' activities are protected from retaliation only to the extent they are not otherwise in violation of Federal antitrust and other relevant laws. Furthermore, to find a violation of § 201.304(b)(2) there must be a causal connection between the regulated entity's behavior and a producer's protected communications, including where a regulated entity makes a threat that would reasonably dissuade the covered producer from engaging in the protected activity. AMS made no changes in response to this comment.

e. Supporting or Participating as a Witness in any Proceeding Under the Act or a Proceeding Relating to an Alleged Violation of Law by a Regulated Entity

AMS requested comment on whether supporting or participating as a witness in any proceeding under the Act or a proceeding relating to an alleged violation of law by a regulated entity is appropriate to include as a protected activity under § 201.304(b)(2).

Comment: An organization and several individuals indicated support for this protection, saying the ability to testify without fear of retaliation is crucial for promotion of fair and competitive livestock and poultry markets. Some of these commenters mentioned the example of cattle ranchers who declined to testify before Congress after facing threats and retaliation. The organization urged AMS to extend this protection to participation, assistance with, or intent to participate in any investigation of a possible violation of the Act.

AMS Response: The regulation already extends this far. The proposed regulation protected any communication with a governmental entity, including a governmental agency, legislature, or court, with respect to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry. This protection encompasses participation, assistance, or intent to participate in any investigation of a possible violation of the Act. AMS provided an additional protection with respect to serving as a witness because of the different and more public nature of such communication. Furthermore, to underscore the importance of respecting the independent functioning of the judicial process, the provision covers the covered producer's ability to serve as a witness in any proceeding against a regulated entity. AMS made no changes in response to this comment.

f. Other Comments on Appropriateness of Bases of Protected Activities

Comment: A number of commenters urged AMS to expand the list of protected activities. An agricultural and environmental organization said AMS should disavow the proposed rule's position that adverse activities not tied

to the proposed list of protected activities would not receive protection under the rule, arguing that retaliation of any kind against producers exercising their lawful rights qualifies as unjust discrimination and an unreasonable prejudice under the plain meaning of the Act. The commenter urged AMS to instead include the following catch-all provision to protect covered producers from retaliation against other lawful conduct in service of livestock production and marketing:

''(viii) A covered producer engages in any lawful conduct for the purpose of improving production or marketing of livestock or poultry.''

A farmers union said AMS should broaden the grievance-sharing activities producers can participate in to give producers more protection from retaliation.

An agricultural advocacy organization said AMS should protect the ability of producers to freely associate with other farmers and other organizations, including using social media or other communication platforms.

An agricultural and environmental organization said AMS should expand the list of protected activities to include situations in which producers maintain their status as independent participants on open markets, refusing to enter into forward contracts or other contractual agreements that set future price or performance at the regulated entity's request. According to the commenter, producers who resist entering into forward contracts and AMAs often face retaliation, and therefore the final rule should protect them. The commenter recommended AMS add another paragraph to § 201.304(b)(2) as follows:

(vii) A covered producer refuses to sell livestock or poultry through forward contracts, AMAs, or similar contractual arrangements, opting instead to engage in open market sales.

An organization said lawful communications protected under the proposed rule should also include situations where a complainant provides information regarding conduct that they reasonably believe violates the Act or is about to do so. The commenter said that, because most people are not experts on their rights under the Act, the proposed rule should establish that complainants do not need to mention specific violations and that, as with similar corporate anti-retaliation measures, they do not need more than a subjective, good faith belief that the conduct at issue violates the Act. The commenter also said AMS should allow these complaints in any language and by means including in person, in writing, and by email.

An academic institution said the protected activities listed in the proposed rule are all important in empowering producers to assert their rights and promote fair markets.

AMS Response: AMS appreciates and shares the commenters' viewpoint that retaliation is a serious concern in the livestock and poultry industry. AMS has attempted to craft this regulation to respond to the most common and clearly defined forms of retaliation in the form of prohibited unjust discrimination on the basis of protected activities. The regulation does not seek to define every prohibited activity, as the Act may limit unjust discrimination in circumstances not foreseen by this final rule. If covered producers believe they have suffered a form of unjust discrimination that is prohibited by the Act, they should report that to AMS.

AMS notes that communication with other producers for the purposes of improving the production or growing of livestock or poultry is already protected by the proposed regulation. Such communication may include sharing grievances over practices by regulated entities or others as such communications relates to covered producers' desire to overcome obstacles to improving or marketing their livestock or poultry.

AMS acknowledges a commenter's concern regarding some covered producers' interest in not utilizing forward contracting for the sale of livestock. However, regulating whether covered producers have a right to any particular form of livestock sales transaction is outside the scope of this rule.

AMS underscores that, to obtain the protection of this regulation, the producer need not engage in any particular form of the activity, such as quoting a precise regulatory section to assert an Act right. The focus will be on the substance of the producer's activities, and a good faith effort to assert an Act or contractual right is still protected from retaliation *on the basis of that assertion* regardless of the precision, imprecision, or even good faith inaccuracy of the legal or contractual right being asserted by the producer.

Accordingly, AMS did not make any changes in response to the comments.

vi. Limiting of Protected Activities Relating to Communication and Cooperation, Beyond Government Entities, to USDA Extension and USDA Supported Non-Profit Entities

AMS asked for input regarding whether protected activities related to communication and cooperation should be limited to USDA extension and USDA-supported non-profit entities, beyond government entities.

Comment: Several commenters supported expanded protections for activities related to communication and cooperation. An agricultural advocacy organization said AMS should not limit these protections to USDA extension and USDA supported non-profit entities because producers may have concerns about their industry that extend past the department's jurisdiction, giving examples such as concerns about managing animal waste that fall under State and Federal environmental regulations or issues relating to veterinary drugs or animal feed that are regulated by the Food and Drug Administration.

An academic or research institution and several organizations said, given the information asymmetry and lack of transparency in livestock and poultry production markets, AMS should extend protection to more types of communications that producers may want or need to pursue in preventing market exclusion and asserting their rights and protections. Commenters suggested AMS should protect producer social media posts about unfair integrator treatment, as well as producer communications with relevant third parties, such as lawyers and legal aid organizations, veterinarians and others doing work related to animal welfare, producer advocacy organizations, and the media.

Several commenters said AMS should introduce this provision in a new § 201.304(b)(2)(ii), with other commenters providing the following variations on recommended regulatory text:

(ii) A covered producer takes an action through a non-governmental third party that causes the producer's grievances against a regulated entity or a group of regulated entities to be known.

and

(ii) A covered producer communicates with a reporter, private investigator, public interest organization, or the general public through traditional media or social media with respect to any matters related to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry; so long as such communication does not expose a trade secret a regulated entity has reasonably and clearly identified in writing as a sensitive and confidential trade secret. A regulated entity's claim that any communicated information is a sensitive and confidential trade secret is not reasonable if the information is publicly available, shared by the regulated entity to any third party that is authorized to disseminate the information, or exposes standard industry practices common

among more than one regulated entity in the relevant market.

AMS Response: AMS takes note of the commenters' recommendations of expanded protections for activities related to communication and cooperation. AMS believes that the commentators' concerns are largely addressed in the rule, which protects 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, among other protected activities. The regulatory text provides broad coverage for these activities in § 201.304(b)(2)(iv) through (vi), without limitation. These communications are protected because they enhance producers' ability to receive protection under existing laws, improve the production process, and facilitate enforcement of contracts in ensuring producers receive their bargain for exchange. Communications unrelated to those purposes are outside the scope of this regulation.

Whether social media communications are covered will depend on the protected activity in question and the particulars of the social media forum in question. Whether a public post by a covered producer about treatment by a regulated entity that the covered producer asserts to be in violation of the Act or is otherwise harmful to the producer may depend on the facts and circumstances of the post. For example, to the extent that the producer is testifying to Congress or courts regarding unfair treatment and the social media post simply refers to the testimony or describes the same material, then, for example, such a post would likely be protected, depending on the full scope of the facts and circumstances.

Similarly, if the social media post is part of an effort to share information with other producers for the improvement of production or marketing or is part of an effort to form an association or engage in cooperative activities, that would likely be protected under this rule as well since the rule is agnostic as to the form of the communications between producers. However, AMS notes that the activities protected under this rule are covered to the extent that these activities are not otherwise prohibited by Federal, State, or Tribal law. For example, the rule does not provide an exemption from defamation laws.

Nor does this rule attempt to preempt freedoms of the press. Whether a communication with a reporter or public investigation organization is covered will depend upon the facts and circumstances. The inquiry would need to balance the important role that freedom of the press plays in maintaining market integrity with legitimate expectations by a regulated entity of good faith behavior by a producer under a contract. Relevant questions include whether the communication was part of a factual effort to assist the reporter in understanding and reporting on asserted violations of law and regulation and whether the producer provided any confidential business information to the investigator or otherwise exposed the regulated entity to commercial risk or reputational damage unrelated to the violation in question. Also potentially relevant, in some circumstances, may be whether the producer has exhausted other avenues for resolving any dispute and also the extent to which the regulated entity has a reputation recognized in the market for retaliation which would otherwise place the producer in fear of asserting rights even with the presence of this rule.

The rule does not provide unlimited license for producers to damage the reputation of regulated entities. A social media post principally functioning as a threatening or coercive public communication is unlikely to be covered, absent other extenuating facts and circumstances. AMS underscores that the rule is intended to facilitate lawful communication and the exercise of lawful economic rights by covered producers, and the promotion of competitive markets and markets with integrity. That goal is most effectively served by enabling producers to exercise contractual and legal freedoms, communicate with government, other producers, and competitor firms for the purposes set forth in this rule. Therefore, AMS makes no changes to the rule in response to these comments.

vii. Sufficiency of Proposed Anti-Retaliation Provision's Protection Regardless of Covered Producer's Type of Business Organization

AMS requested comment on whether the proposed anti-retaliation provision provides sufficient protection for all types of covered producer business organizations.

Comment: An agricultural advocacy organization indicated that this provision provides sufficient protection regardless of the covered producer's type of business organization.

AMS Response: AMS made no changes in response to this comment.

viii. Extension of Protections for Exploring a Business Relationship to Such Activities With any Person, Rather Than Solely Regulated Entities

AMS requested comments on whether protections for exploring a business relationship with a regulated entity are sufficient, or whether such protections should extend to exploring business relationships with any person, in addition to regulated entities.

Comment: Several organizations asked AMS to broaden these protections to include communications and negotiations with any entity for the purpose of exploring a business relationship or alternative business model. According to these commenters, producers may want to explore alternative uses for industry livestock or poultry-raising infrastructure or add an additional type of agriculture to their operation. Several commenters said that while they recognize that producers who transition outside of the industry would no longer be covered under the Act or subject to many of the retaliatory actions covered by the proposed rule, they believe extending this protection is necessary so producers can fully explore all potential business opportunities without worrying about punishment if they do decide to retain their current business relationship.

Several commenters recommended the following revisions to § 201.304(b)(2)(v):

> (v) A covered producer communicates or negotiates with a regulated entity, other commercial entity, or relevant consultant for the purpose of exploring a business relationship or alternative use or application of their property.

AMS Response: The purpose of the provision is to preserve and promote the competitive position of the covered producer, and as such to ensure that the covered producer is not discouraged from seeking competitive alternatives by a regulated entity's retaliation. Paragraph (b)(2)(v) protects a covered producer's ability to communicate, negotiate, or contract with a regulated entity, another covered producer, another commercial entity, or consultant, for the purposes of exploring or entering into a business relationship. The Act is intended to ensure maximal competitive flexibility for covered producers. It may be the case that producers wish to explore a business opportunity by communicating, negotiating, or contracting with a consultant about forming a cooperative or, with a commercial intermediary such as an exchange or auction, or with another covered producer or commercial entity that may not yet be

a regulated entity but intends to engage in meat or poultry processing. It may also be the case that producers wish to negotiate with other covered producers for the purpose of jointly investing in a business venture such as a slaughter facility. Accordingly, AMS has amended the regulation to indicate that the final rule provides protection for a covered producer who communicates, negotiates, or contracts with a regulated entity, another commercial entity, another covered producer, or a relevant consultant, for the purpose of exploring a business relationship. AMS concludes that a consultant either works to benefit another commercial entity or works to benefit the covered producer, and so would be covered by the provision.

ix. Include Catch-All Clause in Proposed List of Regulatory Actions To Cover Offering of Less Favorable Contract Terms

AMS requested comment on whether the proposed list of retaliatory actions should include a catch-all clause, such as ''offering contract terms that are less favorable than those generally or ordinarily offered.''

Comment: Several organizations indicated support for a catch-all provision. The commenters said they would be in favor of prohibiting the retaliatory offering of less favorable contract terms as AMS suggested in the preamble to the proposed rule. Commenters said this addition would recognize the importance of contracts as a retaliatory weapon because of their effect on producers' financial well-being and would avoid a potential loophole for the proposed rule's prohibition on retaliatory termination or non-renewal of contracts and refusals to deal. One commenter suggested that AMS include a new provision saying ''offering unfavorable contract terms that otherwise affect reprisal'' or ''offering contract terms that are less favorable than those generally or ordinarily offered'' is a prohibited action. However, several commenters recommended that AMS also introduce a second, broader catch-all provision to ensure that regulated entities cannot simply formulate new ways to retaliate against producers for engaging in protected activities. These commenters suggested that AMS add the following regulatory text to § 201.304(b)(3) to achieve both aims:

(v) Offering unfavorable contract terms in contract formation, contract modification, or contract renewal that affect reprisal.

(vi) Any other action that adversely impacts a covered producer's financial or reputational interests or may result in diminished contract performance with the regulated entity.

Unfavorable contract terms include, but are not limited to: 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.

AMS Response: AMS elected not to introduce a provision prohibiting the ''offering of contract terms that are less favorable than those generally or ordinarily offered'' to its list of prohibited retaliatory actions as requested by a commenter because retaliation is principally focused on protecting producers from adverse actions by regulated entities in which they already have establish or recurring contractual relationships. The list of adverse actions in paragraph (b)(3) was designed to provide examples of the most common forms of retaliation as discrimination addressed by this rule. However, the proposed rule was intended and drafted broadly so as to ensure producers can engage in protected activities at all times and with all regulated entities in the marketplace. As described in Section V—Changes from the Proposed Rule, the final rule provides more specificity. Yet the final rule would still protect a producer against adverse treatment by a regulated entity which may be seeking to chill those activities across the marketplace—such as forming a producer association or asserting rights under the Act with other regulated entities—through the clarification that other actions that a reasonable covered producers would find materially adverse.

Additionally, AMS accepts the commenters' critique that the proposed regulatory text was insufficiently specific to provide clarity regarding when regulated entities could and could not take adverse actions against covered producers. In particular, AMS is concerned that the proposed contours regarding refusals to deal and non-renewals offer regulated entities too great a latitude to engage in retaliation, because a regulated entity could, in theory, satisfy the proposed rule by simply offering highly unfavorable terms to the covered producer—which it could not do if the agency prohibited ''offering of contract terms that are less favorable than those generally or ordinarily offered.'' That is not, however, the intent of the regulation. Rather, it is to ensure that covered producers, in whatever circumstance they enjoy, do not suffer retaliation for effectuating their rights under the Act.

Accordingly, in the final rule, AMS has amended the provision to add several clarifying details. First, the final rule clarifies that requiring modifications or only offering to renew contracts on terms less favorable than those enjoyed by the covered producer is a violation where it occurs because the covered producer engaged in protected activities. This provision covers any adverse change to the covered producer's terms to provide maximum flexibility to the covered producer to exercise protected rights regardless of the particular circumstances. Second, the final rule clarifies that a refusal to deal with covered producers would be triggered where the regulated entity fails to offer terms generally or ordinarily offered to other similarly situated covered producers. This provision does not guarantee the covered producer the most favorable contract terms in the market, but simply those that the covered producer would generally or ordinarily offer to other similarly situated covered producers that had not engaged in protected activities, which could include the situation previously enjoyed by the covered producer prior to having engaged in the protected activity. Such a provision is necessary because covered producers may enter or exit the market at different times, and during that period may engage in protected activities for which a regulated entity may attempt to retaliate. Together, AMS believes that these modifications cover the most common circumstances that covered producers may encounter in their business dealings in which regulated entities may attempt to exact retaliation.

AMS is not including the level of detail sought by some commenters regarding the specific form of retaliation. This rule is intended to provide protections for adverse actions against a covered producer based upon the protected activity (including threats intended to chill engaging in that activity). Any inquiry should focus on those bases, rather than on the particular form of the discriminatory harm. AMS recognizes that unfavorable

contractual terms can cover a wide range of elements of a contractual relationship, such as prices, formulas, premiums or discounts, transportation provisions, delivery dates, duration, the required number of animals, arrangements such as financing, investment requirements or incentives, and other contractual specifications, among other terms and conditions. Such unfavorable terms may have direct financial impacts but may also have indirect financial impacts, such as reputational impacts which adversely affect the covered producer's ability to conduct business in the marketplace. Providing further detail in the regulatory text is not necessary to enforce the rule. It is not practical to name all the different ways a malicious actor could find to retaliate. The rule is intended to capture as fully as possible the difference between a serious contract offer and an offer that has the practical intent to retaliate.

Additionally, AMS confirms that when a regulated entity claims that modification or renewal of a contract on less favorable terms is common with similarly situated producers for reasons unrelated to any exercise of protected activities, AMS will not automatically consider the less favorable modification or renewal a violation of this particular rule. AMS will, however, review modification and renewal and will carefully examine the regulated entity's justifications. Even outside of retaliation, unilateral modification of existing contracts has been a violation of the Act. The Act considers it an unfair and deceptive practice to modify an existing contract to either extend the time for payment or reduce the full price agreed upon at delivery. Moreover, contract modification has been a deceptive practice where the terms offered publicly were privately disavowed.

x. Include Other Contract Terms That Could Affect Reprisal

AMS requested comment on whether other contract terms should be included as part of including a non-exhaustive list of contract terms that could affect reprisal.

Comment: An organization said AMS should provide examples of adverse actions that could constitute retaliation to help regulated entities comply with the Act. The commenter said that, for example, adverse actions for speaking out might include negative performance reviews; denial of bonuses; harassment or assault; reduced input quality; or increased scrutiny. The commenter said the proposed rule should cover adverse actions in contract terms such as impacts on price terms; formulas used for premiums or discounts related to grade or other characteristics of the animals or meat; duration of commitment to purchase or contract for the production of animals; transportation or delivery requirements; or terms related to companies' provision of inputs or services, grower compensation, or capital investment requirements under production contracts.

AMS Response: AMS recognizes that unfavorable contractual terms can cover a wide range of elements of a contractual relationship, such as prices, formulas, premiums or discounts, transportation provisions, delivery dates, duration, the required number of animals, arrangements such as financing, investment requirements or incentives, and other contractual specifications, among other terms and conditions. Such unfavorable terms may have direct financial impacts but may also have indirect financial impacts, such as reputational impacts which adversely affect the covered producer's ability to conduct business in the marketplace. In the final rule, AMS has added paragraph (b)(3)(iv) to address any other adverse action that a reasonable covered producer would find materially adverse. This is intended to focus on material harms to covered producers, including threats, based on the protected activities. However, AMS is not including the level of detail sought by some commenters regarding the specific forms of retaliation, because providing further detail in the regulatory text is not necessary to enforce the rule. There are too many possibilities to encompass every possible retaliatory action in a single rulemaking. The Agency prefers the general prohibitions because their simplicity reaches a broad array of unlawful retaliatory activities, including the ones the commenter raises.

xi. Specific Challenges or Burdens Regulated Entities Might Face in Complying With Anti-Retaliation Provisions of Proposed Rule

AMS requested comment on what challenges or burdens regulated entities may face in complying with the proposed rule's anti-retaliation provisions.

Comment: Multiple industry groups argued the retaliation provisions are overly broad and vague, leading to compliance uncertainties and the threat of litigation.

A cattle industry trade association said that AMS's decision to allow violations of the proposed rule's retaliation provisions without demonstrating harm to competition, along with ambiguous definitions letting a wide range of parties qualify as potential complainants, puts the cattle industry in danger of a huge wave of lawsuits that could thwart innovation. A swine industry trade association said the prohibited forms of retaliation listed in § 201.304(b)(3) include a broad range of activities that a regulated entity may have legitimate business reasons to carry out. According to the commenter, these prohibitions would restrict the rights of regulated entities to freely deal and require them to treat every producer the same, putting the proposed rule in conflict with the Act and with antitrust law. A poultry industry trade association and several live poultry dealers said that the list of activities that constitute retaliation is not exhaustive, so regulated entities have no way to know what activities they must avoid to comply with the rule.

AMS Response: In this final rule, AMS has made a number of changes, outlined above in Section V—Changes from the Proposed Rule, to provide additional clarity, specificity, and certainty to market participants. These include switching prohibited conduct in § 201.304(b)(3) from an exemplary list to a specific list of covered items. AMS rejects the general assertion that the provisions on retaliation are vague, ambiguous, or non-exhaustive. To the contrary, the final rule sets forth specific activities that are protected (§ 201.304(b)(2)) and specific conduct (§ 201.304(b)(3)) that would constitute retaliation if it were done because of the producer engaging the protected activities. As described above under Section V—Changes from the Proposed Rule, these included a range of further clarifications to the specific conduct. Notably, the inexhaustive list under paragraph (b)(3) has been refined, with paragraph (b)(3)(v) added to limit the list to any other adverse action that a *reasonable* covered producer would find *materially adverse.*

The activities protected by this final rule each constitute an exercise of basic freedoms necessary and essential to maintain a free and competitive market—freedoms such as exercising contractual and legal rights, seeking recourse through governmental channels, forming cooperatives or associations relating to the business of livestock and poultry, and being a witness in court. Most regulated entities assert that retaliation for engaging in these types of activities is not a common practice in the industry. AMS finds that factually questionable, given the level of complaints and concerns expressed by producers over the years, including

experience in response to producers' participation in hearings on competition by USDA and the DOJ in 2010. But to the extent that regulated entities stand by that position, then there should be little risk to regulated entities from litigation on the grounds of the activities protected in this rule. Regardless, AMS can identify no competitive benefits to adverse actions against covered producers for engaging in the activities protected by this final rule and can identify no genuine risks to contractual freedoms or ability to legitimately innovate from the activities protected by this final rule.

AMS has further responded to the question of the costs and risks of litigation below.

Comment: A swine industry trade association said that the retaliation provisions provide no guidance on legitimate business reasons to engage in the activities deemed as retaliatory conduct or on whose shoulders the burden of proving that a regulated entity's conduct was ''because of'' the producer's activity rather than based on a legitimate reason. A poultry industry trade association and several live poultry dealers said the proposed rule also does not clarify how to establish that a live poultry dealer, and the specific employees involved in grower contracting, knew that a grower had engaged in one of the protected activities.

AMS Response: AMS has not identified any competitive benefits to adverse actions against covered producers for their having engaged in any of the protected activities set forth in this final rule. Accordingly, AMS has not provided any exemptions to the prohibition on retaliation against covered producers. If a regulated entity claims it has taken an adverse action against a covered producer for reasons unrelated to the producer's exercise of rights protected by this final rule, it becomes a factual question of proof. The agency has the burden of showing that the regulated entity violated the rule by taking covered adverse actions against a producer or grower wholly or in part because of the producer's or grower's exercise of a protected right under the rule. Any such determination will turn heavily on the particular facts and circumstances of any claim. This factual determination is not a question of whether a legitimate business reason existed to engage in the retaliation; rather it is a question of whether a violation occurred at all. In some cases, it may be possible that the regulated entity, including in the form of its agent interacting with the covered producer, is genuinely not aware of the protected activity by the covered producer (including not having constructive knowledge, being willfully blind, or grossly negligent in its affairs), the adverse action would not constitute a violation. AMS does not expect, and indeed does not encourage, the regulated entity to engage in any monitoring activities to attempt to make itself aware of when covered producers may be engaging in these activities. In fact, the purpose of the rule is the opposite, and were AMS to identify a regulated entity engaging in any such monitoring program, it would likely view such activities as being in violation of this regulation owing to their likely effect of intimidating producers.

Comment: A swine industry trade association said the proposed rule would allow producers who engage in common conduct, such as joining a cooperative or asserting their rights under a contract, to claim that a regulated entity engaged in retaliation by terminating a contract or giving differential treatment to a producer. A poultry industry trade association and several live poultry dealers said the retaliation provisions create a presumption that all grower protected activities are legitimate, which could open the door to strategically planned actions by poor performing growers designed to trigger these protections and would lead to especially severe risks if a grower has committed animal welfare violations.

AMS Response: AMS rejects the assertion that the rule would permit or encourage gaming by producers to avoid accountability for poor performance or violations of animal welfare guidelines. This final rule clearly specifies that the adverse action must be taken *based on* the producer participating in such protected activities. The mere coincidence, or correlation, between a producer joining an association or reporting to the government and then experiencing an adverse action is not enough for a violation. There must be evidence showing the adverse action taken by a regulated entity was in response to the producer engaging in a protected activity for a violation to be exist.

Additionally, AMS rejects the comment that the regulated entity would face a burden because it would not know which protected activities the producer has engaged in. The purpose of the rule is for the regulated entity to not adversely treat producers based on their participation in protected activities.

Comment: A poultry industry trade association and several live poultry dealers said the proposed rule also does not provide clarity regarding cooperative activity: live poultry dealers would still need to select which specific growers to contract with, choose where to place birds, and evaluate and approve housing and other grow-out specifications even if growers form cooperatives, but the proposed rule does not provide guidance on whether a regulated entity making these decisions might be considered to be engaging in retaliation.

AMS Response: A cooperative is a well understood legal status under the Co-Operative Marketing Associations (Capper-Volstead) Act of 1922 (Pub. L. 67–146) and protected by the Agricultural Fair Practice Act of 1967, which the proposed and final rule have both referenced. Generally, a cooperative is an organization established by individuals to provide themselves with goods and services or to produce and dispose of the products of their labor. The property of a cooperative, including the means of production and distribution, are typically owned in common. The final rule covers activities inherent in the planning and organization of a cooperative.

AMS also rejects the comment that live poultry dealers would still need to determine how to treat particular growers when dealing with a cooperative. Cooperatives are independent entities, and the live poultry dealer would enter in a contract with the cooperative as a whole, rather than with any individual grower. The terms of the general contract would govern the relationship between the live poultry dealer and the cooperative. Generally, a cooperative is an organization established by individuals to provide themselves with goods and services or to produce and dispose of the products of their labor. The property of a cooperative, including the means of production and distribution, are typically owned in common. This rule prohibits live poultry dealers from discrimination against a cooperative because it is a cooperative or from retaliating against producers for forming a cooperative. Because a cooperative is an entity, a regulated entity cannot assert that they are dealing with a cooperative but then limit the agreement to individuals.

Comment: A poultry industry trade association and several live poultry dealers urged AMS to introduce exceptions to the proposed rule's protection of information sharing activities under § 201.304(b)(2)(iv) and (v) that would cover confidential or proprietary information, saying that the

unauthorized release of confidential business information can harm businesses substantially and irreparably and therefore companies act legitimately in exercising their contractual rights to protect this information.

AMS Response: This rule will not create exceptions to existing laws governing the sharing of information between members of associations and cooperatives. Information sharing by associations remains governed by the Federal antitrust laws and other relevant laws. Certain conduct by cooperatives is exempt from the Federal antitrust laws. This rule does not change whether these activities are lawful and protected, or prohibited, under Federal law. AMS makes no changes in response to this comment.

xii. Other Comments on Retaliation

Comment: A whistleblower advocacy organization suggested several changes to expand the proposed rule's coverage. First, it recommended AMS extend the proposed rule's anti-retaliation protection to all natural or legal persons who provide information they reasonably believe is evidence of a violation of the Act or who refuse to take action they reasonably believe would violate the Act. According to the commenter, protected persons should include, but not be limited to, employees of meatpackers and integrators reporting violations of the Act; employees, contractors, and subcontractors of protected farmers or ranchers; and associates and relatives of protected persons or entities. Second, the commenter said that AMS should clarify language in the proposed rule stating that it does not protect farmers and ranchers acting in contravention of the Act from retaliation. According to the commenter, the final rule should exclude from protection only individuals acting without express or implied direction from the covered entity or its agent, and who deliberately and willfully cause a violation of any requirement relating to any violation or alleged violation under the Act. The commenter said this clarification would ensure that live poultry dealers cannot use this provision to attack farmers under broiler production contracts who engage in whistleblowing. According to this commenter, these contractors are subject to extreme corporate control that denies them the right to act under their own agency, so it would not be fair to exclude them from the protections against retaliation based on actions they could not control.

This commenter also said that, because farmers are often unfamiliar with protections that apply to their exposure of industry wrongdoing, USDA must make efforts to share information about producer rights and company responsibilities at the beginning of the contractual relationship as well as throughout the engagement. The commenter suggested that AMS host educational programming about rights under the Act and develop language-appropriate educational material. The commenter urged USDA and DOJ to continue to offer anonymous protected disclosures through their joint portal and be transparent about subsequent regulatory and enforcement activity, saying most producers prefer to make reports anonymously or through another party to avoid retaliation.

AMS Response: In this rule, AMS is principally focused on providing robust protections for covered producers participating in the market. Accordingly, AMS has not amended the regulatory text to extend the rule's coverage to all natural or legal persons who provide information regarding perceived violations of the Act or who refuse to take action they believe would violate the Act. AMS has, however, revised the regulatory text of § 201.304(b)(2)(i) to extend the coverage from a covered producer's communication ''with a government agency'' to communication ''with a government entity or official'' and from ''petitions for redress of grievances before a court, legislature, or government agency'' to ''petitioning a government entity or official for redress of grievances.'' AMS believes that this change ensures that protected communications may occur with any of the three branches of the Federal government and with individual government officials, including committees or members of a legislature. The regulation applies equally to communications with all levels of government—Federal, State, and local—with respect to the matters indicated.

Furthermore, AMS is sympathetic to and broadly in agreement with the commenter's perspective that covered producers should not be required to understand the precise contours of the Act to exert their protected activity rights, and that they should be enjoyed heightened protection when acting at the express or implied direction of a regulated entity. Regulated entities have no motive to purposefully induce producers to commit unlawful acts. If a regulated entity induces criminal activity, irrespective of retaliation, this inducement may be deceptive within the meaning of the Act.

AMS appreciates the commenter's advocacy regarding the need for continuing USDA-sponsored education regarding producer rights and company responsibilities under the Act. AMS is taking steps to increase producer education and outreach, including, for example, establishing the *farmerfairness.gov* portal to facilitate ease of access for submitting complaints. AMS intends to expand education and outreach regarding this rule and other regulatory requirements.

F. Recordkeeping (§ 201.304(c))

AMS proposed a recordkeeping requirement that records related to compliance with this rule be kept for a period of five years from the date of record creation. These records include 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 nature of complaints received relevant to prejudice and retaliation. AMS stated the purpose of this proposal was to reduce the threat of retaliation and to enhance AMS's ability to investigate and secure enforcement against undue prejudice and unjust discrimination.

i. Appropriateness of Proposed Regulation's Recordkeeping Obligations To Permit AMS To Monitor Regulated Entities for Compliance

AMS requested comment on whether the proposed recordkeeping obligations were appropriate to allow AMS to monitor regulated entities for compliance.

Comment: A group of State attorneys general and several organizations generally supported the proposed recordkeeping obligations in order to enhance compliance by regulated entities and enhance AMS's ability to monitor them for discriminatory treatment.

Other commenters supported the proposed recordkeeping requirements, but suggested AMS should require regulated entities to maintain additional specific records. A cattle industry trade association said AMS should require retention of any records that include specific terms (including prices paid) of purchase agreements or contracts, as well as any methodologies used to calculate premiums or discounts paid to producers. This commenter argued that such records would enable AMS to evaluate differential treatment. An agricultural advocacy organization made a similar suggestion for regulated entities to maintain income/payment formulas and pre-contract discussions with producers as part of their recordkeeping obligations.

AMS Response: AMS takes note of the commenters' support for the usefulness of the provisions. With respect to the request that AMS revise the rule to identify specific records that regulated entities must retain, AMS notes that the regulation as proposed provides flexibility for a regulated entity to retain any records relevant to its compliance with § 201.304(c), including records not specifically referenced in the regulation. Under sec. 401 of the Act, regulated entities are already required to maintain the accounts, records, and memoranda necessary to fully and correctly disclose all transactions involved in their business. USDA's implementing regulations can be found at 9 CFR 201.94, 201.95, and 203.4. Existing regulations under part 201 require regulated entities to give the Secretary ''any information concerning the business . . .'' (§ 201.94) and provide authorized representatives of the Secretary access to their place of business to examine records pertaining to the business (§ 201.95). Section 203.4 regulates the types of records that must be kept by regulated entities and the timelines for disposal of these records. As part of its enforcement capabilities under sec. 401 of the Act, AMS can inspect the records of regulated entities to review detailed information related to purchases and ensure that regulated entities are in compliance. Because these records are already required under existing law, AMS made no further changes in response to the comments.

Comment: A poultry industry trade association argued that the proposed recordkeeping regulation—as written—is not appropriate because it is vague and does not make clear that it only requires integrators to maintain records relevant to proposed § 201.304(a) and (b). The trade association contended that the rule should make explicit that, if a regulated entity does not maintain records relevant to those respective proposals, no recordkeeping is required. The commenter also recommended exempting privileged communications or attorney work product from the recordkeeping requirement.

AMS Response: AMS disagrees with the commenter's view that the regulation as proposed does not make clear that regulated entities are only required to maintain records relevant to proposed § 201.304(a) and (b): the regulation as proposed specifically stated that a regulated entity ''shall retain all records relevant to its compliance with paragraphs (a) and (b) of this section.'' Further, AMS does not believe it necessary to specify that certain records do not need to be retained if they are irrelevant because the regulatory text states explicitly that the recordkeeping requirement applies only to records relevant to a regulated entity's compliance with this section. Under the Act and existing PSD regulations, regulated entities are required to keep records pertaining to their business. To comply with the proposed regulation, a regulated entity must retain all records relevant to its compliance with § 201.304(a) and (b) for no less than five years from the date of record creation. Lastly, AMS does not believe that adding an exemption for privileged communication, such as attorney work product, is necessary because attorney work product is already protected from disclosure under current law. Therefore, AMS makes no changes to the rule in response to this comment.

ii. Requirements for Regulated Entities To Produce and Maintain Specific Policies, Compliance Practices, or Disclosures To Help Ensure Compliance With Undue Prejudice and Anti-Retaliation Provisions

AMS requested comment on whether the proposal should require regulated entities to produce and maintain their specific policies and procedures, compliance practices or certifications, or disclosures to ensure compliance with the undue prejudices and provisions and anti-retaliation provisions in the proposed rule.

Comment: Several commenters expressed concern that the proposed recordkeeping requirement would not be sufficient to ensure compliance. One organization argued that AMS should require regulated entities to proactively identify and record the basis of differential treatment (*e.g.,* differences in prices paid) among producers. An academic or research institution concurred, suggesting that any differential treatment in price or contract terms should be justified by regulated entities in their records.

An agricultural and environmental organization proposed regulated entities should be subject to an Annual Compliance Report to AMS that requires a detailed list of all their transactions. This list would include, specifically: (1) an anonymized list of producers the regulated entity did business with; (2) terms offered to producer during contract negotiations; (3) terms entered with producer and whether these terms differ with similarly situated producers; (4) prices paid to producers and methodology for the price; (5) whether AMAs were used; and 6) accounts of all instances of the regulated entity's refusal to deal with a producer and justification for the refusal. The commenter argued that it will be difficult for producers or AMS to prove violations of proposed § 201.304(a) without these detailed disclosures.

An agricultural advocacy organization proposed requiring regulated entities to report to AMS the contract terms and payments made to producers, as well as producer demographic information necessary to determine which producers are market vulnerable individuals. The commenter argued this was necessary to put the burden of enforcement of the new rule on AMS and regulated entities rather than covered producers. This commenter also suggested requiring regulated entities to use a uniform recordkeeping system that tracks and reports ''relevant data'' to allow AMS to monitor for potential differential treatment or discrimination. This commenter likened the proposed system to the Home Mortgage Disclosure Act, which allows regulators to use data from regulated entities to ensure compliance with fair housing laws.

AMS Response: AMS is making no changes to the rule as proposed based on this comment. AMS believes that the regulation as proposed permits flexibility for regulated entities to determine which records best demonstrate compliance with § 201.304. Such an approach is appropriate, given that this rule regulates the poultry, cattle, and swine industries, and that regulated entities vary in size and in the nature of their business operations. Regulated entities may have an existing recordkeeping system in place that is suited to their industry, size, or business operation. The proposed regulation's flexibility regarding the types of records that must be kept will ensure that the array of regulated entities covered by this rule can choose the method of compliance most relevant to their circumstances; the proposed regulation's specification that a regulated entity must retain all records relevant to their compliance with § 201.304(a) and (b) will aid in PSD's enforcement of paragraphs (a) and (b). As noted above, under sec. 401 of the Act, AMS is authorized to conduct compliance inspections, which may include examination of information related to differences in purchases and prices. AMS also has the power under sec. 6 of the FTC Act to require reports from corporations on a case-by-case basis. The additional reporting requirements suggested by commenters are outside the scope of this rulemaking, but AMS reserves the right to consider those approaches in future rulemakings.

Comment: A poultry industry trade association and several live poultry dealers said AMS should identify

specific records that need to be kept or generated, arguing that without specific guidance regulated entities will be left guessing which records are relevant to its compliance obligations.

AMS Response: As noted in the response above, this rule regulates a wide array of entities. Regulated entities may have an existing recordkeeping system in place that is suited to their industry, size, or business operation. Also as noted above, existing regulations and the Act require regulated entities to keep records of their business operations, subject to AMS compliance investigations. The regulation as proposed provides the flexibility for regulated entities to keep the types of records they deem appropriate to demonstrate their compliance with § 201.304, rather than requiring all regulated entities to keep the same set of records that may not be relevant to how they run their businesses. Paragraph (c)(2) provides a non-exhaustive list of examples of the types of records that may be relevant for a regulated entity to demonstrate compliance with § 201.304(a) and (b). AMS is making no changes to the rule as proposed based on this comment.

iii. Specific Challenges or Burdens Regulated Entities Might Face in Complying With Recordkeeping Duties of Proposed Rule

AMS sought comment on what specific challenges regulated entities may face in complying with the recordkeeping duties of the proposed rule.

Comment: A poultry industry trade association and several live poultry dealers said that the proposed recordkeeping rule was overly broad, such that regulated entities would need to document and maintain every document related to interactions with producers (such as emails, visits, or notes from calls or meetings). The commenters raised concerns that this obligation would impose an overwhelming administrative burden and exorbitant compliance costs on regulated entities, which would be compounded by the 5-year record maintenance requirement. They suggested reducing the requirement period to two years. An agricultural association shared these concerns, in particular around the possibility that communications with any person about potentially entering into a contract may be deemed relevant under the rule and that, as such communications could be directed at any employee, a regulated entity could have to maintain records of all communications with its employees for a period of five years. This commenter said, if USDA interprets the recordkeeping requirements in this broad manner, would impose a particular burden on smaller entities subject to the recordkeeping requirement since these entities lack the administrative or IT infrastructure necessary to comply. A legal foundation also posited that the recordkeeping proposal would impose significant costs on regulated entities and—to reduce their burden—urged AMS to impose a warrant requirement before requiring disclosure of records.

AMS Response: AMS is making no changes to the regulation as proposed. The recordkeeping requirement in this rule is not new. PSD currently has recordkeeping authority through the Act and its existing regulations, including sec. 401 of the Act, and 9 CFR 201.94, 201.95, and 203.4. Further, AMS subject matter experts—economists and supervisors with years of experience in AMS's PSD conducting inspections and compliance reviews—have estimated the recordkeeping costs associated with this rule to be relatively low. They have estimated that recordkeeping costs would be correlated with the size of the regulated entity, with the assumption that the hour burden would be highest for the largest entities. Therefore, at the highest end of the spectrum, AMS has estimated that annual recordkeeping compliance costs for the largest regulated entities would average of 4 hours of administrative assistant time and 1.5 hours of time each for managers, attorneys, and information technology staff in the first year. Thereafter, for the largest entities, annual recordkeeping compliance costs would average 3 hours per year of administrative assistant time, 1.5 hours per year of manager and attorney time, and 1.00 hour of time from information technology staff. As stated previously, AMS estimates that the hour burden would decrease proportionate to the size of the entity. AMS also notes that some firms might not have any records to store, while other firms may already store relevant records and may have no new costs associated with this rule. It also notes that the list of suggested records in § 201.304(c)(2) is illustrative and that regulated entities are not required to document and maintain all of these records. Therefore, AMS estimates that the compliance costs associated with this rule will be relatively low and, as these costs are likely to vary in proportion to the size of the regulated entity, smaller entities are unlikely to face particular burdens. The objective of the recordkeeping requirement is to support USDA monitoring efforts as well as to preserve the flexibility of allowing regulated entities to decide how best to comply with the rule. It is incumbent upon regulated entities to decide which records are relevant for rule compliance.

AMS is also declining to revise the regulation to limit the record retention requirement to two years. AMS believes that requiring that records be retained for five years from their creation date will enable the agency to monitor the evolution of compliance practices over time in this area and will ensure that records are available for what may be complex evidentiary cases. AMS will not be adding a warrant requirement to the rule at this time because the Agency already has jurisdiction under the Act to request documents concerning a regulated entity's business and therefore no warrant is required to do so under governing law.[194]

iv. Ways in Which Recordkeeping Duties Differ From Existing Policies, Procedures, and Practices of Regulated Entities

AMS requested comment on how the proposed recordkeeping duties may differ from the current policies, procedures, or practices of regulated entities.

Comment: A poultry industry trade association and several live poultry dealers argued that the proposal to include board of directors and other corporate governance materials as a matter of routine compliance with the Act is not typical of compliance records maintenance. The commenters suggested that these materials would not be helpful in demonstrating violations of the proposed rule, and their inclusion may be an attempt to create liability for executives or board members for everyday regulatory requirements.

AMS Response: AMS is making no changes to the rule as proposed based on this comment. The rule does not require regulated entities to maintain board of directors' materials. These materials are referenced in the rule as an example of the types of records that may be relevant for a regulated entity to demonstrate that it has complied with § 201.304(a) and (b). Therefore, regulated entities are not required to retain these materials. However, AMS notes that the conduct of executives and board members is a critical component in establishing a corporate culture of

[194] Section 201.94 of the regulations requires regulated entities to give the Secretary ''any information concerning the business . . .'' Section 201.95 of the regulations requires that regulated entities provide authorized representatives of the Secretary access to their plaice of business to examine records pertaining to the business.

compliance. As noted previously, a culture of compliance is a critical tool for preventing legal and regulatory violations and a first step toward more inclusive market practices.

G. Deceptive Practices (§ 201.306)

AMS proposed to prohibit regulated entities from participating in several types of deceptive practices with respect to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry. These relate to contract formation, performance, termination, and refusal.

i. Accuracy and Adequacy of Proposed Regulations in Identifying Recurrent Deceptive Practices in Livestock and Poultry Industries

AMS requested comment on whether the proposed regulations accurately and adequately identify recurrent deceptive practices in the livestock and poultry industries, as well as whether any areas of deception may be missing.

Comment: Commenters including a group of State attorneys general, several organizations, and an academic institution indicated support for the deceptive practices provisions, with one commenter saying the provisions would clarify the duties of regulated entities to engage in honesty and market integrity.

Two agricultural advocacy organizations recommended that, in addition to the four broad prohibitions on behavior enumerated under proposed § 201.306, AMS should provide a non-exhaustive list of prohibited conduct known to harm producers, saying this measure would provide clear guardrails and foster quicker termination of abusive practices against producers. These commenters also said the deception provisions of the proposed rule fall well within AMS's authority under the Act, noting that Congress gave USDA broad powers under the Act with the intention of halting unfair trade practices against producers before producers suffer actual harm.

AMS Response: AMS is making no changes to the rule as proposed. AMS appreciates the views expressed by commenters but believes specifying the duties of regulated entities to engage honestly and itemizing prohibited deceptive practices adds unnecessary complexity. Firstly, specific guidance as to what constitutes deceptive practices can be taken from existing regulations in 9 CFR part 201, such as: §§ 201.49 and 201.71 (requiring honesty in weighing); § 201.53 (requiring honesty in representation of market conditions or prices); § 201.98 (requiring honesty in collection of fees); § 201.67 (prohibiting deception regarding the nature of packer and selling agency business relationships); and § 201.217 (requiring transparency regarding breach of contract determinations). Secondly, in the event deception occurs in ways actionable under sec. 202(a) of the Act, yet that violation is not specifically covered by this rule, AMS will look to the legislative history and case law of the Act to guide its handling of these matters. For example, obvious falsehoods, such as false weighing and false accounting have always been considered deceptive practices under sec. 202(a) of the Act. Therefore, AMS believes it is not necessary to itemize such practices in this particular section. Lastly, AMS underscores that this rule is intended to provide a broad array of coverage regarding the general circumstances that encourage the provision of false or misleading information. Facts and circumstances are unique to every case and may vary significantly; therefore, AMS has determined to retain the four broad prohibitions on behavior under § 201.306 as initially proposed.

Comment: A poultry industry trade association said all actions prohibited under proposed § 201.306 are already addressed in sec. 202(a) of the Act, which prohibits regulated entities from engaging in unfair, unjustly discriminatory, or deceptive practices or devices.

AMS Response: AMS is making no changes to the rule as proposed based on this comment. AMS agrees that the prohibitions established by this rule are well within the scope of sec. 202(a) of the Act. This rule is designed to help producers better understand what behavior constitutes a violation of sec. 202(a). Based on complaints and comments from stakeholders over the years, as well as in response to the proposed rule, AMS is aware that deceptive practices continue to harm producers and market integrity. Thus, AMS has determined it necessary to codify in its regulations deceptive practices prohibited under sec. 202(a) of the Act to better ensure that producers benefit from the protections intended by the passage of the Act.

ii. Specific Deceptive Practices

AMS proposed prohibiting regulated entities from:

- Making or modifying a contract by employing a pretext, a false or misleading statement, or an omission of a material fact necessary to make a statement not false or misleading (§ 201.306(b)).
- Performing under or enforcing a contract by employing a pretext, false or misleading statement, or omission of material fact necessary to make a statement not false or misleading (§ 201.306(c)).
- Terminating a contract or taking 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 (§ 201.306(d)).
- Providing false or misleading information to a covered producer or association of covered producers concerning a refusal to contract (§ 201.306(e)).

Comment: An agricultural advocacy organization suggested the final rule's explanatory text should clarify that deceptive practices related to contract formation also include the making of false or misleading statements to prospective producers on the benefits of a contractual relationship with a regulated entity. The commenter said that this clarification would, for example, better address circumstances such as representatives of live poultry dealers who make verbal claims to prospective growers about benefits not reflected in the actual contract the grower later receives to sign.

AMS Response: AMS is not making the specific changes to proposed § 201.306(b) requested in this comment but is making changes to this paragraph to clarify the range of deceptive conduct prohibited during contract formation. AMS agrees with the commenter regarding the harm of false statements in contract formation. AMS formulated § 201.306(b) specifically to address the making of false statements in contract formation. The revised regulation states that not only is a regulated entity prohibited from employing a ''false or misleading statement'' but it also may not omit ''material information necessary to make a statement not false or misleading.'' Therefore, AMS believes the regulation encompasses the protection against misleading statements requested by the commenter. AMS will address the specific circumstances raised by the commenter via other rulemakings.

Comment: An agricultural advocacy organization pointed out a potential discrepancy, saying the range of deceptive behavior in contract formation, performance, and termination covered in § 201.306(b) through (d) of the proposed rule as drafted appears narrower than that contemplated in the proposed rule's preamble. The commenter noted that the preamble said USDA generally approaches deceptive practices from the perspective of a reasonable party

receiving them and asks whether they would affect the conduct or decision of a reasonable recipient of these practices and asserts that the Act reaches beyond common-law fraud to affirmatively require honest dealing and truthfulness in the marketplace.[195] The commenter said that, if AMS intended the description in the preamble to encompass a broader range of deceptive behavior than that in the proposed rule's current language, it should broaden the language in § 201.306(b) through (d) of the proposed rule to prohibit any practices likely to mislead a covered producer, acting reasonably under the circumstances, to the producer's detriment.

AMS Response: There is not a contradiction or discrepancy between the preamble and the proposed regulation. The preamble discusses deception more generally, providing background on AMS's approach to implementing the prohibition on deceptive practices and its legal authority to do so under sec. 202(a) of the Act. The regulatory text is designed to provide example prohibited deceptions under the Act. It is not designed to enumerate every circumstance that may be a prohibited deceptive practice under the Act. There are circumstances where a deceptive practice could be covered under sec. 202(a)'s prohibition on deceptive practices even if that practice is not expressly addressed by this final rule. AMS chose not to provide an exhaustive coverage of every possible circumstance that could be a deceptive practice because such an effort would be unwieldly as a matter of rulemaking and likely offer little benefit to producers in terms of making the protections of the Act concrete and understandable. Such an effort would require such breadth of coverage and flexibility in application as to effectively replicate the interpretive process that is needed to analyze deceptive practices under the Act, which may vary significantly depending on the facts and circumstances of each case. In this rule, AMS has instead chosen to strike a balance, and is offering clear protection for a broad range of commonly encountered circumstances. AMS notes that the regulatory text in paragraphs (b) through (d) does include a prohibition on employing a ''false or misleading statement.'' Therefore, AMS is making no changes to the regulation as proposed.

Comment: Agricultural advocacy organizations urged AMS to expand and clarify the proposed rule's prohibition on deceptive conduct during contract refusal, saying regulated entities can use this tactic to manipulate producers, as they may do with contract termination. The commenters gave the example of a dominant buyer who only wants to purchase cattle from producers locked into AMAs, rather than those selling on a negotiated cash market, so it can pay lower than fair market value. If this buyer simply tells producers on the open cash market that it does not need their cattle, this statement may not necessarily be false or misleading, but it would be a pretextual justification for refusing to deal with them. A cattle industry trade association also urged AMS to ban the practice of refusing to buy a producer's cattle in the negotiated cash market unless the producer agrees to enter a forward contract, saying this practice is so widespread that it is common knowledge among cattle producers that packers who say they do not need their cattle are tacitly providing them with an ultimatum.

Several commenters recommended the following amended regulatory text, with changes in bold:

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

AMS Response: AMS has designed the prohibition on deceptive practices in refusal to contract differently than the prohibition for other circumstances because the relationship between a regulated entity and a covered producer differs in this circumstance. During contract formation, performance, or termination, there is a high degree of reliance by the covered producer on the regulated entity, owing to the existence of the contract. In a refusal-to-contract circumstance, however, the reliance is limited principally to the denial of the opportunity to transact. In general, regulated entities may refuse to contract with a covered producer for any reason or no reason at all, unless the reason is impermissible under the Act. This final rule's prohibition on deception seeks to ensure that any reasons provided by the regulated entity to the producer are truthful and not misleading. Failure to provide such truthfulness is deceptive because, given the high levels of vertical integration and horizonal concentration, producers lack marketing options and thus heavily depend on regulated entities for market integrity and, ultimately, the information needed to compete effectively. Producers are harmed when they cannot evaluate their competitive opportunities in an honest, objective manner. While the USDA Extension Service and other third parties may assist producers in appreciating their competitive strengths and weaknesses, ultimately the signals sent by packers are critical for competitive opportunities.

The final rule does not include ''pretext'' or ''omission of material fact necessary to make a statement not false or misleading'' in this refusal to contract provision because refusals to contract may occur for any number of reasons, and regulated entities may not always be in a position to reveal the reason for a refusal to contract. There may be economic, social, community, or even simply polite reasons for offering an incomplete, if not untruthful, reason for a refusal to contract. As long as a regulated entity is not providing false or misleading information to a covered producer or omitting material information, it will not run afoul of § 201.306(e).

AMS appreciates the commenter's concerns regarding the use of forward contracts. However, including a specific prohibition regarding this practice was not under consideration in the proposal. With this rulemaking, AMS is implementing regulations to provide a broad array of coverage against deceptive practices during various stages of the contracting process. Deceptive acts in contract refusal will be determined on a case-by-case basis based on the facts and circumstances of each individual case. In the example raised by the commenter, were a packer to refuse to purchase cattle in the cash market and state that its plant has acquired all the cattle it needs, the packer would not run afoul of the final rule if that statement was true. However, were the packer to make such a statement but would be willing—or attempt—to purchase the cattle under a different marketing arrangement, that would suggest that the information provided was false or misleading and the packer would run afoul of the final rule. If the cattle were of a quality or type that the packer does not want and the packer has already acquired all the cattle it needs for a given week, the packer could state that it is full without telling the covered producer its real reason for refusing to purchase cattle—again, as long as the statement provided is truthful.

Accordingly, AMS is not making any changes to the regulation as proposed in response to these comments.

iii. Recurrent Deceptive Practices Not Adequately Addressed by Proposed Regulations

AMS asked whether there were recurrent deceptive practices not

[195] 87 FR 60010, 60032, 60034, October 3, 2022.

adequately addressed by the proposed regulations.

Comment: Several organizations recommended AMS add the clause ''but is not limited to'' to § 201.306(a) to provide flexibility regarding other deceptive actions that may arise.

AMS Response: AMS is not adopting the recommendation. ''Not limited to'' language is unnecessary, as paragraphs (b) through (e) of this section are not stated as being exhaustive. This regulation is not designed to, and should not be read to, create an exclusive or exhaustive set of instances of deceptive practices. This rulemaking is intended to provide guidance to covered producers for how to effectuate their rights under the Act by implementing regulations that provide a broad array of coverage against deceptive practices during various stages of the contracting process. Future rulemaking or enforcement actions would not be restricted to the conduct identified in § 201.306 when dealing with deception, as the Act's coverage is broader than this final rule.

Comment: An agricultural advocacy organization recommended that AMS address common cattle contracting practices that enable regulated entities to consolidate their power, expand their profit margins, and shift their risks to producers, particularly those practices facilitated by increased use of AMAs. The commenter asserted AMAs, which are typically contracts for future delivery of cattle where the price paid at time of delivery is tied to a contemporaneous price such as that in the ''spot'' cash market for cattle, give packers ample opportunity to offload the risks of changes in the spot market onto producers by manipulating the prices they pay them at delivery. The commenter cited several ways in which the prevalence of AMAs shapes the market to packers' advantage. According to the commenter, animals under AMAs contribute, along with those directly owned by packers, to a large ''captive supply'' of cattle for packers, which gives these regulated entities substantial control over the cash price of beef. In addition, the commenter said lack of participation in spot markets means they provide less reliable price signals for AMAs, allowing packers to easily conduct limited spot market sales at low prices, in turn lowering the prices they pay producers at time of delivery.

The commenter argued that many of these packer practices relating to AMAs are deceptive because they can induce producers to enter into contracts in which they do not fully appreciate the extent to which packers control the applicable risks. At a minimum, the commenter urged AMS to clarify that the proposed rule's ban on deceptive practices extends to packer manipulation of spot market prices to lower the price paid to independent producers at time of delivery. The commenter also stressed that it would prefer AMS to introduce a comprehensive prohibition of deceptive practices associated with AMAs to avoid placing the burden of identifying manipulation on individual producers. Specifically, the commenter recommended that AMS require forward livestock contracts to include a firm and predictable base price, so packers have no room to manipulate prices, citing the recent Cargill case under which DOJ alleged that contracts executed by major poultry processor defendants under the tournament system violated the Act. The final judgment agreed to by the parties and entered by the Court requires that the defendant processors pay contract poultry growers a firm and predictable base price.[196] The commenter also suggested AMS consider banning packer-owned cattle as well as captive supply arrangements that use formula or basis price forward contracts.

AMS Response: AMS is aware that concerns exist around forward cattle contracts and AMAs, especially those linked to thin cash markets. AMS is not addressing in this rulemaking whether AMAs are inherently deceptive. Therefore, AMS will not include a blanket prohibition on such contracting in this rule.

Likewise, AMS has determined it will not add the commenter's suggested ban on packer-owned cattle and captive supply arrangements that use formula or basis price forward contracts. AMS believes more analysis is needed to ensure such intervention is appropriate.

Comment: An agricultural advocacy organization recommended that AMS add a provision to § 201.306 establishing a standard for contract completeness and providing that use of contracts that do not meet these minimum standards constitutes an unlawful deceptive practice under the Act. The commenter argued this measure would help producers operating in monopolistic regional markets, saying integrators often take advantage of the lack of buyer-side competition by unilaterally dictating base prices, providing deceptive earnings claims, offering incomplete and one-sided contracts leaving out key terms such as the number of flocks a poultry grower can expect to receive, and coercing producers into taking on additional debt to upgrade their facilities. The commenter recommended that the proposed rule specify that complete contracts include the expectation that contracts clearly state a minimum price or rate of pay for products or services rendered; a detailed disclosure of potential expected capital investments necessary for a continued contractual relationship; and a minimum commitment of contract years, annual animal placements, and stocking density sufficient for the producer to maintain any contractually expected debt payments at the minimum guaranteed price or payment rate. The commenter also suggested AMS clarify that it would be unlawful retaliation for an integrator to coerce, intimidate, or break contract with a producer based on the producer's unwillingness to implement integrator-desired upgrades not previously detailed in a complete contract, as long as the producer's infrastructure is legally compliant and in good working order.

AMS Response: AMS understands that in highly concentrated buyer markets, producers may have limited control over contract terms due to the limited availability of buyers; however, AMS will not be establishing minimum standards for contract completeness via this rulemaking. This rule is intended to address broad areas of specific concern, not exhaustively identify all deceptive practices that could violate sec. 202(a) of the Act. Deceptive acts in contracting will be determined on a case-by-case basis based on the facts and circumstances of each individual case. Similarly, AMS will not be amending the regulations prohibiting retaliation (§ 201.304(b)) to implement the commenter's specific circumstance regarding unwillingness to implement upgrades not previously detailed in a complete contract. This comment is outside the scope of this rulemaking and AMS is making no changes to the rule based on this comment.

Comment: Agricultural advocacy organizations asked AMS to include a new paragraph enumerating a non-exhaustive list of prohibited conduct, saying this addition would clarify that the Act explicitly prohibits certain conduct known to harm producers and market integrity. The commenters further said AMS should include any other specific types of harmful conduct producers currently face and stress that all other conduct known to harm producers or market integrity is prohibited even if not directly listed. The commenters provided the following

[196] *See* U.S. v Cargill Meat Solutions Corp., et al. at *https://www.justice.gov/d9/2023-11/418169.pdf.*

recommended regulatory text to incorporate these suggested changes:

(f) *Specific deceptive practices prohibited*.[197] In addition to any other conduct prohibited by subsections (b) through (e), a regulated entity may not engage in the following conduct during contract formation, performance, or termination or when refusing to contract:

(1) Demanding capital investments as a condition of contract renewal if such capital investment demands were not previously agreed to in writing between the covered producer and regulated entity.

(2) Demanding capital investments by a covered producer without commensurate and enforceable obligations on the part of the regulated entity that will reasonably allow the covered producer to recover the demanded capital costs plus a reasonable return.

(3) Refusing to deal because the livestock producer is selling livestock on the cash market rather than through a contract arrangement and the livestock is otherwise marketable.

(4) Failing to provide a guaranteed base pay in Alternative Marketing Agreements, production contracts, or other similar arrangements.

(5) Inequitably distributing inputs such as animal placements, feed, veterinary care, or other inputs controlled by a regulated entity that can impact a covered producers' performance or compensation.

(6) Shifting environmental compliance costs or responsibilities exclusively to a covered producer when the regulated entity exercises substantial operational control, through contract or otherwise, over the producer through an ownership interest in the livestock or poultry, land or other capital, or control of a covered producers' activities, inputs, management and waste management practices, or capital investments.

AMS Response: AMS is making no changes to the rule based on this comment. The commenters' proposed specific prohibitions are outside the scope of the deceptive practices AMS intended to address in this rule.

Comment: Agricultural advocacy organizations suggested AMS look to the poultry transparency proposed rule [198] and the advance notice of proposed rulemaking regarding fairness and related concerns in poultry grower tournament systems,[199] saying AMS should ensure that the deceptive practices identified in these rulemakings, such as unfounded claims about potential earnings made to prospective contract growers, lack of transparency in explaining tournament results, and inconsistent input quality, are also incorporated into this rule.

AMS Response: AMS is making no changes to the rule based on this comment. This final rule seeks to provide a broad set of protections for all producers. Other rules that AMS may propose or finalize, including rules relating to poultry grower ranking systems, are separate and distinct.

iv. Approach to Governance and Structuring of Deception and Employing False or Misleading Statements

AMS requested comment on whether deception in contract refusal should be governed by the categorial approach as proposed, or whether it should be governed by a single statement setting out one standard for contract formation, performance, and termination. It also requested comment on whether it should structure deception around prohibiting the deceptive pretext, statement, or omission, rather than prohibiting the contractual activity based on the deceptive statement or omission as proposed. In addition, it requested comment on whether the prohibitions on ''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, such as its material or relevance to the producer or the formation, operation, etc., of the contract. Alternatively, it asked whether it should prohibit a regulated entity 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 a contract. AMS also asked if there was a better way to approach the issue, such as using elements or defenses.

Comment: An agricultural advocacy organization said the categorical approach to governance in the rule as proposed is appropriate because itemizing the likely deceptive actions more effectively draws attention to the various deceptive actions potentially used by regulated entities. This commenter indicated that either approach to structuring would be effective but said the structure as proposed would better make current producers and prospective aware of the types of potential deception they may encounter. It also indicated support for the approach to employing of false or misleading statements, pretexts, or omissions AMS took in the proposed rule.

AMS Response: AMS takes note of the commenter's support for the usefulness of the provisions. AMS made no changes to the rule in response to this comment; however, as discussed in Section V—Changes from the Proposed Rule, AMS made several changes to the verbiage of § 201.306(b) through (d), including removing the word ''pretext'' and replacing the phrase ''omission of material fact'' with ''omission of material information.''

v. Other Elements To Explicitly Consider in Rule on Deception

AMS requested comment on whether there are other elements, such as the reasonableness of the recipient, that it should explicitly consider in a rule on deception.

Comment: An agricultural advocacy organization said AMS should consider whether the contract language was clear and written in a language the producer understands when evaluating if a regulated entity used deceptive practices. The commenter also said the proposed rule on transparency in tournament systems addressed disclosure-related issues that AMS should consider in establishing when contract terms should be considered deceptive.

AMS Response: Whether the contract language was clear and written in a language the producer understands would be part of any evaluation to determine whether a statement (including any omission of material information) was false or misleading and that determination would be dependent on the particular facts and circumstances of the contract. This rule is intended to cover not only the poultry industry, but the swine and cattle industries. As such, it focuses on general circumstances that may give rise to the provision of false or misleading information. Therefore, AMS is making no changes to the rule based on this comment.

vi. Specific Challenges or Burdens Regulated Entities Might Face in Complying With Deceptive Practices Provisions of Proposed Rule

AMS requested comment on specific challenges or burdens regulated entities might face in complying with the deceptive practices provisions of the

[197] The commenters noted that, if AMS adopts this addition, it must also revise § 201.306(a) to include paragraph (f): ''A regulated entity may not engage in the specific deceptive practices prohibited in paragraphs (b) through (f) of this section.''

[198] Agricultural Marketing Service, ''Transparency in Poultry Grower Contracting and Tournaments,'' Proposed Rule (87 FR 34980, June 8, 2022), available at *https://www.federalregister.gov/documents/2022/06/08/2022-11997/transparency-in-poultry-grower-contracting-and-tournaments.*

[199] Agricultural Marketing Service, ''Poultry Growing Tournament Systems: Fairness and Related Concerns,'' Request for Comments (87 FR 34814, June 8, 2022), available at *https://www.federalregister.gov/documents/2022/06/08/2022-11998/poultry-growing-tournament-systems-fairness-and-related-concerns.*

proposed rule and how they differ from existing policies, procedures, and practices of regulated entities.

Comment: A poultry industry trade association and several live poultry dealers said the deceptive practices provisions of the proposed rule would discourage legitimate adverse actions by companies, making the system less efficient overall. First, the commenters said AMS does not provide guidance on how it defines ''pretext'' or how a regulated entity would demonstrate that an explanation is not pretextual, which raises uncertainties in terms of compliance and may dissuade companies from providing detailed explanations to producers to avoid the potential for second-guessing on motive. The commenters also said the proposed rule is unclear about whether regulated entities seeking to avoid a potential omission of material fact need to mention every business reason that contributed to a decision even if other factors were more relevant. In addition, the commenters said the proposed deception provision makes it more challenging to terminate relationships with contractors who perform poorly or mistreat animals, giving regulated entities incentive to keep these contracts in place rather than risk lawsuits over whether any communications leading up to the termination were deceptive and resulted in fewer opportunities for new entrants to the poultry industry.

A swine industry trade association said the deceptive practices provisions would likely lead to costly litigation because the rule is overly broad and vague in its description of prohibited conduct. For example, according to the commenter, the proposed rule does not provide any definition or guidance on what constitutes a ''material'' fact, which is deceptive if omitted, and its ban on deceptive practices with respect to ''any matter'' related to livestock, meats, or live poultry does not clearly establish the scope of conduct at issue. In addition, the commenter said much of § 201.306 is unnecessary because other laws already sufficiently restrict the conduct at issue.

AMS Response: Section 201.306 is designed to address deceptive practices in the marketplace by establishing four categories in the contracting process where deceptive practices commonly occur. The aim is to promote a marketplace that is free from the type of injury the Act was designed to prevent. Such a framework is necessarily broad, as the commenters noted, however, this framework is not intended to, and should not, cripple regulated entities' decision-making or the system overall.

AMS must help ensure that regulated entities are truthful in their dealings with producers. Under these rules, AMS would seek to uncover the real motive for a regulated entity's treatment of a producer with whom they are forming or have a contractual relationship. AMS is including a prohibition against false or misleading statements, or omission of material information necessary to make a statement not false or misleading (in paragraphs (b) through (d)) to protect producers from conduct that employs deceit to disguise a regulated entity's genuine motive. Over the years, producers have reported concerns regarding their inability to understand and appreciate the real reasons why regulated entities take certain actions against them, in particular with respect to certain actions such as reduced chick placement or contract termination. For example, producers have asserted that sometimes a regulated entity will suddenly enforce certain parts of a contract in a stricter manner—such as animal welfare guidelines—even though the regulated entity had earlier found the producer's conduct under the contract acceptable. Producers assert that this is an example of a form of retaliation for actions by the producer or a deceptive practice to accommodate unrelated economic decision-making. Producers need to understand the real reasons for regulated entities' decision-making both to protect themselves from specific inappropriate adverse actions (such as undue prejudice or retaliation) and to be able to compete more effectively in a concentrated marketplace. If they cannot learn the real reasons why certain actions are taken against them, they cannot plan or mitigate the risks they may face. Therefore, AMS believes it is crucial to establish a regulatory framework prohibiting deceptive practices in contracting. AMS believes such a framework should provide broad, non-exhaustive prohibitions to provide better coverage for producers against deceptive practices in various stages of the contracting process. AMS may refine this framework via future rulemakings if the need arises.

With respect to the commenters' view that AMS does not provide guidance on how it defines ''pretext'' or how a regulated entity would demonstrate that an explanation is not pretextual, AMS adopted clarifying language by withdrawing its use of ''pretext'' and relying on the prohibition against employing a ''false or misleading statement.''

With respect to the commenters' critiques regarding the materiality standard, under the FTC's Policy Statement on Deception, ''material'' refers to information that would affect a consumer's—in this case, producer's—conduct or decision-making, from the perspective of a producer acting reasonably under the circumstances. Act precedent may not require AMS to follow FTC's precedent in all circumstances, but AMS has designed the rule to satisfy the approach set forth in the FTC Policy Statement on Deception in this set of deceptive practice prohibitions. AMS is not seeking to establish a ''but for'' standard; however, the materiality of the information is already embedded in the regulated entity's act of ''employing'' the omission on which the covered producer has relied on in the contracting activity under § 201.306. Commenters also expressed concern about § 201.306's prohibition against the omission of material facts, questioning whether compliance would require that regulated entities mention every business reason that contributed to a decision even if other factors were more relevant. AMS notes that proposed § 201.306(b) through (d) specified that the prohibition applies to the ''omission of material fact necessary to make a statement not false or misleading.'' If one of the factors that contributed to a regulated entity's business decision was not material or relevant, then the omission of that information would be unlikely to make a statement false or misleading from the perspective of a producer acting reasonably under the circumstances. AMS therefore made no changes to the proposed regulations in response to this comment; however, AMS notes that as discussed in Section V—Changes from the Proposed Rule, AMS made several changes to the verbiage of § 201.306(b) through (d), including replacing the phrase ''omission of material fact'' with ''omission of material information.''

In response to commenters' concerns regarding the potential for increased litigation, AMS acknowledges that the provisions of § 201.306 could result in additional litigation because the regulations could provide producers new hope for relief from deceptive conduct in the contracting process. However, as discussed in more detail in this rule's Regulatory Impact Analysis in Section VIII.B., AMS does not expect large increases or decreases in litigation from this rule. Though commenters expressed concern that this regulation will lead to costly litigation because it is too broad and vague, AMS notes that in this final rule the Agency has provided additional clarity on the meaning of ''material'' in these

regulations and removed use of the word pretext. AMS also rejects the commenter's assertion that the rule is overly broad and vague in its ban on deceptive practices with respect to ''any matter'' related to livestock, meats, or live poultry because this assertion is inaccurate. This regulation does not ban any deceptive practice related livestock, meats, or live poultry: paragraph (a) establishes that the scope of § 201.306 is prohibiting deceptive practices that occur in specific stages of the contracting process. These stages are then delineated in paragraphs (b) through (e). AMS notes, however, that it has removed the words ''any matter'' from § 201.306(a).

With respect to the commenter's view that § 201.306 is unnecessary, AMS disagrees. AMS believes that, while USDA regulations prohibiting specific deceptive practices already exist, a regulatory framework prohibiting deception during the contracting process is necessary because this will provide much-needed certainty and predictability to the interpretation of this section of the Act.

vii. Specific Recordkeeping Provisions Relating to Deceptive Practices

AMS requested comment on whether it should propose specific recordkeeping provisions relating to deceptive practices and what such practices should include.

Comment: An agricultural advocacy organization recommended that AMS introduce a recordkeeping requirement related to deceptive practices to help it enforce these practices. Another agricultural advocacy organization suggested AMS require regulated entities to provide examples of contract terms as well as procedures related to tournament settlements and input quality, saying this requirement would help it identify deceptive practices.

AMS Response: In response to commenters' suggestions, AMS notes that regulated entities are already required to maintain records pertaining to their business activities (see 9 CFR 201.95). In light of existing law, a specific recordkeeping requirement covering every statement or interaction that could amount to deception is not appropriate as it could be expensive and burdensome, while yielding little benefit in terms of usable, searchable information. AMS will monitor regulated entities' practices to evaluate whether additional requirements are necessary. AMS further notes that should specific problems emerge, heightened recordkeeping could be a requirement arising out of enforcement actions or adopted in future rulemaking.

AMS is not adopting the commenter's suggestion regarding examples of contract terms and procedures related to tournament settlements and input quality because they are outside the scope of this rule. AMS made no further changes in response to the comments.

viii. Requirement That All Contracts be in Writing

AMS requested comment on whether all contracts with respect to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry should be in writing.

Comment: Agricultural advocacy organizations said AMS should require all contracts to be in writing because doing so is necessary for enforcing the Act. These commenters said AMS should also require regulated entities to make all claims to prospective producers in writing to deter false or misleading statements designed to encourage signing of a contract.

A plant worker indicated support for requiring all contracts to be in writing, while noting that some benefits would be limited. According to the commenter, introducing this type of requirement would help producers by providing a record of the transaction and an increase in transparency. However, the commenter also said such a requirement would be less likely to address packer pressure on producers to use formula market arrangements to incentivize cattle quality if the packers present these arrangements as take-it-or-leave-it offers, although it would at least help create an environment that is transparent about material terms. The commenter also said that many jurisdictions may already require contracts to be in writing to satisfy the statute of frauds, especially if they cover multiple years, thus making a provision requiring written contracts potentially redundant in some cases.

AMS Response: AMS appreciates the commenters' views on the value of written contracts and agrees that written contracts have significant benefits for reducing deceptive practices and encouraging market integrity. Written contracts provide both parties clearer understanding of their positions and the opportunity for regulators to review and evaluate the functioning of the market. However, AMS also recognizes that it is a longstanding trade practice in the agricultural sector for many parties to negotiate and assent to contract terms orally, which holds the same weight under the law as a written contract. USDA has pursued many cases based on the violation of unwritten terms, and this will not change. Requiring that all contracts be in writing would more significantly affect cattle markets, as more of those markets remain cash-negotiated. Contract formation regarding the purchase and sale of livestock often occurs over the phone and quickly. Requiring written contracts would impede the ability of parties to conduct business expeditiously, which is often necessary in fluctuating commodity markets, especially for perishable products like meat. Vertically integrated contract growing arrangements, which are nearly universal in poultry and widespread in hogs, are more characterized by written contracts already. In this rule, AMS is choosing not to adopt a requirement for written contracts or claims in all circumstances. While AMS believes that written contracts are a good practice, especially in light of changes in technology (like email and electronic signatures), AMS believes additional study and consideration is needed and is deferring for future consideration whether a mandate is appropriate.

ix. Treatment of Failure To Continue To Buy in Cash Market Following Regular Pattern or Practice of Such Buying

AMS requested comment on whether a failure to continue to buy in the cash market, following a regular or dependable pattern or practice of such buying, should be treated for the purposes of this proposed rule as more similar to termination of a contract, rather than as refusal to deal.

Comment: An agricultural advocacy organization said it agreed with AMS that a decision or action on the part of a regulated entity to stop buying on the cash market is more analogous to a contract termination than a refusal to deal but notes that these decisions or actions also share key features with the latter. The commenter provided the example of a packer who refuses to buy cattle in the cash market from a covered producer who regularly sells on the cash market unless the producer agrees to enter a forward contract with a packer; this act would constitute both refusal to deal and termination of a contract, and would also be a form of prohibited retaliation.

AMS Response: AMS agrees that a circumstance where a packer refuses to buy cattle in the cash market from a covered producer who regularly sells on the cash market to the regulated entity is analogous to a contract termination, as past court decisions have recognized a remedial duty under the Act to a make purchases in certain circumstances.[200]

[200] *Swift & Co.* v. *United States,* 393 F.2d 247, 253 (7th Cir. 1968).

AMS did not make any revisions to § 201.306 in response to this comment; however, AMS is clarifying in § 201.304(b)(3)(iv) of this final rule that refusing to deal with a covered producer refers to refusing to deal on terms generally or ordinarily offered to similarly situated covered producers, which would include the producer's prior status quo. This would address the case where a producer has a prior track record of regular sales to the packer but is cut off. AMS also added § 201.304(b)(3)(vi) to further clarify that harm to a producer on the basis of protected activities is intended broadly to capture materially adverse retaliatory action that a packer may take against a producer.

H. Severability (§ 201.390)

AMS proposed adding a new provision to 9 CFR part 201 of the Packers and Stockyards regulations ensuring that if any provision—or applicability of any provision—of subpart O was declared invalid, the validity of the other provisions of subpart O would be unaffected. AMS noted this is to provide a reviewing court some guidance on the Agency's position on how the rule is intended to function.

Comment: An agricultural advocacy organization indicated support for the severability provision, saying that, in the event of successful court challenges to specific provisions of the proposed rule, it would help ensure that the protections in the rest of the rule remain.

AMS Response: AMS agrees that a severability clause is appropriate because the undue prejudice, retaliation, and deception sections of this rule can be enforced as stand-alone provisions. They are not interdependent, therefore the exclusion of one does not disqualify any of the others. For this reason, as discussed in more detail in Section VI.F—Provisions of the Final Rule, Severability, AMS has included under § 201.390 a severability clause in its final rule.

I. Effective and Compliance Dates

Comment: An industry company said AMS should consider what amount of time is necessary to implement changes resulting from its new rules, and recommended it provide one effective date for all regulatory changes required by updates to the Act.

AMS Response: AMS agrees with commenters that the final rule should provide a clear effective date for implementation. The AMS Act final rule ''Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act'' was published on December 11, 2020, and became effective on January 11, 2021, providing a 30-day period. AMS believes that this rule presents a similar scope of rulemaking coverage, relating to basic principles that regulated entities themselves have acknowledged they already comply with. However, in response to requests from commenters for additional time, AMS will give 60 days, which the Agency feels provides adequate time for regulated entities to become compliant with this rule given the low cost and minimal process changes required to do so. Accordingly, within 60 days of publication in the **Federal Register**, regulated entities are expected to comply with all components of new subpart O.

J. Regulatory Notices & Analysis & Executive Order Determinations

i. Costs and Benefits of Proposed Rule

Pursuant to the requirements of Executive Order 12866, AMS conducted a cost-benefit analysis of the proposed rulemaking by considering three regulatory alternatives: (1) maintaining the *status quo* and not implementing the proposed rulemaking, (2) issuing the proposed rulemaking, or (3) issuing the proposed rulemaking but exempting small businesses from compliance with the recordkeeping requirement.

a. Costs of Proposed Rule

Comment: Several live poultry dealers and trade associations took issue with the accuracy of cost estimates in the proposed rulemaking. A poultry industry trade association and several live poultry dealers contended that the Agency's first-year estimate of $504 per live poultry dealer to comply with the proposed rule is a drastic underestimate. They argued that the costs of physical filing cabinets to maintain the requisite paperwork alone would exceed the estimated first-year cost, and that recordkeeping and computer systems to digitally maintain records would be more costly. The commenters also contended that the AMS cost estimates overlooked significant labor costs that would be required to comply with the new rules, including legal services.

AMS Response: AMS disagrees with commenters' assertions regarding the accuracy of its cost estimates. AMS subject matter experts calculated the estimated compliance and recordkeeping costs associated with this rule. These experts are economists and supervisors in AMS's PSD with many years of experience conducting investigations and compliance reviews. AMS stands behind their estimates. AMS believes that the costs associated with this rule will be minimal: the first-year total cost is estimated to be $586,000, or 0.0002 percent of revenues, given that total sales of beef, pork, and broiler chicken was approximately $294.5 billion in 2022.[201] This figure encompasses an estimate of the total value of the time required to review and learn the rule, review live poultry dealers' and packers' procurement policies and production contracts, make any necessary changes to ensure compliance with the new regulations, and maintain records to demonstrate compliance practices. AMS estimates that the total cost for each succeeding year would be $298,000, or 0.0001 percent of revenues.

With respect to commenters' assertion that AMS has neglected to account for labor costs, including legal services, AMS notes that in the proposed rule's Paperwork Reduction Act analysis, AMS provided a compliance cost breakdown for the hours required of attorneys, as well as administrative assistants, managers, and information technology staff. AMS does not expect large increases or decreases in litigation costs, and thus regulated entity legal services. The clarity provided by the rule encourages regulated entities to proactively avoid prejudicial, discriminatory, and deceptive practices that could otherwise lead to costly litigation. Likewise, the rule could also provide producers hope for relief from the courts for perceived prejudicial, discriminatory, and deceptive practices, which could, in turn, increase litigation but would return benefits to producers in reduced harms. In response to commenters' concerns regarding the costliness of the rule's recordkeeping requirements, AMS argues that the recordkeeping requirements were crafted to provide flexibility for regulated entities. The rule does not prescribe the manner in which records must be stored. If a regulated entity finds the cost of filing cabinets prohibitive, the entity may choose whichever means of file retention is most cost effective, including currently available computer filing systems, which most companies maintain in the normal course of business. Additionally, the rule provides regulated entities leeway to determine which records they choose to maintain. Because this rule applies to regulated entities across a

[201] Total meat and poultry processing industry revenues. Source: *https://www.ibisworld.com/industry-statistics/market-size/meat-beef-poultry-processing-united-states/#:~:text=The%20market%20size%2C%20measured%20by,industry%20increased%200.2%25%20in%202022.*

variety of industries and of varying sizes, AMS did not prescribe a set of records each entity must retain, regardless of their relevance to a particular entity's circumstances. Some firms might not have any records to store. Others may already store relevant records and may have no new costs. Therefore, the rule saves regulated entities from the burden of maintaining records irrelevant to their circumstances.

Accordingly, AMS makes no changes to the rule in response to these comments.

Comment: Many industry companies and trade associations argued that the cost estimates put forward in the proposed rule ignore significant litigation costs that would be inevitable under the proposed regulations. A cattle industry trade association disagreed with AMS's cost analysis that the rule could plausibly reduce litigation costs ''if companies come into compliance without any enforcement action.'' The trade association argued that the rule contains vague standards and eliminates the requirement that a plaintiff must show competitive harm, both of which would lead to a proliferation of litigation. It asserted that the threat of litigation would cause packers to reduce their legal risk exposure by standardizing their contracts with producers, which could be costly for producers who benefit from contracts tailored to their individual needs or conditions (*e.g.,* cattle weight targets based on geographic location and regional feedstuffs availability). Finally, it noted that AMS itself acknowledged that GIPSA declined finalizing the agency's proposed rule in 2016—the Farmer Fair Practices Rule—because it contained ambiguous terms that would increase litigation between regulated entities and producers.

A live poultry dealer echoed this concern, citing USDA's acknowledgement in the previously proposed 2016 Farmer Fair Practice Rule that rolling back the harm to competition requirement would ''inevitably lead to more litigation in the livestock and poultry industries.'' [202] The dealer also said that if the proposed rule is implemented, the company would no longer have incentive to contract with individuals due to litigation risk and would need to rely more heavily on company-owned farms to raise its poultry. It argued that the result would be decreased grower competition and thus decreased grower pay, resulting in another unmeasured cost of the proposed rule.

An industry trade association suggested that millions of dollars per year would be required to litigate, define, and refine the terms of the new rule due to ambiguity. It said that frivolous litigation that misunderstands or capitalizes on vagueness in the rule would add significant litigation costs. The trade association estimated the cost of compliance with the new rule (including anticipated litigation) to be more than $100 million to the industry. It cited independent economic analyses of previous AMS rulemakings on similar topics that estimated economic impact costs exceeding $1 billion,[203] arguing that AMS significantly underestimates cost estimates in the new proposed rule.

AMS Response: Litigation is possible following the passage of any rule. The threat of such litigation does not preclude AMS from fulfilling its mandate to administer the Act. AMS believes that discriminatory, retaliatory, and deceptive practices only serve to exclude qualified producers from the market. Even if such conduct impacts a single producer, it can reasonably be inferred that, if unchecked, such conduct will proliferate and negatively impact other producers and the market. Therefore, it is the opinion of the Agency that such conduct must be stopped in its incipiency, or it will likely cause widespread harm.

In response to commenters' complaint that AMS has overlooked significant litigation costs that would be inevitable under the proposed regulations, AMS does not expect large increases or decreases in litigation costs. The clarity provided by the rule encourages regulated entities to proactively avoid prejudicial, discriminatory, and deceptive practices that could otherwise lead to costly litigation. This effect would lead to a decrease in litigation costs. Likewise, the rule could also provide producers hope for relief from the courts for perceived prejudicial, discriminatory, and deceptive practices, which could, in turn, increase litigation costs but would return benefits to producers in reduced harms. AMS is uncertain as to which effect will dominate and to what extent and, therefore, does not estimate litigation costs in this analysis.

With respect to the comments regarding compliance costs for the 2016 Farmer Fair Practice Rule, commentors discussed that a trade association estimated the cost of compliance with rule (including anticipated litigation) to be more than $100 million to the industry. A commentor also noted that an independent economic analyses of previous AMS rulemakings on similar topics that estimated economic impact costs exceeding $1 billion. The 2016 Farmer Fair Practice Rule was a very different proposed rule with a much wider scope than this final rule, and AMS does not consider a comparison of the 2016 Farmer Fair Practice Rule and this final rule to be an accurate comparison. The costs of this final rule are much smaller than the estimated costs of the 2016 Farmer Fair Practice Rule. GIPSA estimates the average litigation cost of the 2016 Farmer Fair Practice Rule to be less than $9 million in the first year. Given the scope of this final rule is smaller than the 2016 Farmer Fair Practice Rule, AMS expects litigation to be smaller. This, combined with the offsetting effects of the increases and decreases in litigation, leads AMS to not consider adding litigation costs to the rule.

The assertion that packers will be forced to standardize all contracts to ensure conformity with the rule is without basis. Standardizing contracts may be one way to ensure fair treatment of producers, however, this rule in no way mandates such a response from packers. Similarly, AMS disagrees with the assertion that fear of litigation would remove any incentive to contract with individual poultry growers. The aim of the rule is to discourage abuses of power in the marketplace to allow qualified producers to participate freely in the market and receive full value for their efforts. Reliance on individuals to raise poultry evolved as an economically advantageous way for integrators to bring poultry to the market. AMS does not believe that a greater focus on ensuring honest dealing and honest decision-making is incompatible with this model. Further, AMS disagrees with the assumption that a regulated entity would need to abstain from contracting with individuals to ensure that they are not abusing their market power by operating in prejudicial, retaliatory, or deceptive ways.

With respect to the comments regarding rules previously published by GIPSA, AMS notes that GIPSA's withdrawal of its 2016 rules was justified in part due to the rules' lack of clarity regarding prohibited behavior and the agency's perception that such ambiguity would increase litigation costs. This rule differs from the GIPSA rules by more clearly and specifically laying out the types of conduct that will

[202] *Org. for Competitive Mkts.* v. *Dep't of Agriculture,* 912 F.3d 455, 459 (8th Cir. 2018) (quoting 82 FR 48594, 48597 (Oct. 18, 2018)).

[203] Scope of §§ 202(a) and (b) of the Packers and Stockyards Act, 81 FR 92566, 92576, December 20, 2016 (discussing cost estimates prepared by Thomas Elam and Informa Economics).

be prohibited. Additionally, much has changed since the withdrawal of GIPSA's 2016 rules. In 2017, GIPSA merged with AMS. AMS now administers regulations under the Act and undertook this rulemaking to meet its statutory mandate. Also, in the years since the GIPSA rules were withdrawn, USDA has continued to receive complaints from producers regarding undue prejudice and unfair, unjustly discriminatory, and deceptive practices. When Congress, in April 2022, held hearings to discuss such concerns regarding the cattle and poultry markets, the hearings were marked by the absence of producers who chose to avoid public testimony for fear of retribution.[204] Meanwhile, the market remains highly concentrated and vertically integrated, which enables market power abuses and unjust distortions of the competitive landscape and makes any harms from them more significant. Smaller producers are unable to freely compete and receive fair value for their goods because in highly concentrated markets they often have no option but to do business with regulated entities which, in AMS's experience, have caused producers to experience unjust and adverse treatment. AMS has not been able to effectively address these complaints, partly because of the lack of clarity regarding its regulations under the Act and the ability for individuals to bring cases based on specific instances of harm. Therefore, it is now the Agency's belief that the potential costs of increased litigation are outweighed by the benefits to the market as a whole.

With respect to the ''vague standards'' giving rise to increased litigation specifically, AMS has taken note and addressed clarity in this rule.

Further, AMS will review the facts and circumstances of each case and the regulated entity's justifications for any alleged adverse treatment to determine whether the regulated entity has violated this rule. AMS is making no changes to the rule in response to these comments.

Comment: A plant worker argued that—given the modest cost estimates AMS provided for regulated entities to administratively comply with the recordkeeping requirements ($231–$485 for first-year costs and less in succeeding years) of proposed § 201.304(c)—consideration of the third regulatory alternative put forth by AMS was unnecessary. The commenter reasoned that because over 95 percent of packers reporting to AMS are small businesses, exempting such a large part of the industry would not be conducive to creating a uniform standard of recordkeeping and reducing deceptive practices across the industry.

AMS Response: AMS agrees with the commenter that the third regulatory alternative was not the best option. AMS opted to proceed under regulatory alternative two, the proposed alternative. AMS chose to publish its legal and economic analysis regarding the third alternative to provide better transparency to the public regarding the Agency's decision-making process. AMS is making no changes to the rule in response to this comment.

AMS chose final §§ 201.304 and 201.306 over the Small Business Exemption Alternative because AMS wishes to prevent the kind of undue prejudices and unjust discrimination described in the rule. AMS believes that keeping relevant records will help promote compliance with this rule, that all packers, live poultry dealers, and swine contractors cannot purchase livestock or enter into contracts for growing services with the kind of undue prejudices and unjust discrimination described in the rule. All packers, live poultry dealers, and swine contractors cannot purchase livestock or enter into contracts for growing services with the kind of undue prejudices and unjust discrimination described in the rule.

b. Other Comments on the Cost-Benefit Analysis

Comment: An agricultural advocacy organization contended that AMS should clarify the role of litigation costs in its cost-benefit analysis. It argued that litigation resulting from proposed rulemaking should not be treated purely as a cost, since (1) changes in behavior by regulated entities to reduce violations of the Act and (2) compensatory awards to market participants that suffer from violations of the Act both result in benefits that AMS should weigh in calculating the net costs of the proposed regulation. The association said that the Act relies in part on private litigation to keep livestock markets competitive, and while AMS is right to be cognizant of litigation costs by providing clear and unambiguous language to forestall unnecessary legal proceedings, litigation in general should not be treated solely as an ancillary cost without considering the benefits it confers.

AMS Response: AMS is making no changes to the rule in response to this comment. Rulemaking procedure regarding the calculation of costs and benefits requires the inclusion of specific costs. The benefits of litigation are harder to quantify, and thus were not specifically included in the proposed rule. However, AMS agrees with commenter that there are benefits of litigation in that producers will be better able to protect themselves from undue prejudice, retaliation, and deception, and thus that litigation does not result solely in negative costs. By adding private rights of action to the Act as recently as 1987, Congress has expressly recognized that private litigation, or the threat thereof, is a force that shapes conduct for the protection of producers. To the extent that the threat of private litigation pressures regulated entities into compliance and keeps their conduct fair, litigation risks can serve to ensure this rule's full potential is realized.

K. Comments on Legal Authority or Other Legal Issues

i. Statutory Authority Under the Act

Comment: Several live poultry dealers, an industry company, industry associations, a legal foundation, and an individual argued the proposed rule exceeds AMS's authority because it unlawfully seeks to transform the Act from an antitrust statute into a civil rights law despite Congress's clear intention to address the type of harm to producers covered by the proposed rule via other statutory schemes rather than under the auspices of the Act. They argued that, if these laws still do not cover certain types of mistreatment producers may face, the correct course of action is for Congress to revise these statutes or pass new ones, not for AMS to attempt to address them via the Act. For example, a cattle industry trade association noted that 42 U.S.C. 1981 already prohibits racial discrimination in private contracting in cases where the contractor cannot show harm to competition. The cattle industry trade association contended that, because Congress has never sought to expand the protections of section 1981 to other protected categories, AMS lacks authority to use the Act to effectively do

[204] *See* House Chair David Scott D–GA, Opening remarks, U.S. House, Committee on Agriculture, ''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. See also* 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* (Described fear of retaliation in livestock and poultry markets).

so in the absence of enabling legislation. This commenter also noted that multiple other USDA statutes explicitly refer to socially disadvantaged groups and socially disadvantaged farmers or ranchers, saying the lack of such references in the Act itself indicates that Congress did not intend for issues relating to exclusion or disadvantage of covered producers to fall within its scope. A swine industry trade association said proposed § 201.304(a) of the proposed rule covers conduct already prohibited by the Act itself as well as by other antitrust and anti-discrimination laws, such as the Civil Rights Act of 1964, the Agricultural Fair Practices act, and the Robinson-Patman Act. Industry trade associations and companies said other statutes such as the Agricultural Fair Practices Act, the Capper-Volstead Act, and laws protecting farmers from retaliation if they act as witnesses in a Federal investigation already prohibit retaliation against essentially all covered activities under proposed § 201.304(b).

AMS Response: Consistent with the Act, this rule protects inclusive competition and market integrity, and is designed to ensure that fair and competitive conditions prevail in livestock and poultry markets. While this rule may in some ways resemble certain civil rights laws, it is distinct as it draws its authority from the Act, which sets forth a general prohibition on unjust discrimination and undue prejudice that is broader than civil rights statutes that focus solely on discrimination on account of a protected status. AMS believes that discrimination on the basis of an individual's characteristics—in particular, the bases (as set forth in § 201.304(a)) of race, color, religion, national origin, sex (including sexual orientation and gender identity), disability, or marital status, or age, and the producer's status as a cooperative)—has no place in the market for livestock and poultry. Prejudices, disadvantages, inhibitions on market access, or otherwise adverse actions against covered producers on these bases must fundamentally be viewed as unjust forms of discrimination, lest the word *unjust* be unmoored from its plain meaning. Moreover, this rule addresses the unique and often difficult-to-prove discriminatory conduct that has long existed in the agricultural sector. Demographic information is seldom recorded in agricultural transactions; therefore, it is difficult to quantify discrimination. However, as the preamble set forth, agricultural markets are not representative of the population as a whole, for reasons in part arising from a well-established track record of unjust discrimination from USDA itself. Unjust discrimination on the bases set forth in this rule does not stem solely from USDA's actions, rather it was widespread across society. Discrimination and prejudice have not been eliminated from society, and heightened steps are appropriate to prevent unjust discrimination from coloring public or private decision-making. Such clarity is especially important in today's highly concentrated agricultural markets, with few minority participants, as the lack of competition means that failure of inclusion for all farmers gives rise to a competitive harm under the Act.

AMS recognizes that section 1981 of the Civil Rights Act establishes that certain rights are to be guaranteed, and these rights are to be protected against impairment by nongovernment and state discrimination. This rule addresses prohibited conduct specifically in the agricultural sector and is not superseded by section 1981. By expressly stating prohibited conduct that is violative of the Act, this rule seeks to allow AMS to better enforce the Act. AMS acknowledges that multiple USDA-administered statutes explicitly refer to socially disadvantaged groups and socially disadvantaged farmers or ranchers but underscores that AMS has replaced the definition of ''market vulnerable individual'' (which was more closely aligned with the formulations under those laws) with a simpler set of prohibited bases. And for the reasons described above, AMS's interpretation of the Act is faithful to its text and purposes. AMS notes that comments indicated that the Act in fact does prohibit the conduct set forth in this rule, in which case the rule will function to clarify and explicate already prohibited conduct.

AMS notes commenters' argument that § 201.304(a) covers similar conduct as the Civil Rights Act of 1964, the Agricultural Fair Practices Act (AFPA), and the Robinson-Patman Act. However, the fact that such conduct is prohibited under those statutes does not mean that it is not also prohibited by the P&S Act, which is broader in scope than other antitrust laws.[205] AMS believes it is appropriate to provide clarity regarding application of the Act because AMS has the authority to enforce the Act (and the AFPA), and not the Civil Rights Act of 1964 or the Robinson-Patman Act, with respect to livestock and poultry. The Act provides supplemental and parallel coverage to the AFPA, making its application appropriate and valuable to livestock producers and poultry growers who have, over the years, found it challenging to earn the full value of their animals in their dealings with packers and live poultry dealers.

Similarly, AMS disagrees with commenters' argument that § 201.304(b), which prohibits retaliation, is unnecessary because these protections are already afforded by the AFPA, the Capper-Volstead Act, and other laws which specifically protect farmers from retaliation for acting as a witness in a Federal investigation. USDA has continually received complaints from producers regarding retaliatory practices. Therefore, AMS concludes that promulgating these rules under the authority of the Act is necessary to address these concerns.

Therefore, AMS makes no changes to the rule as proposed in response to these comments.

Comment: A legal foundation and a cattle industry trade association claimed AMS's decision to broadly restrict discrimination against ''market vulnerable'' individuals exceeds its statutory authority. One commenter said this decision, and its likely result of leaving courts to flesh out the vague definition to determine whom the proposed rule should protect, is inconsistent with Congress's longstanding and repeated choices to ban discrimination using an approach based on protected classifications. Another commenter said AMS acts beyond its authority in proposing a broad definition of ''market vulnerable'' individuals because its goal in taking such an approach is to ensure that the rule can address prejudice based on categories such as sexual orientation or gender identity. According to the commenter, AMS cannot redefine the meaning of the key terms ''undue prejudice'' and ''unjust discrimination'' under the Act to include protections based on these categories because the Congress that enacted the Act in 1921 would not have contemplated such protections. The commenter further critiqued AMS's citation of *Bostock* v. *Clayton County*[206] to support its approach. According to the commenter, *Bostock,* which establishes that discriminating against an individual for being lesbian, gay, transgender, or

[205] H.R. Rep. 67–77, at 2 (1921); *see also Swift & Co.* v. *United States,* 308 F.2d 849, 853 (7th Cir. 1962) (''The legislative history showed Congress understood the sections of the [P&S Act] under consideration were broader in scope than antecedent legislation such as the Sherman Antitrust Act, sec. 2 of the Clayton Act, 15 U.S.C. 13, sec. 5 of the Federal Trade Commission Act, 15 U.S.C. 45 and sec. 3 of the Interstate Commerce Act, 49 U.S.C. 3.'').

[206] 140 S. Ct. 1731, 1741 (2020).

queer, constitutes discrimination on the basis of sex or gender prejudices, is in fact limited to an employment context and does not apply to contract arrangements.

AMS Response: AMS accepts the comment that it would be burdensome for the courts to flesh out the vague definition of ''market vulnerable individual'' to determine who the proposed rule should protect and that the approach is inconsistent with Congress's longstanding and repeated choices to ban unjust discrimination using an approach based on protected classifications. Accordingly, AMS is adopting specific prohibited bases in this final rule.

AMS rejects the commenter's view that it is beyond the authority of the Act for AMS to address prejudice based on categories, such as sexual orientation or gender identity, because the Congress that enacted the Act in 1921 would not have contemplated such protections. The Act specifically addressed ''unjust discrimination'' and ''undue prejudice'' and left it to the Secretary to set out the scope of equitable terms such as ''unjust'' and ''undue,'' as well as ''unfair.'' [207] Moreover, ECOA prohibitions on discrimination in the extension of credit—which includes many of the protected bases covered by this final rule, including sex, shall be enforced under the P&S Act. Therefore, a violation of ECOA (if committed by a regulated entity) is also violation of the P&S Act.[208] It is widely accepted, following *Bostock* v. *Clayton Cnty* [209] and other cases, that the term ''sex'' covers sexual orientation and gender identity and the categorization as such is not limited to employment law.[210] Moreover, since 2014, USDA has prohibited discrimination on those bases in all of USDA's Conducted Programs.[211]

Comment: Industry trade associations said proposed § 201.304(a) inappropriately fails to incorporate the requirement from section 202(b) of the Act that a prejudice or disadvantage be ''undue or unreasonable'' to constitute a violation. The commenters said this provision would go against precedent which has concluded that the Act, as well as the broader antitrust regime, allows actions such as refusal to deal or non-renewal of a contract when conducted reasonably. One commenter said AMS exceeds its authority in omitting this statutory requirement from the proposed rule.

AMS Response: Under Act precedent, the Secretary is authorized to determine whether discriminatory conduct is ''undue'' or ''unreasonable.'' [212] The Secretary has in the past interpreted similar provisions governing stockyards to include prohibitions on discrimination on similar bases.[213] Moreover, multiple precedents interpret the unfair practices provisions of sec. 5 of the FTC Act to incorporate discrimination on race, sex, and similar prohibited bases.[214] The ICA's provisions barring unjust discrimination too, have been interpreted to bar discrimination on the protected bases.[215] Therefore, this rule is within the Secretary's authority under secs. 202(a) and (b) of the Act. Under Act precedent, whether discriminatory conduct amounts to being ''undue'' or ''unreasonable'' is a determination that the statute provides broad discretion to the Secretary to determine. Advantages are not a component of this rule instead the rule focuses on prohibiting conduct that disadvantages producers based on characteristics unrelated to the quality of their products or services.

Comment: Multiple industry companies and associations, another organization, and an individual contended that AMS unlawfully rejected precedent by asserting that discriminatory conduct can violate secs. 202(a) or (b) of the Act without demonstrating injury, or likelihood of injury, to competition. The commenters cited legislative history and judicial precedent to argue that the Act is fundamentally an antitrust statute and is thus bound by the key antitrust principle of preventing harm to competition. Commenters said Congress's main concern in enacting the Act was preventing harm to competition from meatpacker monopolies and that, in drafting the Act, Congress used the basic blueprint of the Sherman Act and other existing antitrust statutes, which distinguish between fair competition and undesirable predatory competition. Commenters said interpreting secs. 202(a) and (b) to require plaintiffs to prove actual or likely harm to competition thus promotes the Act's main purpose of protecting healthy competition in the meatpacking industry. Commenters also cited numerous court cases holding that the Act requires a showing of injury to competition, including rulings spanning eight circuits.[216] The commenters argued AMS's approach would open the door to baseless litigation and increased costs to industry. A commenter argued that, in the absence of the harm-to-competition standard, courts will use a range of inconsistent means to establish violations of the Act, meaning individual cases will more likely require judicial resolution despite AMS's claim that its proposed approach will reduce litigation.

AMS Response: Congress designed the Act to provide broader protections than existing antitrust laws such as the Clayton and Sherman Acts due to specific challenges in agricultural markets.[217] The existence of the Act is proof that existing antitrust laws were not sufficient in protecting livestock producers and ensuring fair agricultural markets. It is well established that, to meet the needs of livestock producers more effectively, the Act provides broader protections than existing antitrust laws. The statutory text, case law, and legislative history make plain that the Act's protections extend beyond

[207] Section 407 of the 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.''

[208] 15 U.S.C. 1691c(a)(5).

[209] 140 S. Ct. 1731, 1741 (2020).

[210] *https://www.consumerfinance.gov/about-us/newsroom/cfpb-clarifies-discrimination-by-lenders-on-basis-of-sexual-orientation-and-gender-identity-is-illegal/.*

[211] *https://www.federalregister.gov/documents/2014/07/16/2014-16325/nondiscrimination-in-programs-or-activities-conducted-by-the-united-states-department-of-agriculture.*

[212] *Mahon* v. *Stowers,* 416 U.S. 100, 112 (1974)). Section 407 of the Act (7 U.S.C. 228) also provides that the Secretary ''may make such rules, regulations, and orders as may be necessary to carry out the provisions of this Act.''

[213] 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)).

[214] *See Federal Trade Commission* v. *Passport Automotive Group, Inc., No. 8:22–cv–02670 (D. Md. filed Oct. 18, 2022)* (Settlement resulting from FTC allegations that Passport's discriminatory conduct, including charging Black and Latino customers interest-rate markups not tied to creditworthiness, violated the ''unfairness'' prong of Section 5 of the FTC Act); Michael Kades, ''Protecting Livestock Producers and Chicken Growers,'' *Washington Center for Equitable Growth* (May 5, 2022), available at Protecting livestock producers and chicken growers—Equitable Growth.

[215] *See* 7 U.S.C. 193. *Cf. Mitchell* v. *United States,* 313 U.S. 80, 94 (1941)).

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

[217] *See In re Pilgrim's Pride,* 728 F.3d 457, 460 (5th Cir. 2013) *Been,* 495 F.3d at 1231 *Swift & Co.* v. *US,* 393 F.3d 247, 253 (7th Cir. 1968) *Swift & Co.* v. *United States,* 308 F.3d 849, 853 (7th Cir. 1962).

antitrust laws.[218] Accordingly, it has been the Agency's longstanding position that because the Act addresses more and different types of harmful conduct than antitrust laws, a showing of competitive injury is not required to establish violations of secs. 202(a) and 202(b). Market abuses such as deception, unjust discrimination, and retaliation are illegal per se under the act. Addressing the harmful conduct this rule aims to prevent is squarely within the authority of the Secretary and accords with Congressional intent.[219] Moreover, the Secretary, exercising broad authority to define the scope of secs. 202(a) and (b), has determined that the prohibited practices are likely to exclude producers from the market, thereby lessening competition and causing widespread marketplace harm if not addressed in their incipiency, before competitive injury has occurred.

Commenters cite several circuit court decisions that required a showing of harm to competition or a likely harm to competition establish a violation of sec. 202. These cases involved private claims and do not control the Agency's statutory authority to promulgate regulations. AMS is within its statutory authority to promulgate rules that ''assure fair competition and fair-trade practices, to safeguard farmers and ranchers . . . to protect consumers . . . and to protect members of the livestock, meat, and poultry industries from unfair, deceptive, unjustly discriminatory and monopolistic practices. . . .'' Congress granted the Secretary broad authority to determine the scope of coverage of terms such as ''unjust discrimination'' and ''undue prejudice'' or ''unreasonable disadvantage'' under secs. 202(a) and (b) of the Act.

This rule aims to prevent market exclusion of producers who have been subjected to unjust discrimination on a prohibited basis or based on engaging in a protected activity, and to snuff out those harms at their incipiency. Based on its knowledge of the industry, AMS has determined that undue and unreasonable prejudice and unjust discrimination on the prohibited bases and the protected activities identified in the rule amount to conduct that negatively effects these markets, and therefore AMS is establishing these regulations to address that conduct at its incipiency, when it occurs against a single individual.

Additionally, deceptive conduct violative of the Act has routinely been enforced on an individual basis absent a required showing of any particularized harm to competition since the very first administrative actions brought by the Department. Deceptive conduct often takes the form of unfair contract formation, enforcement, and termination and therefore most frequently occurs on an individual basis. To require a showing of harm to competition to prove deception violations under the Act would be contrary to longstanding enforcement standards and is adverse to the intent of the Act to protect farmers and ranchers from deception. Furthermore, the assertion from commenters that this rule will result in costly ''baseless'' litigation is contrary to the findings of AMS. AMS has determined that this rule will not increase litigation significantly due to the assertion by regulated entities, through their comments, that they do not engage in the conduct this rule aims to prohibit.

Comment: Several advocacy organizations and a cattle industry trade association supported AMS's position that prohibited conduct under the Act need not lead to market-wide harm to competition, with some urging AMS to explicitly state that a showing of such harm is not required under the proposed rule. An agricultural and environmental organization cited E.O. 14036 on Promoting Competition in the American Economy,[220] which called for a rule explicitly stating individuals should be able to prevail under the Act without proving market-wide harm. This commenter argued AMS needs to explicitly state its position to stop judicial confusion in the face of a Federal circuit court split on the competitive-harm issue. The commenter said that, since the proposed rule contains multiple references to both USDA's position on market-wide harm to competition and E.O. 14036's explicit direction to incorporate this position into a final rule, amending the rule to clearly adopt this position would be a logical outgrowth of the proposed rule.

An agricultural advocacy organization contended the text, structure, and legislative history of the Act indicate that it prohibits discrimination based on market-vulnerable and protected-class status, giving AMS the legal authority to promulgate regulations based on this interpretation. The commenter argued the Act's prohibition of differential treatment on an ''unjust,'' ''undue,'' or ''unreasonable'' basis encompasses all forms of discrimination based on a producer's market vulnerability or protected classification because it includes all actions that adversely differentiate between producers without a legitimate basis. The commenter said that, in using such words in the Act, Congress clearly intended to invoke national values and policies related to fairness and equal treatment, including equal protection jurisprudence as it existed during enactment. According to the commenter, this jurisprudence was understood to prohibit essentially unjust or arbitrary discrimination between persons or corporations ''in a similar situation or condition.'' [221]

The commenter next looked at secs. 202(a) and (b) of the Act in the context of the statutory scheme, contrasting their broad reach with the more limited scope of secs. 202(c) through (f), which specifically target business practices with anticompetitive effects, and arguing this difference implies Congress intended for these first two sections to apply more expansively. This commenter further claimed, if unfair, discriminatory, prejudicial, or deceptive conduct always required proof of market-wide competitive injury, these paragraphs would be superfluous because paragraph (e), which prohibits ''any course of business'' or ''any act'' for the purpose or with the effect of causing competitive injury, would always apply. The commenter said this broad interpretation of secs. 202(a) and (b) to include discrimination based on protected-class or market-vulnerable status easily advances the Act's statutory purpose of ensuring fair competition and trade practices in livestock markets, noting that this type of discrimination reduces output and prevents efficient resource allocation by restricting certain producers' ability to enter and participate in markets. The commenter also said legislators enacting the Act sought to broadly address imbalances between buyers and sellers of livestock, referring in detail to the Act's legislative history for evidence that Congress intended for it to have an expansive scope, including coverage of a wide range of unfair and unjust practices.

The commenter also argued that the prohibitions in secs. 202(a) and (b) do not merely include intentionally

[218] *See Wilson & Co.* v. *Benson,* 286 F.2d 891, 895 (7th Cir. 1961); *Bowman* v. *USDA,* 363 F.2d 81, 85 (5th Cir. 1966), *Swift,* 393 F.3d at 253.

[219] 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.

[220] 86 FR 36987, July 9, 2021.

[221] *See* 14 Fletcher Cyc. L. Corps. section 6716 (2022). *See also, e.g., Holden* v. *Hardy,* 169 U.S. 366, 383 (1898)); *Yick Wo,* 118 U.S. 356, 373–74; (1886); *San Bernardino Cnty.* v. *S. Pac. R. Co.,* 118 U.S. 417, 422–23 (1886) (Field, J., concurring); *Barbier* v. *Connolly,* 113 U.S. 27, 31 (1884); *C.R. Cases,* 109 U.S. 3, 25 (1883); *In re State Freight Tax,* 82 U.S. 232, 263 (1872).

discriminatory actions but also extend to actions with a disparate impact on covered producers based on their protected-class or market-vulnerable status. To support this position, the commenter noted that sec. 202(a) prohibits regulated entities from engaging in practices or using devices that are ''unjustly discriminatory,'' rather than simply prohibiting them from actively discriminating, and that sec. 202(b) prohibits regulated entities from ''subject[ing]'' persons or localities to undue or unreasonable prejudices or disadvantages, arguing that both provisions specifically use language intended to encompass non-intentional actions.

The commenter further argued that AMS holds authority to interpret the meaning of sec. 202 and identify practices that violate its prohibitions. The commenter said Congress modeled USDA's role under the Act on that of the Federal Trade Commission under the FTC Act, envisioning an authority with broad jurisdiction and power. According to the commenter, Congress even went beyond the FTC Act model in one respect in its grant of authority to USDA, with sec. 407 of the Act giving USDA unequivocal authority to promulgate rules as needed to carry out its provisions. The commenter also said many court decisions have given strong deference to USDA determinations on whether a practice violates the Act, relying on reasoning that the facts of individual cases determine the meaning of the Act's operative terms, and that USDA is responsible for efficiently regulating market agencies and packers. Finally, the commenter argued ''*Chevron* deference'' [222] applies to USDA interpretations of the Act regarding differential treatment because these interpretations would be promulgated pursuant to express delegation of rulemaking authority as given in sec. 407, fill in the gaps Congress left in sec. 202, reflect a permissible construction of the statutory text that aligns with the statute's purpose, and take advantage of USDA expertise regarding the details of livestock production and marketing.

One commenter recommended the following proposed regulatory text language to explicitly state violations of the proposed rule require no showing of competitive harm:

§ 201.308 No Requirement to Cause Market-Wide Harm

Where a regulated entity commits conduct prohibited by Subpart 201.302–201.306, such conduct violates §§ 202(a) and (b) of the Act whether or not market-wide harm to competition results. The unfair, unjustly discriminatory, or deceptive treatment of one covered producer, the giving to one covered producer of an undue or unreasonable preference or advantage, or the subjection of one covered producer to an undue or unreasonable prejudice or disadvantage in any respect violates the Act.

AMS Response: AMS notes and appreciates the comments, but made no further changes in response to the comments.

AMS acknowledges the commentors' comments around a showing of harm to competition. The meaning of competition or harm to competition must be broader than its meaning under the antitrust laws.[223] USDA maintains that this consistently held position is based on the language, structure, purpose, and legislative history of the Act, and USDA continues to adhere to this longstanding position, notwithstanding the disagreement of some courts as to the relationship between harm to competition and violations under the Act. Discrimination and undue prejudice on the bases set forth in this final rule are both essentially unjust and undue as forms of unacceptable personal discrimination under the Act (drawing on similar precedent from the ICA and from P&S Act implementation in stockyards), and also subvert normal market forces, undermine market integrity, and deprive producers of the true value of their products and services. AMS has not incorporated the suggested § 201.308 provisions because the rule itself prohibits discrimination against an individual producer on the prohibited bases or protected activities. The proposed rule elaborated on the regulatory text, stating ''[t]his proposed regulation sets forth specific prohibitions on prejudicial or discriminatory acts or practices against individuals that are sufficient to demonstrate violation of the Act without the need to further establish broad-based, market-wide prejudicial or discriminatory outcomes or harms.'' [224] AMS's position is that under the Act even a single instance of discriminatory or prejudicial conduct may violate the Act.[225] The Act prohibits ''essentially unjust'' discrimination and undue prejudice, which AMS has determined the provisions of this final rule to address. Moreover, discrimination on prohibited bases and retaliation on the basis of protected activities in livestock and poultry markets leads to economic inefficiency, and has no procompetitive justification. Undue prejudices or disadvantages and discriminatory practices in a concentrated livestock or poultry market inflict economic harm through a distortion of market signals such as a distortion of market prices and exclusion of market participants, which, in turn, can lead to disinvestments in the livestock and poultry markets and a misallocation of scarce resources. Deception deprives the seller of the benefits of the market, as competitors of the initial deceiving regulated entity may be induced to likewise engage in such practices. When market abuses become widespread, market success becomes less based on productive efficiency or quality and more on who can engage in the most abuses, leading to allocative inefficiencies and loss of social welfare.

Comment: Commenters representing industry perspectives said proposed § 201.306 on deceptive practices is outside the scope of the Act because it would require all tort or contract disputes under the Act to be addressed in Federal courts rather than as State matters. According to the commenters, Congress would have explicitly said so if it intended to give AMS wide-ranging authority to regulate the specifics of livestock industry contracts and business practices regardless of their effect on competition. According to commenters, further evidence that Congress did not intend to give the agency such authority includes its previous rejections of other proposals to expand the Act to cover contractual matters traditionally covered under State law, with Federal courts likewise holding that the Act does not cover these circumstances.

A cattle industry trade association said this provision also exceeds the scope of the Act because AMS's contention that deception does not

[222] *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 468 U.S. 837 (1984).

[223] 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;* 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.*

[224] 87 FR 60018.

[225] Extensively discussed in 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,* among other articles referenced above.

require proof of a particularized intent contradicts the plain text of the statute as it would have been interpreted at enactment. According to the commenter, Congress at this time would have understood meatpacker conduct only to be deceptive when committed with the intent to deceive a producer. The commenter further stated that AMS's arguments that deceptive practices under sec. 202 of the Act do not necessarily require intent to deceive—based on analogy to developments in the law of deceptive marketing—do not provide sufficient support for its position. An organization asserted that the proposed rule attempts to undercut Federal court rulings, such as *Jackson* v. *Swift Eckrich, Inc.,*[226] which hold that the Act is not intended to undermine traditional freedom-of-contract principles by exposing producers to Federal liability if they refuse to enter into certain contracts or exercise basic contract rights.

AMS Response: This rule does not require all tort or contract disputes under the Act to be addressed in Federal courts rather than as State matters. It only addresses the specific prohibited conduct covered by the rule. Moreover, in secs. 202(a) and (b), Congress gave broad authority to the Secretary to establish the scope of Federal protections governing transactions in livestock and poultry, given the interstate nature of the industry.

The Act does not require proof of a particularized intent to deceive.[227] This rule does not inhibit freedom to contract by exposing producers to liability if they refuse to enter into a contract.[228] It addresses undue prejudice, retaliation, and deception which may occur at various stages of the contracting process, including the stage when a refusal to deal may amount to discrimination on the bases of prohibited categories specified in the final rule or a deceptive practice when distorted owing to an untrue statement. Therefore, this rule does not contradict the holding in *Jackson* v. *Swift Eckrich, Inc.* Accordingly, AMS made no changes to the rule in response to these comments.

Comment: Cattle industry trade associations argued the proposed rule also represents an inappropriate attempt to regulate commercial feed yards under the Act, saying AMS improperly cites *Solomon Valley Feedlot Inc.* v. *Butz*[229]—a case holding that feed yards are not regulated entities under the Act—to support its reference to surety bonds as one means to protect farmers and consumers from unfair practices under the Act. According to the commenters, AMS's citation in this context suggests commercial feed yards are required to post bonds despite the case holding that they are not regulated entities and thus do not need to do so. A commenter further said this inaccurate citation, combined with the proposed rule's overbroad definition of ''livestock producer,'' suggests AMS is trying to regulate feed yards under the Act despite both Congressional intent and judicial precedent supporting their exclusion.

AMS Response: AMS respectfully considers these comments to be outside the scope of this rulemaking. To be clear, AMS does not intend to refute the court's holding in *Solomon Valley* that feedlots are unregulated. Nor does the rule make any attempt to define ''regulated entities'' to include feedlots.

This final rule prohibits regulated entities from engaging in deceptive practices. Regulated entities include packers, swine contractors, and live poultry dealers. The rule *protects* feedlots as livestock producers from undue prejudice, retaliation, and deception. AMS sees no reason for the commenter's argument that the definition of livestock producers should exclude feedlots, except to the extent that the feedlot is acting as a dealer under the Act. This rule does not attempt to regulate the behavior of livestock dealers or feedlots in any capacity. The *Solomon Valley* decision, which shows it is a deceptive practice for a regulated entity to fail to maintain a bond, was cited in the proposed rule to provide an example of what the court has found constitutes a deceptive practice.

ii. Congressional Direction

Comment: Live poultry dealers and poultry industry trade associations said Congressional authority for AMS to issue the proposed rule has expired because the agency did not promulgate it within the deadline set by the 2008 Farm Bill. A commenter said this Farm Bill included language asking GIPSA, the agency formerly in charge of implementing the Act, to promulgate new regulations dealing with several sections of the Act. The commenter noted that section 11006 of the 2008 Farm Bill tasked AMS with writing new regulations establishing criteria to determine four issues, including whether an undue or unreasonable preference or advantage has occurred in violation of the Act. Section 11006 included a timeline, requiring AMS to promulgate these new regulations no later than two years after the Farm Bill's May 22, 2008, enactment. However, AMS did not publish the proposed rule for comment until October 3, 2022, nearly 12 years after the Farm Bill deadline expired. According to the commenter, finalizing the proposed rule would therefore unconstitutionally exceed the scope of Congress's grant of authority to USDA.

Likewise, a meat industry trade association argued that Congress referred to issues relating to socially disadvantaged farmers and ranchers in other parts of the 2008 Farm Bill but failed to do so in the context of its direction for rulemaking under the Act; therefore, it is reasonable to assume Congress did not seek to address such topics under the Act.

AMS Response: AMS respectfully considers these comments to be outside the scope of this rule. The 2008 Farm Bill's directive that GIPSA promulgate rulemaking pertaining to the Act does not restrict USDA's and AMS's authority to conduct *this* rulemaking and thus effectuate the purposes of the Act.

Further, as noted earlier, Executive Order 14036 directs the Secretary to address unfair treatment of farmers and improve conditions of competition in their markets by considering rulemaking to address, among other things, certain market abuses and anticompetitive practices in the livestock, poultry, and related markets, including unjustly discriminatory, unduly prejudicial, and deceptive practices—in particular retaliation. This final rule is responsive to the Executive Order.

Comment: A cattle industry trade association and a live poultry dealer argued that, in addition to taking advantage of an expired grant of authority, the proposed rule also extends beyond the scope of the original Congressional authority to amend the Act. Commenters said issues not covered under the Farm Bill grant include the introduction of a vague and ambiguous definition of ''market vulnerable individual;'' a determination that proof of anticompetitive harm is no longer necessary to prevail under secs. 202(a) or (b) of the Act; and regulation of deceptive practices and of recordkeeping.

AMS Response: As stated by Congress, the purpose of the Act is ''to assure fair competition and fair trade practices, to safeguard farmers and ranchers . . . to protect consumers . . .

[226] 53 F.3d 1452, 1458 (8th Cir. 1995).

[227] *See Parchman* v. *U.S. Dep't of Agric.,* 852 F.2d 858, 864 (6th Cir. 1988).

[228] *Swift & Co.* v. *United States,* 393 F.2d 247, 253 (7th Cir. 1968).

[229] 550 F. 2d 717 (10th Cir. 1977).

and to protect members of the livestock, meat, and poultry industries from unfair, deceptive, unjustly discriminatory and monopolistic practices. . . .'' This regulation bans behavior that is unjustly discriminatory, unreasonably prejudicial and disadvantageous, and deceptive. AMS has addressed the other matters raised by the commenter in previous comment responses.

Comment: Multiple industry commenters argued that the proposed rule triggers the major questions doctrine under *West Virginia* v. *EPA,* under which an agency lacks authority to take politically or economically significant regulatory actions without ''clear congressional authorization.'' [230] Commenters said the Supreme Court has indicated particular concern where an agency fundamentally changes the regulatory scheme under a statute, seeks to adopt a rule Congress has clearly and repeatedly declined to enact, or claims broad authority for which there is a lack of historical precedent, arguing that the proposed rule raises all three of these issues.[231] Commenters argued that the Act has long been understood to be grounded in antitrust principles and has never in its hundred-year history been used to broadly address the kind of discriminatory conduct covered in the proposed rule. The commenters further claim that the proposed rule's treatment of the Act as an antidiscrimination statute also unprecedently extends past the scope of other such laws by targeting discrimination against independent contractors rather than employees.[232] They also note that, in addition to declining to apply the Act as an antidiscrimination statute, Congress has also declined to adopt any general prohibitions on discrimination in contracting extending beyond the ban on racial discrimination in 42 U.S.C. 1981. The commenters stressed that it would be the role of Congress, not AMS, to decide to apply the Act like an antidiscrimination statute. According to the commenters, specific aspects of the proposed rule that trigger this doctrine include the elimination of the harm-to-competition standard, the creation of a definition of ''market vulnerable individuals,'' the identification of conduct constituting deceptive conduct, and the 5-year document retention mandate for regulated entities.

AMS Response: As discussed in the preamble to this final rule, Congress enacted the Act after many years of concern about farmers and ranchers being cheated and mistreated. In the Act, Congress gave the Secretary broad authority to regulate the meatpacking industry. 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. In the Act, Congress gave the Secretary broad authority to regulate the meatpacking industry. The House of Representatives' report on the 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.'' [233] The Conference Report on the Act stated that: ''Congress intends to exercise, in the bill, the fullest control of the packers and stockyards which the Constitution permits. . . .'' [234] Congress considered this a power beyond the authority that of the FTC and the Interstate Commerce Commission.

This rule's interpretations of unjust discrimination, undue and unreasonable prejudice, and retaliation are consistent with longstanding approaches to protecting producers under the Act, are consistent with interpretations of similar provisions of sec. 5 of the FTC Act and the ICA, and mirror congressional policy as reflected in ECOA. Moreover, Congress as recently as 2008 directed USDA to conduct rulemakings on sec. 202, which led to the 2020 Rule discussed above on undue preferences. The 2020 Rule wrestles with questions of undue prejudices which this final rule settles. Deception similarly follows a long line of cases and rules covering deceptive practices under the Act. Regarding issues raised by commenters around the major question doctrine, this rule does not address political matters, nor does it focus on fixing purely economic harms. This rule aims to increase protections for producers by clarifying that secs. 202 (a) and (b) of the Act prohibit discriminatory, retaliatory, and deceptive conduct by regulated entities.

iii. Legal Justification

Comment: Live poultry dealers and industry associations argued that the administrative record for the proposed rule fails to support a rulemaking. Commenters contended AMS has failed to identify any actual harmful conduct that would justify the proposed rule. Several commenters criticized specific aspects of the record, saying the court cases providing examples of alleged violations of the Act seem to be ''opportunistically selected'' and inaccurately cited, while the discussions of previous rulemaking efforts, many of which were withdrawn after Congressional objection, do not provide legitimacy. The commenters said, rather than basing its justification on facts, AMS instead acted arbitrarily and capriciously in supporting it with unverifiable anecdotal evidence and anonymous sources. A cattle industry trade association said that the proposed rule is too reliant on unexplained anecdotal evidence and suggested AMS has compounded this problem by encouraging commenters to respond anonymously.

A commenter said AMS aggravates these issues by inviting more anonymous feedback in its request for comment on the proposed rule, making it difficult to assess commenters' credibility, encouraging more false or unverifiable anecdotes, and further weakening the evidentiary foundation of the eventual final rule. The commenter urged AMS to reopen the comment period after clarifying that it will not give anonymous anecdotes disproportionate weight. Another commenter said, as AMS explicitly left racially discriminatory practices off its list of criteria for finding undue or unreasonable preferences under the Act in promulgating the final rule codified at 9 CFR 201.211,[235] it must explain its rationale for reversing its position to determine that the Act now covers protected-class discrimination.

AMS Response: AMS disagrees with commenters' argument that the administrative record for the proposed rule fails to support this rulemaking. Section 407 of the 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.'' Under the APA, an Agency may conduct rulemaking to

[230] *West Virginia* v. *EPA,* 142 S. Ct. 2587, 2613–14 (2022).

[231] *Id.* at 2612, 2610; *NFIB* v. *OSHA,* 142 S. Ct. 661, 666 (2022) (per curiam).

[232] 42 U.S.C. 2000e-2; E.E.O.C., Coverage, *https://www.eeoc.gov/employers/coverage.cfm* (last visited Jan. 1, 2023); see also Health Care Workers and the Americans with Disabilities Act, *https://www.eeoc.gov/laws/guidance/health-care-workers-and-americans-disabilitiesact#:~:text=While%20the%20ADA's%20protections%20apply,does%20not%20cover%20independent20contractors* (last visited Jan. 1, 2023) (''While the ADA's protections apply to applicants and employees, the statute does not cover independent contractors.''); 29 U.S.C. 623; E.E.O.C., Coverage, *https://www.eeoc.gov/employers/coverage-0#:~:text=People%20who%20are%20not%20employed,by%20the%20anti%2Ddiscrimination%20laws* (last visited Jan. 1, 2023) (''People who are not employed by the employer, such as independent contractors, are not covered by the antidiscrimination laws.'').

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

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

[235] *See* 85 FR 79779.

revise prior positions if it can show that there are ''good reasons'' for the change and that the ''new policy is permissible under the statute.'' [236] AMS gathered evidence from livestock producer and poultry grower testimonies, Congressional testimonies, DOJ and USDA public workshops, case law, and economic data. AMS has gathered economic data on disparities between white farmers and ranchers and other racial and ethnic groups. This data is presented in Figure 5 and highlights the need for this rulemaking to provide fair access to markets for all producers. Preliminary empirical results indicate that there are some systemic differences in prices received across ethnic/racial groups after accounting for regional fixed effects and marketing variables. Relative to White producers, historically underserved Black and American Indian groups receive lower cattle prices; Black groups receive lower contract broiler prices, and Black and American Indian groups receive lower hog prices.[237]

The provisions in this rule are basic, fundamental protections against discrimination on prohibited bases as authorized by the Act and as consistent with congressional policy. The prohibition on retaliation protects the ability for producers to communicate with governmental entities, associate, cooperate, and compete. The prohibitions on deception are equally basic. These basic and fundamental provisions are justified with the record presented. Decades of complaints by producers, include public hearings with the Department of Justice, have catalogued how vertical integration and market concentration have left producers unable to avoid adverse treatment that tends to exclude them from the marketplace, including retaliation preventing them from even reporting these concerns to governmental authorities. The result has been producers unable to bargain effectively in the marketplace or fully obtain the benefits of their livestock production and poultry grow out services. Regulated entities consistently assert they do not engage in such practices; if so, then the burdens from adopting this rule are low.

AMS is not reopening the comment period for this rule. Consistent with the Administrative Procedure Act, all interested persons had an opportunity to comment and the agency has considered all relevant matter received through the public comment process.

AMS does not agree that it has reversed its position with respect to the rationale underpinning the rule promulgating § 201.211. This final rule addresses undue and unreasonable prejudices and disadvantages and unjust discrimination. Conversely, the rule implementing § 201.211 addressed undue and unreasonable preferences and advantages. AMS may return to the question of undue and unreasonable preferences and advantages in future rulemaking but does not have at this time any further information to offer with respect to how AMS would or would not apply the Act's prohibition on undue or unreasonable preferences or advantages. AMS is not making any further changes in response to this comment.

Comment: A cattle industry association said AMS has provided no meaningful evidence of discrimination on grounds other than race, saying evidence of the latter is unnecessary because racial discrimination in private contracting is already prohibited. According to the commenter, AMS also has provided no evidence that would justify its proposal to establish a broad market vulnerable producer approach to discrimination. This commenter also criticized AMS's citation of disparities in farm size and income along racial and ethnic lines. It said the agency confuses correlation and causation by arguing that smaller minority-owned farms necessarily have a harder time competing because of race discrimination when it has merely shown that minority-owned farms tend to be smaller and that any smaller farms tend to face competitive disadvantages compared to larger ones.

AMS Response: The existence of the continued correlation suggests the continued persistence of problems, and accordingly the need for additional clarity regarding the enforcement of the Act. To the extent that the activities covered are already prohibited, then the clarity provided by this rule should place no new burdens on industry with respect to compliance. Additionally, AMS has adopted in its final rule a list of prohibited bases for undue and unreasonable prejudice and disadvantages instead of using the term ''market vulnerable,'' therefore addressing commenters' concerns around the term's broadness.

Recent research conducted by the USDA's Office of the Chief Economist and presented at the American Association for Agricultural Economics [238] suggests that certain ethnic or racial groups may be suffering currently from discrimination by packers in the establishment and/or performance of livestock and poultry contracts. Qualitatively, the research found consistent differences in prices received for livestock (cattle and hogs) and broiler products across ethnic or racial groups after controlling for variables such as farm size, regional differences, type of marketing contract or channel, organic certification status, distance to closest packer, and size of closest packer. Limitations of the study include that it is unable to control for all animal characteristics and cannot separate disparate economic outcomes arising from current racial discrimination from disparate economic outcomes due to historical discrimination.

Comment: A cattle industry association said the proposed rule is arbitrary and capricious because AMS has yet to release several related proposals dealing with rulemakings under the Act. The commenter notes that sec. 553(c) of the Administrative Procedure Act requires agencies to give interested parties a ''reasonable'' and ''meaningful'' opportunity to participate in the rulemaking, then argues that AMS's failure to disclose how this proposed rule will fit in with other related rules addressing poultry and livestock contractors under the Act does not meet this standard because it does not give parties a chance to respond to the rulemaking actions as a whole.

AMS Response: That previous rulemaking efforts, such as those published in 2016, tied multiple rulemakings together with respect to certain assumptions in their cost-benefit analysis is not dispositive on how this set of rulemakings—which are entirely different and unconnected to the 2016 effort—should be designed or presented for public comment. This final rule is a logical outgrowth of the rule as proposed and does not in any way depend upon what AMS may or may not propose or finalize in any other rules. AMS made no changes to the rule based on this comment.

Comment: A meat industry trade association expressed concern because AMS stated in the preamble to the proposed rule that retaliation may include activities other than those listed in the proposal. The commenter said the statement in the preamble, which says

[236] *FCC* v. *Fox Television Stations,* 556 U.S. 502, 514 (2009).

[237] ''Competition and Discrimination—is there is a relationship between livestock prices received and whether the grower is in a historically underserved group?'' 2023 AAEA Annual Meeting, Washington, DC, July 23–July 25, 2023.

[238] Breneman, V., Cooper, J. Nemec Boeme, R. and Kohl, M. ''Competition and Discrimination—is there is a relationship between livestock prices received and whether the grower is in a historically underserved group?'' 2023 AAEA Annual Meeting, Washington, DC, July 23–July 25.

the proposed rule is ''designed to prohibit all such actions with an adverse impact on a covered producer,'' [239] conflicts with another statement in the preamble regarding § 201.304(b), which says the proposed regulations are ''narrowly tailored, requiring the adverse action to be linked to specific protected activities,'' [240] making the rule arbitrary and capricious in failing to give useful guidance on permissible activities.

AMS Response: The commenter confuses the design of the rule. The specific protected activities set forth under § 201.304(b)(1) and (2) are narrowly tailored and limited to those delineated. In contrast, the forms of adverse conduct, as set forth in 201.304(b)(3), are inherently broader and more flexible. Additionally, the final rule provides greater specificity with respect to forms of adverse conduct, which are now delineated specifically and are no longer subject to open-ended addition.

Therefore, AMS will not make changes to the final rule in response to this comment.

iv. Vagueness

Comment: Commenters argued that multiple provisions of the proposed rule are so vague and open-ended they thwart processors' ability to determine how it may apply to their conduct. According to the commenters, these provisions raise issues under the Fifth Amendment's Due Process Clause, which requires rules of law to define unlawful conduct with enough specificity to let interested parties understand what conduct is prohibited and to prevent arbitrary or discriminatory application of the rule.[241]

Live poultry dealers and a poultry industry trade association said the proposed rule is unconstitutionally vague because it includes a number of poorly defined or undefined terms for which failure to comply would result in a regulatory violation. The commenters said it provides only examples of behavior that would constitute a prohibited ''prejudice or disadvantage'' or ''retaliation,'' rather than spelling out definitive lists or definitions that regulated entities can use to comply with the proposed rule. The commenters highlighted other terms raising vagueness issues, such as ''generally or ordinarily offered,'' ''differential contract performance or enforcement,'' and ''tak[ing] an adverse action.'' These commenters said the rule also fails to spell out other concepts essential for identifying unlawful conduct, such as what would constitute a prohibited pretext or a legitimate explanation, how the recordkeeping requirements would be triggered, or what records must be kept. Commenters emphasized clear definitions are critical for companies to know what is and is not allowed under the rule.

AMS Response: The Due Process Clause under the Fifth Amendment requires legal matters to be resolved according to established rules and principles. AMS has adequately described the type of conduct prohibited under this rule by expressly stating that prejudices on specified prohibited bases constitutes a violation under the Act. These prohibited bases expressly draw from ECOA and apply to the Act and are explained in this rule with the specificity required to give notice to interested parties as to what conduct is prohibited. Moreover, changes in this final rule more clearly delineate prohibited bases of discrimination in § 201.304(a)(1), prohibited prejudicial conduct under § 201.304(a)(2), prohibited retaliatory conduct under § 201.304(b)(3), and more. Concerns of vagueness are addressed by AMS further explaining terms in the final rule with the specificity needed to thwart claims of unconstitutional government action. The final rule also provides two new specific exceptions that address commenters' concerns regarding the proposed rule not including exceptions. Furthermore, as explained in response to earlier comments, the recordkeeping requirement is clear and specific in its explanation in requiring regulated entities to keep certain records pertaining to their business practices relating to activities subject to the jurisdiction of the Act.

The terms used in this rule are intended to follow their plain language meaning, as applied to the livestock and poultry industries and within the legal framework regulating these industries. The following discussion demonstrates how these terms support the rule's prohibitions against undue prejudice, deception, and retaliation and in fact are quite specific.

''Retaliation'' is set forth in paragraph (b)(3) and encompasses actions taken by regulated entities against covered producers such as contract termination, refusal to renew a contract, offering of more unfavorable contract terms than those generally or ordinarily offered, refusal to deal, interference with third-party contracts, and modification of contracts on less favorable terms than those previously enjoyed in response to the producer's participation in a protective activity. What constitutes retaliation is clearly defined in the rule, and likewise the rule clearly lays out protected activities against which retaliation is prohibited.

In this rule, ''generally or ordinarily offered'' terms are terms most producers would qualify for when contracting with a regulated entity. Whether terms are ''generally or ordinarily offered'' is an inquiry regarding specific facts and circumstances. Each case may vary by regulated entity and even for any given regulated entity may vary based on how the regulated entity would normally deal in the circumstances presented by the producer in question. However, ''generally or ordinarily'' does not apply to special contract terms that some regulated entities may use with certain producers, whether to receive particular quality attributes or services or for other reasons that are not discrimination on prohibited bases. The purpose of the rule is to ensure that a covered producer is not denied contract terms on the basis of a protected class that an ''ordinary'' similarly situated producer could receive from the regulated entity.

''Performing under or forcing a contract differently than with similarly situated producers'' refers to situations where a regulated entity operates in such a way that it denies a grower the full benefits to which it is entitled under its contract with the regulated entity. A poultry grower may seek to enforce a production contract term that gives the grower the right to receive appropriate feed for the grower's flocks on a timely basis in the event the grower regularly or at critical times experiences insufficient, delayed, or inappropriate feed. If a regulated entity threatens to terminate a grower's contract in response to the grower's efforts to enforce a particular contract term (a protected activity), this retaliatory conduct would violate the Act. AMS notes that this violation would be separate from any violation of contract law that may also exist. Another example is selective information disclosures. These often take the form of a regulated entity withholding materially relevant information from one covered producer that the regulated entity generally or ordinarily provides to other covered producers. In these instances, information-deprived producers will have an incomplete picture of their business relationships with regulated entities, and therefore will operate at an unreasonable disadvantage relative to producers who receive the pertinent information.

[239] 87 FR 60026, October 3, 2022.

[240] *Id.* at 60024.

[241] See *Skilling* v. *United States,* 130 S. Ct. 2896, 2927–28 (2010).

Furthermore, this rule not only protects covered producers from such conduct in the form of retaliation. If a regulated entity engages in differential contract enforcement on the bases of a producer's protected class, this would constitute discriminatory conduct in violation of § 201.304(a) of this regulation.

''Tak[ing] an adverse action'' encompasses a range of prejudicial, deceptive, or retaliatory actions that unjustly inhibit market access such as prejudice, disadvantage, retaliation, deception, or any action that inhibits market access to producers. A range of actions taken by producers on legitimate business grounds can be adverse to producer welfare. However, in the context of this rule, adverse actions are those actions taken by regulated entities against producers that either unfairly discriminate against producers on the basis of a protected class, deceive producers, or represent retaliation against producers for engaging in protected activities such as lawful communications, assertion of contract rights, associational participation, or participating as a witness in any proceeding under the Act.

v. Other Legal Issues

Comment: A cattle industry trade association said the requirement to demonstrate harm to competition is crucial within its industry because packers differentiate cattle values using an array of different factors including production method, animal handling requirements, and program enrollment, meaning that seemingly similar lots of cattle may be valued substantially differently. The commenter expressed concern that the results of individual adjudications taking place under sec. 202 of the Act without the threshold of a competitive-injury requirement would vary significantly, diminishing innovation and product differentiation, confusing market participants, and ultimately harming both producers and consumers. A poultry industry trade association said that, if AMS seeks to establish circumstances in which conduct can violate secs. 202(a) and (b) without a showing of competitive injury, a separate standalone rulemaking would be more suitable than inclusion in the proposed rule.

AMS Response: This final rule solely addresses the prohibited conduct it covers—undue prejudice on prohibited bases, retaliation as unjust discrimination for engaging in protected activities, and certain forms of deception. It does not, beyond the specific prohibitions, interfere with the manner in which packers differentiate cattle values using an array of different factors including production method, animal handling requirements, and program enrollment, meaning that seemingly similar lots of cattle may be valued substantially differently. Individual adjudications with respect to the conduct covered by this proposed rule are essential to effectuate the prohibitions set forth in this rule, so as to eliminate in their incipiency occurrences of undue prejudice on prohibited bases and retaliation on protected activities.[242] The Act empowers the Secretary to make the determinations around what conduct is unreasonable and undue prejudices and disadvantages and unjust discrimination. It is also well-established that deception is a prohibition that can be enforced on the bases of each individual occurrence.

Moreover, even where relevant, the meaning of competition or harm to competition must be broader than its meaning under the antitrust laws.[243] USDA has previously explained that this consistently held position is based on the language, structure, purpose, and legislative history of the Act, and USDA continues to adhere to this longstanding position, despite the disagreement of some courts as to the relationship between harm to competition and violations under the Act. *See* Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 FR 48596 (Oct. 18, 2017), (reaffirming that ''USDA has adhered to this interpretation of the P&S Act for decades'' and rejecting comments that this interpretation is not the USDA's longstanding position). Regardless, even if a showing of harm to competition were required for an undue prejudice or discrimination claim, the discriminatory practices prohibited in this rule would meet such a requirement. Discrimination and undue prejudice have no value or place in a competitive market, and in fact can lead to inefficiencies as personal characteristics, not production factors influence contracting decisions. Ultimately, the conduct at issue is squarely within the purposes of the Act. Where conduct ''prevents an honest give and take in the market,'' it ''deprives market participants of the benefits of competition'' and ''impedes . . . a well-functioning market.'' In its report on the 1958 amendments to the Act, the U.S. House of Representatives explained that the statute promotes both ''fair competition and fair trade'' and is designed to guard ''against [producers] receiving less than the true market value of their livestock.'' Discrimination and undue prejudice on the bases set forth in this final rule are both essentially unjust and undue as forms of unacceptable personal discrimination under the Act (drawing on similar precedent from the ICA and from P&S Act implementation in stockyards), and also subvert normal market forces, undermine market integrity, and deprive producers of the true value of their products and services.

Comment: A legal foundation said the introduction of a recordkeeping requirement for processors may violate the due process clause by imposing unreasonable burdens on them and may exceed the limits of Federal enumerated powers under the Constitution. The commenter said that, although the Supreme Court upheld a recordkeeping requirement for banks against a due process challenge, the ruling was specific to entities receiving public funds and does not apply to regulated entities under the proposed rule. The commenter also contended such recordkeeping requirements generally lead to warrantless searches of businesses, and that these types of searches are only authorized for pervasively regulated, inherently hazardous industries, which likely does not apply to the meat or poultry industries.

AMS Response: AMS has authority under the Act to regulate certain entities and to promulgate rulemaking accordingly. The inclusion of a recordkeeping requirements serves the legitimate purpose to ensure compliance with this rule. Recordkeeping is regularly a component of rulemaking to ensure compliance and allow the regulating agency to better monitor impacts of the Rule. Regulated entities are already subject to a range of oversight by AMS subject to the longstanding application of the Act. Indeed, the Act already requires recordkeeping that fully and completely discloses the transactions by regulated entities of their poultry growing arrangements and transactions in

[242] *Bowman* v. *United States Dep't of Agric.,* 363 F.2d 81, 85 (5th Cir. 1966)

[243] 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;* 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.*

livestock, meat, live poultry, etc.[244] The recordkeeping addressed by this rule is to keep records already kept, and is within the scope of AMS's authority under the Act.[245]

Comment: A cattle industry trade association said AMS failed to clarify the causation standards for proving a violation of its new discrimination rule. The commenter suggested AMS should confirm that the default causation rule under tort law applies, meaning a violation would require impermissible discrimination to be the but-for cause of a packer's contracting decision.

AMS Response: Although pervasive unjust discrimination has in the past kept outstanding producers from achieving their potential, AMS recognizes that adverse actions against producers commonly have several elements mixed in, some of which may include the discrimination or retaliation covered by this rule. AMS has set forth a standard causation standard: ''because'' and ''on the basis of.'' Further cause will be determined in the specific facts and circumstances of any enforcement matter. Those facts will determine whether AMS brings any particular matters and AMS expects unjust discrimination and retaliation to be the principal, or at least substantial, part of any decision by the regulated entity. Moreover, AMS is choosing not to require ''sole'' causation because doing so would undermine the effectiveness of the rule and encourage after-the-fact revisions of causation. Rather, AMS believes that regulated entities should have a heightened duty to eliminate unjust discrimination on the protected basis and retaliation for engaging in protected activities. To do so, boards of directors and chief executive officers may wish to establish clear corporate policies, adopt procedures to provide for heightened managerial supervision for circumstances where a close call may arise, and implement training across the corporate structure. ''Tone at the top'' should direct employees such that undue prejudice and retaliation are not acceptable forms of conduct, and when close calls arise, the regulated entity has taken every step reasonably possible to ensure that its conduct is focused solely on the merits of the producer's performance and the other competitive factors that the regulated entity must take into account when running its business. AMS made no changes to the final rule based on this comment.

L. Other Comments Related to the Proposed Rule

Comment: A cattle industry trade association said that AMS has not yet made available its proposal for an additional related rule concerning section 202 of the Act, which must be considered alongside the current proposal. A meat industry trade association likewise cited AMS's anticipation of a ''suite of major actions [. . .] to create fairer marketplaces for poultry, livestock and hog producers'' and argued that AMS should withdraw the current proposal until the entire suite of proposals can be submitted holistically. Live poultry dealers and industry companies, a poultry industry trade association, and a swine industry trade association concurred that piecemeal updates to the Act would create challenges and confusion for regulated entities and producers. They suggested updating regulations collectively at one time.

AMS Response: AMS made no changes to the proposed regulations based on this comment. AMS appreciates the comments regarding the desire to view the rules holistically. However, AMS is under no obligation to make all potential rules available to the public simultaneously, regardless of their potential connection to components of this rulemaking. AMS is addressing issues in the livestock and poultry sector through its statutorily defined authority to administer the Act. Federal agencies commonly use separate rulemakings to address specific issues under their regulatory authority. As stated elsewhere, the authority or effect of this rule does not in any way depend upon the proposal or adoption of any other rules, proposed or not yet proposed. Accordingly, AMS made no changes based on this comment.

Comment: A cattle industry trade association noted that the proposed rule's preamble implied a strong relationship between concentration in the meatpacking industry and declining use of negotiated cash trades, with the further implication that the use of AMAs in place of cash trades has negatively impacted the market and rural economies. The commenter said that AMAs are not germane to the proposed rule and requested information on whether AMS intends the proposed rule to limit the ability of cattle producers to use AMAs. It argued that AMAs are critical to funding production of more sustainable and climate-friendly cattle production. In defense of AMAs, the trade association cited a 2021 Texas A&M study finding that AMAs do not change underlying supply-and-demand fundamentals and so do not create market power[246] and a 2007 GIPSA Livestock and Meat Marketing Study finding a negative effect on producer and consumer surplus measures in response to reducing AMA use.[247] Another cattle industry trade association agreed that AMAs benefit producers and cautioned against any attempts to standardize agreements between producers and regulated entities through new rules.

AMS Response: AMS acknowledges the commenters' concerns over the relationship between this rulemaking and the use of AMAs in the cattle industry. According to some in the industry, the growth of these vertical contracting 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. This rule prohibits prejudices on certain protected bases that tend to exclude or disadvantage covered producers in those markets; identifies retaliatory practices that interfere with lawful communications, assertion of rights, and associational participation, among other protected activities, as unjust discrimination prohibited by the law; and identifies deceptive practices that violate the Act with respect to contract formation, contract performance, contract termination, and contract refusal. AMS sees no manner in which this regulation affects the general existence or use of AMAs. Therefore, AMS has made no changes to the regulations in response to this comment.

Comment: An industry company rejected any implication that food companies are withholding critical business information from producers

[244] Section 401 of the Act requires regulated entities to keep ''such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business . . .'' Section 201.94 of the regulations requires regulated entities to give the Secretary ''any information concerning the business . . .'' Section 201.95 of the regulations requires that regulated entities provide authorized representatives of the Secretary access to their plaice of business to examine records pertaining to the business. Section 203.4 of the regulations is a Statement of General Policy regarding disposition of records by regulated entities that records be retained for a period of two full years. We have interpreted this to mean that records should be maintained for the current year to date, plus the prior two full years (Jan–Dec). This regulation also provides that longer retention periods may be required upon notice by the Administrator.

[245] *Id.*

[246] Fischer, Bart, L., Joe L. Outlaw, and David P. Anderson, eds. *The U.S. Beef Supply Chain: Issues and Challenges.* Texas A&M University (June 2021) available at *https://www.afpc.tamu.edu/research/publications/710/cattle.pdf.*

[247] *GIPSA Livestock and Meat Marketing Study, Vol. 1,* ES–8 (January 2007).

and argued that producers are already provided critical information required to make informed business decisions. It suggested that, in lieu of new rules to require greater information disclosure, AMS should consider dedicated producer education resources or outreach programs to raise producer awareness.

AMS Response: AMS appreciates this commenter's suggestion to further educate producers and will take this under consideration as additional support AMS may offer to producers. This rulemaking action clarifies that if regulated entities make omission of material information necessary to make a statement or representation not false or misleading (as defined in the rule) against a covered producer, such conduct amounts to deception and is a violation of the Act. The codification of these regulations stems from existing law that aims to prohibit deception in Act-regulated markets. The new regulations do not create any specific disclosure of information requirements. To the extent that regulated entities identify the need to provide additional information to producers, the facts and circumstances of the transaction will determine whether the information is in violation of the rule. AMS agrees that producer education and outreach are valuable to protecting producers and effectuating the purpose of the Act and intends to conduct more of such activities in the immediate term. AMS is making no changes to the regulations as proposed in response to this comment.

VIII. Regulatory Analysis

A. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. chapter 35), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. This final rule includes a new collection of information contained in new § 201.304(c), ''Recordkeeping of compliance practices.'' The proposed rule requested comment on the estimated recordkeeping burden. All comments received on this information collection are summarized and included in the final request for OMB approval. Under the final rule, there are no new regulatory text changes that would change the proposed rule costs and benefits analyses. The burden estimates under the final rule are updated to reflect the most recent data available, updates in regulated entity wages, and the number of regulated entities. The estimated burden for the recordkeeping requirement imposed by this final rule is as follows:

OMB Number: 0581–NEW.

Expiration Date of Approval: This is a NEW collection.

Type of Request: Approval of a New Information Collection.

Abstract: Section 201.304(c) will require live poultry dealers, swine contractors, and packers to retain all relevant records relating to their compliance with § 201.304(a) and (b) for no less than five years. This recordkeeping requirement is necessary to evaluate compliance with § 201.304(a) and (b) and to facilitate investigations and enforcements based on producer and grower complaints. This recordkeeping requirement will bolster AMS's ability to review the records of regulated entities during compliance reviews and investigations based on complaints of undue prejudices, unjust discrimination, and retaliation in the livestock and poultry industries in accordance with the purposes of the Act. Costs of recordkeeping include maintaining and updating records by regulated entities and will be discussed and quantified below.

Live Poultry Dealer, Swine Contractor, and Packer Recordkeeping Costs

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

Respondents: Live poultry dealers, swine contractors, and packers.

Estimated Number of Respondents: 1,030.

Estimated Total Annual Burden on Respondents: 4,377 hours in the first year and 3,605 hours annually thereafter.

Information Collection and Recordkeeping Costs of § 201.304(c): Costs to comply with the recordkeeping are likely relatively low. This rule extends the disposal date of most records, if already kept, from 2 years to five years to promote efficient USDA monitoring efforts. For some records, the current disposal date is 1 year, which could be extended to five years under this rule if they are deemed relevant to showing compliance with this rule. Costs of recordkeeping include regulated entities maintaining and updating compliance records they already keep. From the perspective of the regulated entity, recordkeeping is a direct cost. Some smaller regulated entities that currently do not maintain records may voluntarily decide to develop formal policies, procedures, training, etc., to comply with the rule and will then have records to maintain.

AMS expects the recordkeeping costs will be comprised of the time required by regulated entities to store and maintain records they already keep. 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 unduly prejudicial and unjustly 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 was estimated by AMS subject matter experts. These experts were auditors and supervisors with many years of experience in AMS's PSD conducting investigations and compliance reviews of regulated entities. AMS used the May 2022 U.S. Bureau of Labor Statistics (BLS) Occupational Employment and Wage Statistics for the time values in this analysis.[248] BLS estimated an average hourly wage for general and operations managers in animal slaughtering and processing to be $61.24. The average hourly wage for lawyers in food manufacturing was $103.81. In applying the cost estimates, AMS marked-up the wages by 41.79 percent to account for fringe benefits.

AMS expects that recordkeeping costs will 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 § 201.304(c) will 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

[248] Estimates are available at U.S. Bureau of Labor Statistics. Occupational Employment and Wage Statistics, available at *https://www.bls.gov/oes/special-requests/oesm22all.zip* (accessed 7/14/2023). Featured OES Searchable Databases: U.S. Bureau of Labor Statistics (*bls.gov*) (accessed July 2023).

first year. AMS expects the packers, live poultry dealers, and swine contractors in the second quartile will 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 will 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 will 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 § 201.304(c) will 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 first 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 will 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 will 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 fourth quartile will 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 § 201.304(c) totaled $30,000 for live poultry dealers,[249] $193,000 for swine contractors,[250] and $122,000 for packers.[251] Estimated yearly continuing costs for recordkeeping requirements in § 201.304(c) totaled $26,000 for live poultry dealers,[252] $166,000 for swine contractors,[253] and $106,000 for packers.[254]

Breaking out costs by market, AMS expects recordkeeping requirements in § 201.304(c) to cost beef packers $58,000 in the first year and $50,000 in each following year. Section 201.304(c) will cost lamb packers $23,000 in the first year and $20,000 in successive years. Section 201.304(c) will cost pork packers $42,000, and it will cost swine contractors $193,000 for a total of $235,000 in the first year. Section 201.304(c) will cost swine contractors $166,000 in successive years, and it will cost pork packers $36,000 for a total of $202,000 in successive years.

B. Executive Orders 12866, 13563, and 14094; Regulatory Impact Analysis; and the Regulatory Flexibility Act

AMS prepared this assessment in compliance with the requirements of Executive Orders 12866, 13563, and 14094. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 reaffirms, supplements, and updates Executive Order 12866 and further directs agencies to solicit and consider input from a wide range of affected and interested parties through a variety of means.

This rulemaking has been determined to be significant for the purposes of E.O. 12866 as amended by E.O. 14094 and, therefore, has been reviewed by OMB. As a required part of the regulatory process, AMS prepared an economic analysis of the costs and benefits of §§ 201.302, 201.304, 201.306, and 201.390.

This Regulatory Impact Analysis (RIA) presents an assessment of the anticipated benefits and costs from the rule including an assessment of regulatory alternatives: the *status quo,* the preferred alternative, and the small business exemption alternative. The Regulatory Flexibility Analysis (RFA) evaluates the effect of the rule on small businesses.

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, livestock producer, and regulated entity will apply to §§ 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 § 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 will remain valid.

Under the final rule, there are no new regulatory text changes that would change the proposed rule costs and benefits of the regulatory analyses. The new information collection and recordkeeping requirements under the final rule are updated to reflect only the most recent data available, updates in regulated entity wages and number of regulated entities.

The Need for the Rule: Market Failure in Livestock and Poultry Markets

This section describes the need for the regulatory action, and how the regulatory action will meet this need. The structure of the livestock and poultry industries sets the stage for unjustly discriminatory and deceitful conduct by regulated entities. This rule aims to benefit covered producers by protecting their rights from these market harms. This regulatory action addresses market failure in the livestock and

[249] 90 live poultry dealers × ($44.51 per hour admin. cost × (4 hours + 2 hours + 1.33 hours + .67 hours)) + ($86.83 per hour manger cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($147.19 legal cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($93.68 information tech cost × (1.5 hours + .75 hours + .5 hours + .25 hours))/4 = $30,132.

[250] 575 swine contractors × ($44.51 per hour admin. cost × (4 hours + 2 hours + 1.33 hours + .67 hours)) + ($86.83 per hour manger cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($147.19 legal cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($93.68 information tech cost × (1.5 hours + .75 hours + .5 hours + .25 hours))/4 = $192,507.

[251] 365 packers × ($44.51 per hour admin. cost × (4 hours + 2 hours + 1.33 hours + .67 hours)) + ($86.83 per hour manger cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($147.19 legal cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($93.68 information tech cost × (1.5 hours + .75 hours + .5 hours + .25 hours))/4 = $122,200.

[252] 90 live poultry dealers × ($44.51 per hour admin. cost × (3 hours + 1.5 hours + 1 hours + .5 hours)) + ($86.83 per hour manger cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($147.19 legal cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + $93.68 information tech cost × (1 hours + .5 hours + .33 hours + .17 hours))/4 = $26,021.

[253] 575 swine contractors × ($44.51 per hour admin. cost × (3 hours + 1.5 hours + 1 hours + .5 hours)) + ($86.83 per hour manger cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($147.19 legal cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + $93.68 information tech cost × (1 hours + .5 hours + .33 hours + .17 hours))/4 = $166,244.

[254] 365 packers × ($44.51 per hour admin. cost × (3 hours + 1.5 hours + 1 hours + .5 hours)) + ($86.83 per hour manger cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($147.19 legal cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + $93.68 information tech cost × (1 hours + .5 hours + .33 hours + .17 hours))/4 = $105,529.

poultry industries. This section will show how high levels of concentration, the prevalence of vertical contracting, asymmetry of information and the hold-up problem together create an environment facilitating abusive conduct that this rule addresses and defines the need for this rule. Discriminatory practices are the exclusionary or adverse treatment which market concentration and vertical contracting makes possible and hard to avoid on the basis of a covered producer's race, or other protected basis, and on the basis of actions that prejudice, disadvantage, inhibit market access, or are otherwise adverse compared to terms generally or ordinarily offered to similarly situation covered producers. This rule focuses on prohibiting regulated entities from wrongfully excluding producers from markets or denying those producers the full value of their products or services in those markets. It will then be shown how the livestock and poultry market structures help define the distribution of this rule's costs and benefits.

The Need for the Rule: Prevalence of Concentration and Contracting in Cattle, Hog, and Poultry Industries

The rise of concentration and vertical contracts in livestock and poultry markets has increasingly created an environment that enables packers, swine contractors, and live poultry dealers to unjustly exclude many producers from, and otherwise undermine their economic opportunities in, the marketplace. This adverse treatment is a cost, or economic harm, to covered producers born from market exclusion and associated high search costs of finding alternative markets in concentrated markets coordinated with vertical contracts.

Concentration in these markets has intensified over the past several decades and continues today. Concentration ratios are one metric to track the increasing share of slaughter of livestock and poultry in U.S. attributed to fewer packers and poultry integrators. Table 1 in the *Background* section shows the level of concentration in the livestock and poultry slaughtering industries for 1980–2020 using four-firm Concentration Ratios (CR4). The CR4 for steers and heifers was 36 percent in 1980 and rose to 81 percent in 2020. That is, in 2020, the top four beef packers slaughtered 81 percent of the nation's steers and heifers. The CR4 for hogs was 32 percent in 1980 and rose to 64 in 2020, and the CR4 was 32 percent in 1980 for broilers and rose to 53 percent in 2020.[255]

The data in Table 1 are estimates of CR4s at the national level; however, in practice, the relevant economic markets for livestock and poultry may be regional or local, where concentration may be higher than those at the national level. This is because of limits on how far live animals can be safely and efficiently transported. In particular, regional concentration is often higher than national concentration for hogs.[256] Similarly, based on AMS's experience conducting investigations and monitoring cattle markets, there are often only one or two cattle buyers in many local geographic markets, and very few sellers have the option of selling fed cattle to more than three or four packers. Likewise, even though poultry markets are the least concentrated of the four markets described above as measured by their national CR4s, relevant 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 the national concentration level. Thus, the current environment is one where producers have little choice in whom they do business with, resulting in an unequal distribution of bargaining power between parties. MacDonald and Key found that about one quarter of contract growers reported that there was just one live poultry dealer in their area, defined by a roughly 34-mile radius from their farm; another quarter reported two; another quarter reported three; and the rest reported four or more.[257] Table 2 in the *Background* section [258] highlights this issue by using the Herfindahl-Hirschman Index (HHI) to show the limited ability of poultry growers to switch to different integrators. Similar to a CR4, HHI is an indicator of market concentration, with the index increasing as market shares across firms (packers) become more unequal or the number of these firms decrease. Markets with HHIs above 2,500 are considered highly concentrated. Table 2 presented earlier from MacDonald showed that 88.4 percent of growers face an integrator HHI of at least 2,500. As stated earlier, the data suggest that most contract broiler growers in the U.S. are thus in markets where the sellers have the potential for market power advantage. Livestock producers face similar market vulnerabilities as shown here for poultry growers given that livestock producers also face regional market concentration that is more concentrated than national data would indicate.

Market concentration and the use of vertical contracts are interrelated; as such, growing, production, and marketing contracts feature prominently in the livestock and poultry industries. As outlined above, several provisions in §§ 201.304 and 201.306 will affect the process of contract formation, performance, termination, and any other action that a reasonable covered producer would find materially adverse for livestock, poultry, and meat grown or marketed.

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 labor, water, electricity, fuel, and provide for waste removal. Fed cattle marketing contracts typically take the form of marketing agreements. Hog production falls between these two extremes.

As shown in Table 5 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.

[255] Sheep and turkeys exhibit similar increases in concentration between 1980 and 2020.

[256] 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).

[257] 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. (In the 2011 Agricultural Resource Management Survey (ARMS), the mean distance from a grower to the integrator's processing plant was 34 miles, and 90 percent of all birds were produced on farms within 60 miles of the plant.)

[258] 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 5: Percentage of Poultry and Hogs Raised and Delivered Under Production Contracts[259]

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 and 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 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. Table 6 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 (formula and forward contracts in the below table). 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, or negotiated trades, from 46 in 2010 to 28 in 2021.

Table 6: Percentage of Fed Cattle Sold by Type of Purchase[260]

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 5 above, over 40 percent of hogs are grown under production contracts. These hogs are then sold by swine contractors to packers. The percentage of hogs sold under marketing contracts or produced by packers has increased to over 98 percent in 2020 (other marketing agreements and formula sales in the table below). The spot market, or negotiated trades, 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.

[259] 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).

[260] 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).

Table 7: Percentage of Hogs Sold by Type of Purchase[261]

Year	Other Marketing Arrangements[262]	Formula[263]	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

The Need for the Rule: 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. When coupled with high levels of market concentration, this market environment can make it easier for regulated entities to engage in undue prejudice and unjust discrimination, retaliation, and deception and make the harms to producers greater from those abuses.

Despite various policy and public concerns, 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.[264]

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 unjust discrimination, retaliation, and deception, among other concerns, which cause inefficiencies in the markets for livestock, poultry, and meat.[265] 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 lead 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 risks. The grower faces the risk that the contractor may require additional capital investments or the contractor may impose lower returns at the time of contract renewal—leveraging its market power given the grower's limited options.[266] Some poultry 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 bind the grower to a single contractor or integrator, furthering the indebtedness and exacerbating an imbalance of power.

In the poultry industry, limited integrator choice may accentuate contract risks. The data in Table 2 above show that 52 percent of broiler growers, who account for 56 percent of total production, report having only one or two integrators in their local areas. Even where multiple integrators 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.

A 2006 survey indicated that growers with access to a single integrator received seven to eight percent less

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

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

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

[264] 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,''.

[265] 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.*

[266] *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).

compensation, on average, than farmers located in areas with four or more integrators.[267] 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.[268]

In 2013, production contracts covered $58 billion in agricultural production, 83 percent of which was poultry and hog contracts.[269] Most hogs are produced and marketed under production and marketing contracts. Open market negotiated trade represented nine percent of total trades for hogs in 2008 and dropped to two percent in 2020.[270] In effect, the only production or 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. Access to competitive markets, absent from unjust discrimination, undue prejudice, and retaliation, is important to the economic livelihood of the market. 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 29 percent in 2022.[271]

One indication of potential market power is industry concentration.[272] Market concentration facilitates the exclusionary and adverse treatment observed in discriminatory practices. The data in Table 1 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 2 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 1 and 2 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 anticompetitive conduct such as undue prejudice and unjust discrimination, retaliation, and deception.

The Need for the Rule: Asymmetric Information

There is asymmetry in the information available to livestock producers and livestock and poultry growers as compared to 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 contract formation, performance, termination, or refusal by employing a false or misleading statement, or omission of material information necessary to make a statement not false or misleading. A 2023 AMS rule, Transparency in Poultry Grower Contracting and Tournaments, directly aims to address this asymmetric information in the poultry industry by adding disclosures and information that live poultry dealers engaged in the production of broilers must furnish to poultry growers with whom dealers make poultry growing arrangements.[273] There remains a wide range of circumstances where information asymmetry is present in the livestock and poultry markets, which would be addressed in whole or in part by this final rule. Additionally, the information this rule provides can help producers know if they are treated unfairly.

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.

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.[274]

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. A grower may not be able to evaluate the inputs it received such as chicks and feed, and he or she almost certainly will not know about the inputs received by other growers. A live poultry dealer also has historical information concerning growers' production and income under many

[267] 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.

[268] *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).

[269] 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.

[270] 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.

[271] USDA, AMS, FTPP, Packers and Stockyards Division. Packer Annual Reports, 2021 and 2022 pending, and 2012. Available at *https://www.ams.usda.gov/reports/psd-annual-reports,* accessed 9–19–22.

[272] 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.

[273] Transparency in Poultry Grower Contracting and Tournaments. A Rule by the Agricultural Marketing Service on 11/28/2023. *https://www.federalregister.gov/documents/2023/11/28/2023-24922/transparency-in-poultry-grower-contracting-and-tournaments.*

[274] All live poultry dealers are required to annually file Packers and Stockyards Division (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.*

different circumstances for all the growers with which the dealer 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 grower association organization, shared information to improve their production or growing practices with a regulated entity, another covered producer, or with a commercial entity, communicated with the government, or asserted any of the rights granted under the Act should lead to reducing the information asymmetry between regulated entities and producers.

The Need for the Rule: Hold-Up Problem

Hold-up is another problem that is particularly acute in service contracts between poultry growers and live poultry dealers. The economic concept of a hold-up problem refers to a situation in which two parties may be unable to cooperate efficiently due to incomplete or asymmetric information and the inability to write, enforce, or commit to contracts. Once a party becomes locked into a transaction, especially as a result of making a transaction-specific investment, they become vulnerable to exploitation by the other party. This may involve one party to a contract opportunistically deviating from expectations of the other party or failing to live up to previously agreed upon terms.

In the poultry industry, hold-up occurs when a poultry grower makes an investment, such as in poultry housing, and becomes dependent upon the growing arrangement to repay the investment. Hold-up is less common 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 the potential for hold-up into the contracting process. If the integrator takes advantage of the grower's dependence, for example, by delaying delivery of chicks that the grower depends upon to make payments on investments, it would be holding up the grower. The aim of the economic hold-up may be to coerce the grower into accepting conditions that benefit the integrator at the expense of the grower. For example, refusing to supply chicks until a contract amendment with unfavorable conditions is signed.

This is of concern in poultry production contracts because the capital investment 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, may face similar risks.

Long term, this behavior may result in underinvestment in production, which is inefficient. Alternatively, if growers make a significant investment because they do not anticipate hold-up, but then it does occur, then growers may be required to spend too much on investments. The resulting over-investment in capital by those growers facing hold-up is also inefficient. The hold-up problem is a manifestation of both market power and asymmetric information.

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

As described previously, the organization and structure of poultry and livestock markets is characterized by regional market power; substantial investment in production capital that is specific to a single production purpose; and, in the poultry industry, nearly universal use of production contracts, and widespread use of marketing contracts in the cattle industry, while less so, for hogs. These conditions create the potential for market failures. Asymmetric information and imperfect competition are concerns in livestock and poultry markets. economically incomplete contracts and hold-up are of particular concern in poultry markets and can exacerbate the risk of undue prejudice and unjust discrimination, retaliation, and deception in poultry and livestock markets.

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

Cost-Benefit Analysis of §§ 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.[275] 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 §§ 201.304 and 201.306 as presented in this rule.[276] 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 §§ 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

[275] *See* sec. 6(a)(3)(C), E.O. 12866.

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

regulatory alternative, it will serve as the baseline against which to measure the other two alternatives.

Final Rule

As discussed above, final § 201.304 prohibits undue prejudice, unjust discrimination, and retaliation by regulated entities and adds a requirement for regulated entities to maintain records that they already keep, for up to a period of five years, related to its compliance with final § 201.304. Section 201.306 will prohibit deceptive practices by regulated entities in contract formation, performance, or termination by employing a false or misleading statement, or omission of material information necessary to make a statement not false or misleading. Additionally, a regulated entity may not refuse a contract by providing false or misleading information to a covered producer or associations of covered producers.

Final Rule: Benefits

Reductions in prejudicial, discriminatory, retaliatory, and deceptive practices by packers, swine contractors, and live poultry dealers will benefit society. These types of conduct are inefficient, and often difficult to quantify for prejudicial, discriminatory, retaliatory, and deceptive practices are not necessarily written into contracts but in contract offers, preparation and enforcement. Production contracts need not change to realize benefits in this rule. The amount of benefits that depends on the extent to which the 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. If the reductions are small, the benefits will be small. The greater the reductions, the greater the potential benefits. USDA's long-standing policy has been that the Act prohibits the type of conduct that final §§ 201.304 and 201.306 addresses.

Final §§ 201.304 and 201.306 add specificity to what constitutes undue prejudices, unjustly discriminatory practices, retaliation, and deception. The size of the benefits is difficult to quantify as it depends on the amount of undue prejudice, unjust discrimination and deception that will be avoided due to added specificity provided by the rule. The added benefits to the industry from final §§ 201.304 and 201.306 over the *Status Quo* occur when packers, swine contractors, and live poultry dealers alter their conduct to reduce instances of deceptive, prejudicial, and discriminatory practices, including retaliation. The potential benefits include protecting producer and grower rights, improved corporate culture, improved information, fewer deceptive practices, among others. The more undue prejudice, unjust discrimination, retaliation, 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 undue prejudice, unjust discrimination, retaliation, and deception.

Benefits: Protecting Producer and Grower Rights

A key purpose of specifying certain prohibitions on unduly prejudicial, discriminatory, and deceptive practices, including those in final §§ 201.304 and 201.306, is to protect livestock producers, swine contractors and poultry growers' rights under the Act. Final §§ 201.304 and 201.306 will also help protect producers from unfair and deceptive practices stemming from market power imbalances such as undue prejudice, unjust discrimination, retaliation, and deception by using false or misleading statements in contracting by packers and live poultry dealers. The benefits of prohibiting prejudicial, discriminatory, and deceptive practices, will accrue not only to the market's covered producers and cooperative producers who have been subjected to the prohibited practices, but also to those for whom the rule's deterrence effects will protect from future potential abuses.

Benefits: Addressing Imperfect Information

Several provisions in the final rule will enhance the protection of the rights of producers 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 will benefit producers by encouraging the use of their currently existing legal rights that will solidify and enhance their access to information. This in turn will help address information asymmetry and thus help producers make better business decisions, enhance their competitiveness, reduce the hold-up problem, and promote innovation and economic efficiency in the industry.

The final rule will help close this information gap by protecting the rights of 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. This will benefit producers by improving their ability to strengthen the returns to their livestock and poultry investments, by enhancing the bargaining power of supplier groups if they elect to organize in such a way.

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

More information will also reduce the risks associated with hold-up as discussed above. By protecting rights to freely communicate and associate, this rule will 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 with access to more and better information should promote innovation and economic efficiency in the industry.

The final rule may also serve to reduce the risk of violating sec. 202(a) of the Act because it will provide clarification to the livestock, and poultry industries as to the discriminatory and deceptive practices that will be prohibited under that section of the Act. Less risk through the clarification provided in the final rule will likely foster fairness in contracting by providing explicit protections for livestock producers, swine production contract growers, and poultry growers.

Benefits: Prohibiting Deceptive Practices

Final § 201.306 specifies prohibited practices that will be considered deceptive, and thus in violation of sec. 202(a) of the Act. Though USDA already protects producers from deceptive practices, the rule will explicitly protect suppliers from deception by packers and live poultry dealers by employing a false and misleading statement, or omission of material information necessary to make a statement not false or misleading in contracting. Prohibited deceptions, including false statements or omissions, can prevent or mislead producers, sellers, or buyers from making informed decisions and thus

represents a market inefficiency. The provisions in final §§ 201.304 and 201.306 will help give producers confidence that the information provided by processors is reliable, which will help them to make better and more informed business decisions and manage risk.

Other Benefits

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

Production and marketing contracting has many benefits in the livestock and poultry industries. The final rule can further enhance the documented benefits of contracting by prohibiting unduly prejudicial, discriminatory, and deceptive practices. Livestock producers often have few choices of packers to which they sell, and poultry growers often have few choices in the live poultry dealers for which they raise poultry. The limited alternatives cause fear among producers 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 final rule to promote integrity to the marketplace by enhancing the protection of the rights of the producers 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 final rule may correct above the *Status Quo* Alternative, nor the degree to which the additional producer and grower protections will address inefficiencies. Though AMS is unable to quantify the benefits of the regulation, this analysis has explained the types of benefits that will be derived from reductions in undue prejudice, unjust discrimination, retaliation, and deception. If the reductions are small, the benefits will be small. The greater the reductions, the greater the potential benefits.

Final Rule: Costs

The final rule will not impose any restrictions on numbers or types of production or marketing contracts that can be utilized, use of AMAs, poultry tournaments, or base price mechanisms in contracts for packers, swine contractors, and live poultry dealers. Instead, the final rule clarifies the prohibited unduly prejudicial, unjustly discriminatory, and deceptive practices that AMS considers violations of sections 202(a) and (b) of the Act. The final rule will require packers, live poultry dealers, and swine contractors to discontinue any prejudicial, unjustly discriminatory, or deceptive practices, if any are occurring. The practices prohibited by §§ 201.304 and 201.306 are the kind of practices that do not benefit society as a whole, but there is uncertainty about the extent of net costs to regulated entities of preventing them since they are based on behaviors and are not expressly written into contracts. In other words, §§ 201.304 and 201.306 result in uncertain-in-magnitude indirect costs resulting from adjustments by the livestock and poultry industries to reduce their use of AMAs, poultry tournaments, and pricing mechanisms, with the possibility of a number of changes to existing marketing or production contracts.

Though the magnitude of indirect costs is uncertain, AMS has constructed a scenario that indicates the magnitude is likely below an established dollar value benchmark. The following scenario illustrates why it is extremely unlikely that the rule's indirect costs will exceed the Unfunded Mandates Reform Act's (UMRA) cost compliance threshold of $170 million annually, a benchmark used to assess this rule's effects on the private sector.[277] If some cattle contracts are altered to come into compliance with the rule, and cattle prices to some producers are increased, AMS expects that the packers will offer, at most, the average price paid for cattle. Looking just at cattle, the weighted average difference between the minimum and average liveweight prices paid for cattle over the last nine years in four cattle regions reported by AMS Market News is $1.31 per cwt ($.01/lb.).[278] If AMS assumes that the entire difference between the minimum and average prices paid was due to unlawful discrimination, deception, and retaliation, this will require 13 billion pounds of liveweight cattle to meet the $170 million threshold.[279] This assumption does not account for any price differences for cattle related to quality of the animal. Taking the 2022 average liveweight per head for all cattle of 1,369 lbs. per head,[280] this means that 9.5 million head of cattle in one year would have to face conduct this rule aims to prohibit to equal $170 million in costs in that year.[281] This number accounts for 28 percent of all cattle slaughtered in 2022.[282] Based on AMS's knowledge of the livestock industry, it is not expected that the number of cattle affected by unlawful discrimination, retaliation, or deception reaches this level. This fact, combined with the unrealistic assumption that any price deduction below the average price does not account for quality differences and is wholly the result of discrimination, retaliation, and deception, points to a conclusion that this rule will have limited impacts, and not exceed the UMRA threshold.

Litigation Costs

AMS expects §§ 201.304 and 201.306 to reduce litigation costs due to increased compliance with the rule associated with the clarity provided by the rule as to the conduct that violates the Act, but also to increase litigation as this rule allows producers to find relief in courts. AMS is uncertain as to which of these offsetting effects will dominate and to what extent. The final rule clarifies the prohibited unduly prejudicial, discriminatory, and deceptive practices that will violate section 202(a) of the Act. The clarification could result in a reduction in litigation costs if companies come

[277] Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, Pub. L. 104–4) requires Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal Governments and on the private sector. Agencies generally must prepare a written statement, including cost benefits analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures of $100 million or more (adjusted for inflation) in any 1 year for State, local or Tribal governments, in the aggregate, or to the private sector. Congressional Research Service. Updated February 23, 2021. Unfunded Mandates Reform Act: History, Impact, and Issues. Accessed at *https://crsreports.congress.gov/product/pdf/R/R40957/109* on 02/08/2024.

[278] Data for negotiated steers and heifers, across all Choice cattle, four cattle regions, 2015–2023. Sources: U.S. Department of Agriculture, Agricultural Marketing Service. Texas-Oklahoma-New Mexico Weekly Direct Slaughter Cattle—Negotiated Purchases (LM_CT156), Kansas Weekly Direct Slaughter Cattle—Negotiated Purchases (LM_CT157), Nebraska Weekly Direct Slaughter cattle—Negotiated Purchases (LM_CT158), and Iowa/Minnesota Weekly Weighted Average Cattle Report—Negotiated (LM_CT167).

[279] 13 billion lbs. = UMRA $170 million threshold divided by $0.01 per lb. (difference between the minimum and average liveweight prices paid for cattle over the last nine years in eight cattle markets is $1.31 per cwt ($.01/lb.)).

[280] U.S. Department of Agriculture, National Agricultural Statistical Service. April 2023. Livestock Slaughter 2022 Summary. Accessed at *https://downloads.usda.library.cornell.edu/usda-esmis/files/r207tp32d/8p58qs65g/g445dv089/lsan0423.pdf* on 02/08/2024.

[281] 9.5 million head of cattle = 13 million lbs. of cattle divided by 1,369 lbs. per head.

[282] 28 percent = (9,479,254 head divided by 34,300,00 head annual slaughter) multiplied by 100.

into compliance without any enforcement action. These regulations encourage 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 recordkeeping requirements. This effect could reduce litigation and thus result in reduced litigation costs for regulated entities.

However, there are several provisions in § 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 § 201.306 that could result in additional litigation, including refusals by regulated entities to enter into or renegotiate contracts and contract terminations by producers. The clarity of the practices that AMS considers to be discriminatory and deceptive in §§ 201.304 and 201.306 could offer producers new hope for relief from courts for undue prejudicial, discriminatory, and deceptive practices by regulated entities. This effect could result in increased litigation.

As stated above, AMS is uncertain as to which effect will dominate and to what extent. AMS does not estimate litigation costs in this analysis.

Direct Costs of the Final Rule

AMS expects §§ 201.304 and 201.306 will result in direct administrative and recordkeeping costs to the industry. AMS expects that packers, swine contractors, and live poultry dealers will incur direct administrative costs of learning the rule and then reviewing and, if necessary, revising marketing and production contracts to ensure compliance with §§ 201.304 and 201.306. Regulated entities will also incur recordkeeping costs from keeping the records they already maintain for up to five years as required under § 201.304. The expected total costs of §§ 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 of the Final Rule

AMS expects that §§ 201.304 and 201.306 will prompt packers, live poultry dealers, and swine contractors to first review and learn the 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 rule and then review and, if necessary, revise procurement and production contracts.

AMS expects the direct administrative costs of complying with §§ 201.304 and 201.306 will be relatively small.

The certain types of benefits outlined above will be in proportion to the extent to which the rule reduces prejudicial, discriminatory, retaliatory, and deceptive practices. The USDA policy has long held that several of the provisions in §§ 201.304 and 201.306 or similar provisions were violations of the 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.

The direct costs of the rule are low because the discriminatory, retaliatory, and deceptive behavior which the rule seeks to mitigate are not overtly written into the terms of the contracts between regulated entities and producers. They are behaviors or conduct in which some regulated entities engage, for example by not offering contracts to some producers due to discrimination and retaliation or by offering less favorable contract terms due to discrimination, retaliation, and deception. If the rule results in less discriminatory, retaliatory, or deceptive behavior by regulated entities, the costs of offering a contract to a producer or grower that was previously denied a contract or amending the terms of a less favorable contract to an impacted producer or grower will be of uncertain. Given that the behavior that the rule seeks to mitigate is not overtly written into contracts and is behavior during the contract offering process, the potential costs of mitigating the behavior are uncertain. The more that discriminatory, retaliatory, and deceptive behavior is mitigated because of the rule, the greater the benefits. AMS does not expect any changes in types of production and marketing contracts offered. AMS expects the same types of contracts to be offered, but with more equitable performance under the contracts by regulated entities across producers, fewer producers denied or terminated from contracts, and better clarity regarding contractual expectations. AMS also expects more contracts to be offered to producers who may not previously have been offered a contract due to discrimination, for example. Given its professional expertise based on regulating the industry and investigating complaints of the prohibited behaviors, AMS does not believe that the discriminatory, retaliatory, and deceptive behavior addressed by this rule is written into contract terms frequently enough to warrant changes to very many contracts.

Although the amount of indirect costs is uncertain, AMS expects any indirect costs will likely range from marginal to modest. As shown above, AMS acknowledges that some regulated entities may offer higher prices to some livestock producers and growers when they come into compliance with this rule. This could shift livestock and poultry prices offered to some producers and growers toward the true value of their livestock or poultry that would prevail in a more competitive market and away from the artificially low prices offered through the abuse of market power by engaging in deception, discrimination, or retaliation. This would reduce the cost to society due to the market inefficiency (dead weight loss) created by discriminatory, retaliatory, and deceptive practices by some regulated entities. This shift in prices offered to some producers and growers toward their true value would result, in some instances, in a transfer of excess profits (profits that exceed those that would be earned in a more competitive market) from regulated entities to some growers and producers. This transfer from regulated entities to some producers and growers could occur. AMS cannot quantify the extent to which the behavior this rule aims to prohibit occurs in the industry or the extent of any harm that would be avoided by regulated entities' cessation of the behavior under the clearer limitations set by this rule. AMS notes that regulated entities, in their comments to the proposed rule, asserted that the occurrence of the practices addressed in the rule are not widespread. Assuming this is true, the indirect costs will be marginal. AMS, however, has noted the behaviors have been sufficiently widespread to warrant the intervention provided by this final rule.

Estimates of the amount of time required to review and learn the rule and to review and revise contracts and keep records were provided by AMS subject matter experts. These experts were auditors and supervisors with many years of experience in AMS's PSD conducting investigations and compliance reviews of regulated entities. In May 2022, BLS released

Occupational Employment and Wage Statistics that AMS used for the time values in this analysis.[283] BLS estimated an average hourly wage for general and operations managers in animal slaughtering and processing to be $61.24. The average hourly wage for lawyers in food manufacturing was $103.81. In applying the cost estimates, AMS marked up the wages by 41.79 percent to account for fringe benefits.[284]

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

Live poultry dealers are currently required to file form PSD 3002, ''Annual Report of Live Poultry Dealers,'' OMB control number 0581–0308, with AMS. Ninety live poultry dealers filed annual reports with AMS for their 2021 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-five packers that processed cattle or calves, hogs, or lamb, sheep or goats filed reports or were due to file a report with AMS for their fiscal year 2021. Two hundred sixty-one were beef or veal packers. One hundred ninety-six were pork packers, and 139 were lamb, sheep, or goat packers.[285] The number of beef, pork, and lamb packers do not sum to 365 because many firms slaughtered more than one species of livestock. For instance, 112 packers slaughtered both beef and pork, and 66 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 final rule will require one hour of an attorney's time costing the industry $13,000 [286] and one hour of management time costing the industry $8,000 [287] for learning the rule, reviewing, and adjusting contracts. The total costs for learning, reviewing, and adjusting contracts will be $21,000 [288] for live poultry dealers.

AMS expects that packers will require an estimated one hour of an attorney's time and one hour of management time costing the industry $85,000. AMS estimates the total costs will be $40,000 for beef packers and $16,000 for lamb packers to learn and review the rule and adjust contracts.[289] Pork packers' share of the packers' costs will be $29,000. AMS also expects that rule will cost all 575 swine contractors an hour of an attorney's time and one hour of management time costing a total of $135,000 across all swine contractors.[290] Combining costs to pork packers with costs to swine contractors arrives at a total cost of $164,000 for hog and pork markets.

Direct Recordkeeping Costs for the Final Rule

Costs to comply with the recordkeeping requirements are likely relatively low. Section 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 unjustly discriminatory-based complaints received.

Costs of recordkeeping include regulated entities maintaining and updating compliance records and are 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 rule and will then have records to maintain.

AMS expects the recordkeeping costs will comprise the time required by regulated entities to store and maintain records they already keep. 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 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.

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 § 201.304(c) will 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.

AMS also expects that packers, live poultry dealers, and swine contractors will incur continuing recordkeeping costs in each successive year. AMS estimated that § 201.304(c) will 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.

Estimated first-year costs for recordkeeping requirements in § 201.304(c) totaled $30,000 for live poultry dealers,[291] $193,000 for swine

[283] Estimates are available at U.S. Bureau of Labor Statistics. Occupational Employment and Wage Statistics, available *https://www.bls.gov/oes/special-requests/oesm22all.zip* (accessed 7/14/2023).

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[285] 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.

[286] 90 live poultry dealers × $147.19 per hour × 1 hour = $13,247.

[287] 90 live poultry dealers × $86.83 per hour × 1 hour = $7,815.

[288] $13,247 + $7,815 = $21,062.

[289] 365 × ($147.19 per hour × 1 hour + $86.83 per hour × 1 hour) = $85,417.

[290] 575 × ($147.19 per hour × 1 hour + $86.83 per hour × 1 hour) = $134,562.

[291] 90 live poultry dealers × (($44.51 per hour admin. Cost × (4 hours + 2 hours + 1.33 hours + .67 hours)) + ($86.83 per hour manger cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($147.19 legal cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($93.68 information tech cost

Continued

contractors,[292] and $122,000 for packers.[293] Estimated yearly continuing costs for recordkeeping requirements in § 201.304(c) totaled $26,000 for live poultry dealers,[294] $166,000 for swine contractors,[295] and $106,000 for packers.[296]

Breaking out costs by market, AMS expects recordkeeping requirements in § 201.304(c) to cost beef packers $58,000 in the first year and $50,000 in each following year. Section 201.304(c) will cost lamb packers $23,000 in the first year and $20,000 in successive years. Section 201.304(c) will cost pork packers $42,000, and it will cost swine contractors $193,000 for a total of $235,000 in the first year. Section 201.304(c) will cost swine contractors $166,000 in successive years, and it will cost pork packers $36,000 for a total $202,000.

Total Direct Administrative & Recordkeeping Costs for the Final Rule

Table 8 below 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 §§ 201.304 and 201.306 will cost each packer, swine contractor, and live poultry dealer an average $569 in the first year and an average $289 in each succeeding year. First-year costs will total $51,000 for live poultry dealers, $327,000 for swine contractors, and $208,000 for packers. Costs in successive years will be due to recordkeeping requirements and will total $26,000 for live poultry dealers, $166,000 for swine contractors, and $105,000 for packers annually.

Table 8: 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	569	289
Average Cost per to Swine Contractor	569	289
Average Cost per Packer	569	289
Total Cost to Live Poultry Dealers	51,000	26,000
Total Cost to Swine Contractors	327,000	166,000
Total Cost to Packers	208,000	105,000**
Beef Packers*	98,000	50,000
Pork Packers*	71,000	35,000
Lamb Packers*	39,000	20,000
Total Cost	586,000	298,000

*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.

× (1.5 hours + .75 hours + .5 hours + .25 hours)))/4 = $30,132.

[292] 575 swine contractors × (($44.51 per hour admin. cost × (4 hours + 2 hours + 1.33 hours + .67 hours)) + ($86.83 per hour manger cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($147.19 legal cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($93.68 information tech cost × (1.5 hours + .75 hours + .5 hours + .25 hours)))/4 = $192,507.

[293] 365 packers × (($44.51 per hour admin. cost × (4 hours + 2 hours + 1.33 hours + .67 hours)) + ($86.83 per hour manger cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($147.19 legal cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($93.68 information tech cost × (1.5 hours + .75 hours + .5 hours + .25 hours)))/4 = $122,200.

[294] 90 live poultry dealers × (($44.51 per hour admin. cost × (3 hours + 1.5 hours + 1 hours + .5 hours)) + ($86.83 per hour manger cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($147.19 legal cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + $93.68 information tech cost × (1 hours + .5 hours + .33 hours + .17 hours)))/4 = $26,021.

[295] 575 swine contractors × (($44.51 per hour admin. Cost × (3 hours + 1.5 hours + 1 hours + .5 hours)) + ($86.83 per hour manger cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($147.19 legal cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + $93.68 information tech cost × (1 hours + .5 hours + .33 hours + .17 hours)))/4 = $166,244.

[296] 365 packers × (($44.51 per hour admin. cost × (3 hours + 1.5 hours + 1 hours + .5 hours)) + ($86.83 per hour manger cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + ($147.19 legal cost × (1.5 hours + .75 hours + .5 hours + .25 hours)) + $93.68 information tech cost × (1 hours + .5 hours + .33 hours + .17 hours)))/4 = $105,529.

The total direct administrative and recordkeeping costs are estimated to be $586,000 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 9: Direct Administrative and Recordkeeping Costs for §§ 201.304 and 201.306 in 2023

Cattle ($ Th)	Hogs ($ Th)	Lambs ($ Th)	Poultry ($ Th)	Total ($ Th)
98	398	39	51	586

Final Rule: Ten-Year Total Direct Administrative and Recordkeeping Costs

Expected administrative and recordkeeping costs of §§ 201.304 and 201.306 for each year from 2023 through 2032 appear in the table below. Based on the analysis, AMS expects the ten-year total direct administrative and recordkeeping costs of §§ 201.304 and 201.306 to be $3.3 million.

Table 10: Ten-Year Total Direct Administrative and Recordkeeping Costs of §§ 201.304 and 201.306*

Year	Cattle ($ Th)	Hogs ($ Th)	Lambs ($ Th)	Poultry ($ Th)	Total ($ Th)
2023	98	398	39	51	586
2024	50	202	20	26	298
2025	50	202	20	26	298
2026	50	202	20	26	298
2027	50	202	20	26	298
2028	50	202	20	26	298
2029	50	202	20	26	298
2030	50	202	20	26	298
2031	50	202	20	26	298
2032	50	202	20	26	298
Totals	**547**	**2,216**	**217**	**285**	**3,266**

*Column total may not sum due to rounding.

Final Rule: 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.[297]

[297] Circular A–4. September 17, 2003, available at *https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/*. Note: OMB issued an updated Circular A–4 on November 9, 2023. AMS developed its analysis for this final rule using the 2003 Circular A–4 guidance. The 2023 guidance is effective March 1, 2024, and applies to draft final rules submitted to OMB's Office of Information and Regulatory Affairs after December 31, 2024. The 2023 guidance is available at *https://*

Continued

AMS calculated the PV of the ten-year total direct administrative and recordkeeping costs of the regulations using a three percent and seven percent discount rate. The PVs appear in Table 11.

Table 11: PV of Ten-Year Direct Administrative and Recordkeeping Cost of §§ 201.304 and 201.306

Discount Rate	Final Rule ($ Th)
Three Percent	2,820
Seven Percent	2,361

AMS expects the PV of the ten-year total administrative and recordkeeping costs of §§ 201.304 and 201.306 to be $2.8 million at a three percent discount rate and $2.4 million at a seven percent discount rate.

Final Rule: 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 §§ 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 Table 12.[298]

Table 12: Annualized Direct Administrative and Recordkeeping Costs of §§ 201.304 and 201.306

Discount Rate	Final Rule ($ Th)
Three Percent	331
Seven Percent	336

AMS expects the annualized ten-year administrative and recordkeeping costs of final §§ 201.304 and 201.306 to be $331,000 at a three percent discount rate and $336,000 at a seven percent discount rate.

Cost-Benefit Comparison of the Final Rule

The expected costs of this rule are very small relative to the size of the industry; and expected benefits are expected to be proportional to reductions in conduct this rule addresses. Combined sales of beef, pork, and broiler chicken in the U.S. for 2022 were approximately $294.5 billion.[299] As discussed above, the total cost of §§ 201.304 and 201.306 in the first year is estimated to be $586,000, or 0.0002 percent of revenues. A reduction in prejudicial, discriminatory, retaliatory, and deceptive practices will lead to benefits that will be directly related to the reductions in these practices. If the reductions are small, the benefits will be small. The greater the reductions, the greater the benefits. AMS expects that the costs and benefits to society from the 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 §§ 201.304 and 201.306, but exempting small businesses, as defined by the SBA, from compliance with the recordkeeping requirement of § 201.304(c).[300] All other provisions of §§ 201.304 and 201.306 will still apply to small businesses. Most packers are small businesses under the SBA definition. Of the 365 packers reporting to AMS, 348 are small businesses. Two hundred fifty-three beef packers and 183 pork packers are small businesses. All 139 lamb packers are small businesses. Packers include multi-species packers. One hundred eight swine contractors are small businesses. There are 55 small poultry dealers.

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

Table 13 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 a small business exemption alternative will cost each live poultry dealer, swine contractor, and packer an average of $448, $548, and $265, respectively, in the first year. AMS expects costs to average $185, $271, and $27 for live poultry dealers, swine contractors, and packers, respectively, in each succeeding year. First-year costs will total $40,000 for live poultry dealers, $315,000 for swine contractors, and $97,000 for packers.

www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf.

[298] Circular A–4. September 17, 2003, available at *https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/.*

[299] Total meat and poultry processing industry revenues. Source: *https://www.ibisworld.com/industry-statistics/market-size/meat-beef-poultry-processing-united-states/#:~:text=The%20market%20size%2C%20measured%20by,industry%20increased%200.2%25%20in%202022.*

[300] *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).

Costs in successive years will be due to recordkeeping requirements and will total $17,000 for live poultry dealers, $156,000 for swine contractors, and $10,000 for packers annually. The total direct administrative and recordkeeping costs are estimated to be $452,000 in the first year.

Table 13: Small Business Recordkeeping 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	448	185
Average Cost per Swine Contractor	548	271
Average Cost per Packer	265	27
Total Cost to Live Poultry Dealers	40,000	17,000
Total Cost to Swine Contractors	315,000	156,000
Total Cost to Packers	97,000	10,000
Beef Packers*	44,000	3,000
Pork Packers*	36,000	6,000
Lamb Packers*	16,000	0
Total Cost	452,000	183,000

*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.

As discussed above, AMS considers the total costs from §§ 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 to pricing mechanisms or poultry tournaments, and no substantial changes to existing marketing, or 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 rule 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 final rule. 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 Table 14. Costs for the final rule are also shown for convenience.

Table 14: Annual Total Direct Costs: Small Business Exemption Alternative

Year	Final Rule ($ Th)	Small Business Exemption Alternative ($ Th)
2023	586	427
2024	298	182
2025	298	182
2026	298	182
2027	298	182
2028	298	182
2029	298	182
2030	298	182
2031	298	182
2032	298	182
Total	**3,266**	**2,067**

AMS estimates that §§ 201.304 and 201.306, with the small business exemption, will result in $427,000 in direct total costs in the cattle, hog, lamb, and poultry industries in the first full year following implementation and $182,000 each year in ongoing costs. AMS expects the ten-year total costs of § 201.304 and 201.306 with a small business exemption to be $2.1 million. Exempting small business will save approximately $159,000 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. Costs for the final rule are also shown for convenience.

Table 15: PV of Ten-Year Total Cost: Small Business Exemption

Discount Rate	Final Rule ($ Th)	Small Business Exemption Alternative ($ Th)
Three Percent	2,820	1,792
Seven Percent	2,361	1,509

AMS expects the PV of the ten-year total costs of §§ 201.304 and 201.306 with a small business exemption to be $1.8 million at a three percent discount rate and $1.5 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 §§ 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 Table 16. The final rule is also shown for convenience.

Table 16: Ten-Year Annualized Costs - Small Business Exemption

Discount Rate	Final Rule ($ Th)	Small Business Exemption Alternative ($ Th)
Three Percent	331	210
Seven Percent	336	215

AMS expects the annualized costs of §§ 201.304 and 201.306 with a small business exemption to be $210,000 at a three percent discount rate and $215,000 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 final rule 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 final rule and the results appear in Table 17.

Table 17: Difference in Ten-Year Annualized Costs of §§ 201.304 and 201.306 Between the Final Rule and Small Business Exemption Alternative

Discount Rate	($ Th)
Three Percent	121
Seven Percent	121

The annualized costs of the Small Business Exemption Alternative are $121,000 less expensive using a three percent discount rate and $121,000 less expensive using a seven percent discount rate. As is the case with costs, the benefits will be highest for the final rule because the full benefits will be received by all livestock producers and poultry growers, not just those doing business with large packers, swine contractors and live poultry dealers.

Though the Small Business Exemption Alternative will save approximately $121,000 on an annualized basis, AMS chose final §§ 201.304 and 201.306 over the Small Business Exemption Alternative because AMS wishes to prevent broadly the kind of undue prejudices and unjust discrimination described in the rule. AMS believes that keeping relevant records will help promote compliance with this rule, that all packers, live poultry dealers, and swine contractors cannot purchase livestock or enter into contracts for growing services with the kind of undue prejudices and unjust discrimination described in the rule.

AMS considered all three regulatory alternatives and believes that the final rule 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

As part of the regulatory process, a Regulatory Flexibility Analysis (RFA) is conducted in order to evaluate the effects of this rule on small businesses. Under the final rule, there are no new regulatory text changes that would change the proposed rule costs and benefits of the regulatory analyses.

The SBA defines small businesses by their North American Industry Classification System Codes (NAICS).[301] 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, 90 live poultry dealers will be subject to the regulation. Fifty-five of the live poultry dealers will be small businesses according to the SBA standard.

AMS records identified 365 packers that file annual reports or are due to file with PSD for their 2021 fiscal year. Two hundred sixty-one were beef packers. One hundred ninety-six were pork packers, and 139 were lamb or goat packers. Many firms slaughtered more than one species of livestock. For instance, 112 packers slaughtered both beef and pork.

Most packers will be small businesses, although large packers are responsible for most meat production. Three hundred forty-eight packers will be small businesses. Two hundred fifty-three beef packers and 183 pork packers were small businesses. All 139 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 will review and learn the new rule and, if necessary, revise production and marketing contracts to ensure compliance with the new rule. Second, AMS expects that packers, live poultry dealers, and swine contractors will have additional costs associated with the new recordkeeping requirements in § 201.304(c).

AMS estimated that costs for reviewing and learning the final rule to small live poultry dealers, small packers, and small swine contractors will consist of one hour of a manager's time and one hour of a lawyer's time to review the requirements of §§ 201.304 and 201.306. Expected first-year costs will be $234 [302] for each live poultry dealer, each swine contractor, and each packer. This will amount to a total $13,000 for the 55 live poultry dealers, $81,000 for the 348 packers, and $25,000 for the 108 swine contractors.

Concerning the recordkeeping requirements in final § 201.304(c), AMS expects the cost will be comprised of the time required to store and maintain records already kept. AMS expects that the costs will be relatively small

[301] 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.*

[302] $147.19 per hour × 1 hour of an attorney's time + $86.83 per hour × 1 hour of a manager's time = $234.

because packers, live poultry dealers, and swine contractors will 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 will 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 § 201.304(c) will 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 will 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 will 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, will 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 § 201.304(c) will 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 will 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 will 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 will 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 final § 201.304(c) totaled $11,000 for live poultry dealers,[303] $12,000 for swine contractors,[304] and $111,000 for packers.[305] Estimated yearly continuing costs for recordkeeping requirements in § 201.304(c) totaled $9,000 for live poultry dealers,[306] $10,000 for swine contractors,[307] and $96,000 for packers.[308]

Total expected first year costs for small businesses, including one time reviewing costs and recordkeeping costs will be $192,000 for packers, $37,000 for swine contractors, and $24,000 for live poultry dealers. The table below lists expected costs for small businesses subject to §§ 201.304 and 201.306. AMS expects marginal costs to total $255,000 in the first year. Ten-year costs annualized at three percent will be $107,000 for packers, $13,000 for swine contractors, and $11,000 for live poultry dealers. Total ten-year costs annualized at three percent will be expected to be $131,000.

The table below shows that ten-year costs annualized at seven percent will be $109,000 for packers, $14,000 for swine contractors, and $11,000 for live poultry dealers. Total ten-year costs annualized at seven percent will be expected to be $134,000.

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[303] 10 live poultry dealers × ($44.51 per hour admin. cost × 2 hours + $86.83 per hour manger cost × .75 + $147.19 legal cost × .75 hours + $93.68 information tech cost × .75 hours) + 45 live poultry dealers × ($44.51 per hour admin. cost × (1.33 hours + .67 hours) + $86.83 per hour manger cost × (.5 hours + .25 hours) + $147.19 legal cost × (.5 hours + .25 hours) + $93.68 information tech cost × (.5 hours + .25 hours))/2 = $10,881.

[304] 108 swine contractors × ($44.51 per hour admin. cost × .67 hours + $86.83 per hour manger cost × .25 hours + $147.19 legal cost × .25 hours + $93.68 information tech cost × .25 hours) = $12,053.

[305] 74.25 packers × ($44.51 per hour admin. cost × 2 hours + $86.83 per hour manger cost × .75 hours + $147.19 legal cost × .75 hours + $93.68 information tech cost × .75 hours + 273.75 packers × ($44.51 per hour admin. cost × (2 hours + 1.33 hours + .67 hours) + $86.83 per hour manger cost × (.75 hours + .5 hours + .25 hours) + $147.19 legal cost × (.75 hours + .5 hours + .25 hours) + $93.68 information tech cost × (.75 hours + .5 hours + .25 hours))/3 = $110,817.

[306] 10 live poultry dealers × ($44.51 per hour admin. cost × 1.5 hours + $86.83 per hour manger cost × .75 + $147.19 legal cost × .75 hours + $93.68 information tech cost × .50 hours) + 45 live poultry dealers × ($44.51 per hour admin. cost × (1 hours + .5 hours) + $86.83 per hour manger cost × (.5 hours + .25 hours) + $147.19 legal cost × (.5 hours + .25 hours) + $93.68 information tech cost × (.33 hours + .17 hours))/2 = $9,396.

[307] 108 swine contractors × ($44.51 per hour admin. cost × .5 hours + $86.83 per hour manger cost × .25 hours + $147.19 legal cost × .25 hours + $93.68 information tech cost × .17 hours) = $10,408.

[308] 74.25 packers × ($44.51 per hour admin. cost × 3 hours + $86.83 per hour manger cost × 1.5 hours + $147.19 legal cost × 1.5 hours + $93.68 information tech cost × 1 hours + 273.75 packers × ($44.51 per hour admin. cost × (1.5 hours + 1 hours + .5 hours) + $86.83 per hour manger cost × (.75 hours + .5 hours + .25 hours) + $147.19 legal cost × (.75 hours + .5 hours + .25 hours) + $93.68 information tech cost × (.5 hours + .33 hours + .17 hours))/3 = $110,817.

Table 18: Estimated Industry Total Costs to Small Businesses

Estimate Type	Packers ($)	Swine Contractors ($)	Poultry Processors ($)	Total ($)
First-Year Costs	192,000	37,000	24,000	255,000
10 years Annualized at Three Percent	107,000	13,000	11,000	131,000
10 years Annualized at Seven Percent	109,000	14,000	11,000	134,000

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 §§ 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.

Table 19 compares the average per entity first-year costs of final §§ 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 will 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 19: Comparison of Average Costs per Entity to Average Revenues per Entity for Small Businesses

NAICS	No. of Small Businesses	Average Revenue or Net Sales Per Establishment ($)	Average First-Year Costs ($)	Average First-Year Cost as Percent of Revenue (percent)	Annualized Cost Discounted at 7 Percent	Annualized Cost as Percent of Revenue (percent)
112210 - Swine Contractor	108	485,860	346	0.0711	130	0.0267
311615 – Poultry Processor	55	52,888,111	432	0.0008	206	0.0004
311611 – Meat Packer*	348	75,838,951	552	0.0007	312	0.0004

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

Average 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 0.0711 percent, the average 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 0.0007 percent. Estimated first year cost for each packer is $552. These are relatively small numbers. If average net sales for each packer were only one hundredth of the amount listed in Table 19, estimated average first-year costs will be less than 0.1 percent of net sales.

AMS has limited data on revenues for the smallest packers and live poultry dealers. One hundred eleven packers submitted shortened annual reports to AMS because they purchased less than $500,000 in livestock. For the largest of these small packers, annual revenues are likely close to $500,000 and expected costs will be about 0.07 percent.

RFA Small Business Exemption Alternative: Recordkeeping Exemption

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

Although the Small Business Exemption Alternative will not require small businesses to keep any additional records, small businesses will still be required to comply with all the other provisions of §§ 201.304 and 201.306. AMS expects that small live poultry dealers, small packers, and small swine contractors will need to review the new rule and determine whether the rule will require any changes to their procurement contracts or other business practices and make the necessary changes. AMS estimated that costs will consist of one hour of a manager's time and one hour of a lawyer's time to review the requirements of final §§ 201.304 and 201.306. This amounts to expected first-year costs of $234 [309] for each live poultry dealer, each swine contractor, and each packer that qualifies as a small business. All costs will occur in the first year.

The table below lists expected costs for small businesses subject to the Small Business Exemption Alternative. AMS expects marginal costs to total $120,000 in the first year. The Small Business Exemption Alternative is expected to cost $81,000, $25,000, and $13,000 in the first year for packers, swine contractors, and live poultry dealers, respectively.

Table 20: Estimated Industry Total Costs for the Small Business Exemption Alternative

Estimate Type	Packers ($)	Swine Contractors ($)	Poultry Processors ($)	Total Costs* ($)
First-Year Costs	81,000	25,000	13,000	120,000
10 years Annualized at Three Percent	9,000	3,000	1,000	14,000
10 years Annualized at Seven Percent	11,000	3,000	2,000	16,000

*Due to rounding, values in "Total Costs" column may not match the sum of costs by entity type.

[309] $147.19 per hour × 1 hour of an attorney's time + $86.83 per hour × 1 hour of a manager's time = $234.

Ten-year costs annualized at three percent will be $9,000 for packers, $3,000 for swine contractors, and $1,000 for live poultry dealers. This amounts to $27 for each live poultry dealer, swine contractor, and packer. Total ten-year costs annualized at three percent will be expected to be $14,000.

Ten-year costs annualized at seven percent will be $11,000 for packers, $3,000 for swine contractors, and $2,000 for live poultry dealers. This amounts to $31 for each live poultry dealer, swine contractor, and packer. Total ten-year costs annualized at seven percent will be expected to be $16,000.

The table below compares the average per entity first-year costs of the Small Business Exemption Alternative to the average revenue for each regulated small business. First-year costs are appropriate for a threshold analysis because all the costs associated with the alternative will occur in the first year.

Table 21: Comparison of Per Entity Cost to Revenues for the Small Business Exemption Alternative

NAICS	No. of Small Businesses	Average First-Year Costs ($)	Average Revenue or Net Sales Per Establishment ($)	Average First-Year Cost as Percent of Revenue (percent)
112210 - Swine Contractor	108	234	485,860	0.0482
311615 – Poultry Processor	55	234	52,888,111	0.0004
311611 – Meat Packer*	348	234	75,838,951	0.0003

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

Average first-year costs as a percent of revenues are small. Similar to §§ 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 0.0482 percent, the first-year cost to swine contractors is small compared to revenue.

Average net sales for packers listed in Table 20 have the same problem as the net sales figures in Table 18. 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 $234. Costs will be less than 0.1 percent of revenues for any packer with revenue greater than $23,400. Even for the smallest packer that AMS regulates, $234 will not likely have a significant economic impact.

Comparison of Alternatives

Expected costs for small businesses under final §§ 201.304 and 201.306 will be more than double the expected costs for small businesses under a Small Business Exemption Alternative. The cost difference is due to recordkeeping requirements. First-year costs will be $159,000 more for final §§ 201.304 and 201.306 than the Small Business Exemption Alternative.[310] While all the costs associated with the Small Business Exemption Alternative occur in the first year, small businesses will continue to incur recordkeeping costs associated with final §§ 201.304 and 201.306 into the future. Estimated costs annualized at seven percent are $121,000 higher for final §§ 201.304 and 201.306 than for the Small Business Exemption Alternative.

With either the Small Business Exemption Alternative or the final rule, AMS expects the costs per entity 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 will 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 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 rulemaking will not change their ability to continue operations or place any small businesses at a competitive disadvantage.

AMS chose final §§ 201.304 and 201.306 over the Small Business Exemption Alternative because AMS wishes to prevent the kind of undue prejudices and unjust discrimination described in the rule. AMS believes that keeping relevant records serves as constant reminder to all packers, live poultry dealers, and swine contractors that they cannot practice undue prejudice on the basis of protected bases and protected actions; retaliate on the basis of protected activities or actions; or deceive on the basis of contract formation, performance, termination, or refusal.

Final §§ 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.*).

C. Executive Order 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.

Three commenters including the Cherokee Nation, the Coalition of Large Tribes (COLT), and an academic commenter who is the executive

[310] $586,000 – $427,000 = $159,000 (Table 15).

director of the Indigenous Food and Agriculture Initiative (IFAI) at the University of Arkansas School of Law, responded to USDA's January 19, 2023, Tribal consultation seeking input on the proposed rule on Inclusive Competition and Market Integrity Under the Act. All three commenters gave context about Tribal participation in the meat and livestock industry and contended that the proposed rule should not apply to Tribes and Tribal entities.

Comment: A commenter stated that the proposed rule's provisions targeting unjust discrimination could inadvertently ban practices designed to enable Tribal enterprises to serve their own community, such as laws requiring businesses to provide contracting and employment preferences to Tribal members. According to the commenter, these practices could arguably be interpreted under the proposed rule as ''offering contract terms that are less favorable than those generally or ordinarily offered'' or ''differential contract performance or enforcement'' which are ''based upon the covered producer's status as a market vulnerable individual.'' According to the commenter, the regulation's language, as proposed, and the lack of exceptions provided could have a chilling effect on the traditional animal husbandry practices of Tribes regardless of a Tribal business's likelihood of prevailing under a legal challenge.

AMS Response: In its final rule, AMS has included a limited list of legitimate business justifications including an exception to the rule's prohibition on unjust discrimination for Tribes fulfilling their governmental function of serving their members. In doing so, AMS in this rule recognizes longstanding practice around Tribal entities, acting in their governmental capacities, in preferencing their own Tribal members and their descendants in the purchase and sale of livestock. Additionally, AMS has changed its approach from the proposed rule to no longer use the term ''Market Vulnerable'' to define to whom the rule offers protections. In shifting to the specific terms identified, the final rule provides greater certainty that Tribal members will be protected against discriminatory practices they may encounter in the marketplace.

Comment: A Tribal commenter stated that Tribal producers may be hesitant to report discriminatory practices, stating that the long history of governmental indifference to, or even complicity in, unjust discrimination against their communities' factors into a fear of retaliation. The commenter noted Tribal producers have also reported that they are not sure where to report violations of the Act, suggesting USDA should consider establishing a streamlined process for reporting issues under the Act and make concerted efforts to inform producers of their rights.

AMS Response: Through expressly prohibiting discriminatory and retaliatory conduct in this rulemaking, AMS aims to address the commenters concern that ''a long history of governmental indifference to, or even complicity in, discrimination against their communities' factors into a fear of retaliation.'' AMS has an online portal designed to receive complaints that may amount to violations under the Act and will direct Tribal producers to this portal as well as educating them as to other methods of reporting potential violations. Furthermore, AMS will consult with the USDA Office of Tribal Relations (OTR) and recommend educational outreach to ensure Tribal producers understand how to report a violation.

Comment: All three commenters urged AMS not to apply the proposed rule to Tribes and Tribal entities. The commenters said Tribes are sovereign governments that retain authority to make their own laws and be ruled by them, unless expressly abrogated. Commenters cited the Supreme Court's holding in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens* that statutory use of the term ''person'' does not include sovereign entities unless there is an ''affirmative showing of statutory intent to the contrary,'' arguing that Tribes do not fall within any of these categories.[311] Commenters said the omission of Tribes from the ''person'' definition also excludes them from being defined as ''packers'' under the Act, as it defines packers as ''any person engaged in'' the packing activities enumerated in the definition.

AMS Response: In this final rule, AMS excludes Tribes that are fulfilling their governmental function of serving their members from the rule's prohibition on unjust discrimination. In doing so, AMS recognizes the longstanding practice of Tribal entities, acting in their governmental capacities, in preferencing their own Tribal members and their descendants in the purchase and sale of livestock. AMS believes that these changes are sufficient to address the immediate policy concerns underlying the comments in relation to this final rule and that any further changes would be outside the scope of this rule.

[311] *See Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000).

Comment: Commenters stated that ''complying with unnecessary and burdensome federal regulations will hinder our small Tribal agricultural operations that already operate on very thin margins.'' Arguing that given the small size of packing operations on Tribal land, they may lack the resources or financial ability to comply with recordkeeping and other regulatory requirements the rule imposes. A commenter stated that ''record keeping, and other regulatory obligations are always more burdensome to small businesses that lack the legal and compliance departments of a large corporation, and isolated rural locations often struggle to hire and retain adequate office staff.''

AMS Response: The economic costs of preventing undue prejudice, unjust discrimination, retaliation, and deception are minor in comparison to the benefit such protections will ensure for farmers and ranchers, including Tribal members. Many businesses already keep records for business purposes, therefore adding hardly any additional costs associated with compliance with this rule. Furthermore, Tribal commenters state that discrimination and retaliation are commonplace in Indian country and that these harms greatly hinder the success of Tribal producers. This rule aims to address those issues directly. AMS notes that the final rule excludes Tribes fulfilling their governmental function of serving their members from the rule's prohibition on unjust discrimination and that any further changes would be outside the scope of this rule.

Comment: Commenters stated that under Federal jurisprudence, sovereign immunity extends to business activities conducted off Tribal lands. Commenters contend that the U.S. Supreme Court has determined in *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505 (1991) decision, that Tribes in their commercial activity with other entities are covered under the umbrella of the Tribes' sovereignty and even when Tribes entered into activities, executed off-reservation, they still enjoy sovereign immunity *Kiowa Tribe of Oklahoma* v. *Manufacturing Technologies,* 523 U.S. 751 (1998). *See Garcia* v. *San Antonio Metro. Transit Auth.,* 469 U.S. 528, 546–47 (1985).

AMS Response: AMS notes that the final rule excludes Tribes fulfilling their governmental function of serving its members from the rule's prohibition on unjust discrimination. Any further changes would be outside the scope of this rule.

Comment: A commenter suggests that if adopted and applied to Tribal entities, the rule would have an adverse effect to its intent. Stating that if the intent of the proposed rule is to decrease market concentration and increase market access, adding additional regulatory burdens on small scale meat packing plants will make it more difficult for these small operations to enter, and maintain presence in, the market.

AMS Response: The overarching objective of this rule is to improve market integrity and inclusive competition, and to decrease the undesirable conduct that is facilitated by concentration in agricultural markets. This rule aims to address three specific types of conduct that harm competition: undue prejudice and unjust discrimination, retaliation, and deception. As explained in the RIA/RFA, any regulatory burdens created from enforcing the Act in this regard will be minimal in comparison to the benefits of protecting producers from this harmful conduct. AMS notes that the final rule excludes Tribes fulfilling their governmental function of serving their members from the rule's prohibition on unjust discrimination and that any further changes would be outside the scope of this rule.

D. Civil Rights Impact Statement

Objective and Purpose AMS is issuing this final rule to revise the regulations that effectuate the Act. AMS is adopting these regulations under the Act's provisions prohibiting undue prejudice, unjust discrimination, and deception to establish clearer, more effective standards to govern the modern marketplace and to better protect, through compliance and enforcement, individually harmed producers. AMS is concerned that the current regulations do not adequately address many unduly prejudicial, unjustly discriminatory, retaliatory, and deceptive practices, which are exacerbated by the environment created through increased horizontal concentration and vertical contracting.

Who Is Impacted—The effects of this new regulation will fall on packers, swine contractors and live poultry dealers. AMS will cite regulated entities initiating actions or conduct. AMS believes creating an undue prejudice is a violation of section 202(b) of the Act. This is particularly true for those purchasing livestock on a carcass grade, carcass weight, or carcass grade and weight basis, under marketing agreements and production contracts. Swine contractors obtaining swine under swine production contracts and live poultry dealers acquiring poultry through poultry growing arrangements will also feel the impacts of the new regulation.

Beneficiaries—The primary beneficiaries of §§ 201.304 and 201.306 will include farmers, feedlot owners, swine production contract growers, and poultry growers. These producers and growers are those most likely to be harmed by undue prejudices, unjust discrimination, retaliation, and deception resulting from the actions or conduct of firms subject to the Act. Identifying criteria for recognizing what actions or conduct may create undue prejudices, discrimination, retaliation, and deception will help lower the number of instances and severity of the harm done by these types of actions or conduct.

The Civil Rights Impact Analysis found that Asian, and Native Hawaiians or Other Pacific Islanders are disproportionately impacted by this rule. Other impacted producers, including Men, Women, Hispanics, Whites, Black/African Americans, and American Indians, are not disproportionately impacted by this rule.

Impacts on Regulated Entities—AMS estimated the direct and indirect costs of regulation over a period of 10 years, from 2023 through 2032. AMS expects the direct costs to be comprised of administrative and litigation costs, largely borne by regulated entities.

Impacts on Protected Groups—Protected groups will see minimal, if any, direct or indirect costs because of the implementation or enforcement of the new regulations. Although the required analysis indicates a disproportionate impact for Asian, and Native Hawaiians or Other Pacific Islanders, because the new regulations impact all industry participants equally, no individual or group would likely be adversely impacted.

AMS has considered the potential civil rights implications of this final rule on members of protected groups to ensure that no person or group will 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.

Tribal Implications—Executive Order 13175 requires Federal agencies to consult with American Indian Tribes on a government-to-government basis on policies that have Tribal implications. This includes regulations, legislative comments or proposed legislation, and other policy statements or actions. Consultation is required when such policies 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.

AMS has determined that this final rule does not have substantial direct effects on one or more Tribes that would require consultation. If a Tribe requests consultation, AMS will work with USDA's Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions, and modifications identified herein are not expressly mandated by Congress. AMS will also conduct outreach to ensure that Tribes and Tribal members are aware of the requirements and benefits under this final rule.

Positive Impacts—This final rule affirms the importance of a clear and direct regulatory framework that prohibits deception, retaliation, undue prejudice, and unjust discrimination, thus protecting producers in the marketplace. The rational decision-making and robust competition so critical to economic success can most effectively occur in a market free of such practices.

To ensure the potential disparately impacted groups identified above receive the full measure of the positive impacts of this new regulation, AMS will provide addition outreach actions directed toward these groups.

E. Executive Order 12988—Civil Justice Reform

This rule has been reviewed under Executive Order 12988. This rule is not intended to have retroactive effect. This 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 rule. Nothing in this rule is intended to interfere with a person's right to enforce liability against any person subject to the Act under authority granted in section 308 of the Act.

F. 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.

G. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, Pub. L.

104–4) requires Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal Governments and on the private sector. Agencies generally must prepare a written statement, including cost benefits analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures of $100 million or more (adjusted for inflation) in any 1 year for State, local or Tribal governments, in the aggregate, or to the private sector. UMRA generally requires agencies to consider alternatives and adopt the more cost effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates, as defined in title II of UMRA, for State, local, or Tribal Governments, and it does not contain a mandate for the private sector that would likely result in compliance costs of $100 million or more (adjusted annually for inflation) in at least one year. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

AMS expects that the direct costs of this final rule will be 0.0002 percent of industry revenues in the first year of the rule, or $586,000. Indirect costs would have to be nearly 300 times [312] the expected direct costs to meet the compliance cost threshold of $170 million or more in a single year ($100 million in 1994 dollars adjusted for inflation as of 2021),[313] which AMS has no basis to expect, given its professional expertise gained by regulating the industry and regularly communicating with regulated entities, growers, and producers. Indeed, to reach that threshold, discrimination, retaliation, and deception would have to occur at a prevalence that would have to touch more than 28 percent of all cattle slaughtered in the United States in 2022 and account for the *entirety* of the difference in prices between the minimum and average liveweight price paid for cattle at the five regional cattle markets over the last 9 years. Extending that analysis to poultry and hogs would not change the conclusion. If anything, it would be even harder to meet the UMRA threshold because almost universal use of the tournament system in the poultry industry means higher compensation to certain growers is unlikely to increase compensation for growers in aggregate. Each tournament has a fixed total compensation pool, with growers ranked relative to other members of their respective tournament and compensated accordingly.

In addition, AMS takes note of the exemption from UMRA for rules enforcing Constitutional rights of individuals or establishing or enforcing a statutory right that prohibits discrimination on the basis of age, race, color, religion, sex, national origin, handicap, or disability. (2 U.S.C. 1503) Provisions of this rule enforce the Act's prohibition against unjust discrimination and undue prejudice to prohibit adverse treatment on the basis of race, color, religion, national origin (including ethnicity), sex (including sexual orientation and gender identity, as well as pregnancy), disability, marital status, or age. The rule also prohibits retaliatory and adverse actions that interfere with lawful communications, assertion of rights, associational participation, and other protected activities.

H. Congressional Review Act

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act, 5 U.S.C. 801 *et seq.*), OMB's Office of Information and Regulatory Affairs has determined that this final rule does not meet the criteria set forth in 5 U.S.C. 804(2).

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 amends 9 CFR part 201 as follows:

PART 201—ADMINISTERING THE PACKERS AND STOCKYARDS ACT

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

Authority: 7 U.S.C. 181–229c.

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

Subpart O—Competition and Market Integrity

Sec.

Subpart O—Competition and Market Integrity

§§ 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, except an employee of the livestock owner, engaged in the raising of and caring for livestock.

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).

§ 201.303 [Reserved]

§ 201.304 Undue prejudices or disadvantages and unjust discriminatory practices.

(a) *Prohibited bases.* (1) Except as provided in paragraph (a)(3) of this section, a regulated entity may not prejudice, disadvantage, inhibit market access, or otherwise take an adverse action against a covered producer with respect to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry based upon the following characteristics:

(i) On the basis of the covered producer's race, color, religion, national origin, sex (including sexual orientation and gender identity), disability, marital status, or age.

(ii) On the basis of the covered producer's status as a cooperative.

(2) Actions that prejudice, disadvantage, inhibit market access, or are otherwise adverse under paragraph (a)(1) of this section are as follows:

(i) Offering contract terms that are less favorable than those generally or ordinarily offered to similarly situated covered producers.

(ii) Refusing to deal with a covered producer on terms generally or ordinarily offered to similarly situated covered producers.

(iii) Performing under or enforcing a contract differently than with similarly situated covered producers.

(iv) Requiring a contract modification or renewal on terms less favorable than similarly situated covered producers.

(v) Terminating or not renewing a contract.

(vi) Any other action that a reasonable covered producer would find materially adverse.

(3) The following actions by a regulated entity do not prejudice,

[312] $170 million UMRA threshold divided by $586,000 (first-year direct costs) multiplied by 100 = 290.

[313] Congressional Research Service. Updated February 23, 2021. Unfunded Mandates Reform Act: History, Impact, and Issues. Accessed at *https://crsreports.congress.gov/product/pdf/R/R40957/109on02/08/2024.*

disadvantage, inhibit market access, or constitute adverse action under paragraph (a)(1) of this section:

(i) Fulfilling a religious commitment relating to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry.

(ii) A Federally recognized Tribe, including its wholly or majority-owned entities, corporations, or Tribal organizations, performing its Tribal governmental functions.

(b) *Retaliation prohibited.* (1) A regulated entity may not retaliate or otherwise take an adverse action against a covered producer based upon the covered producer's participation in an activity described in paragraph (b)(2) of this section.

(2) The following activities by covered producers are protected under paragraph (b)(1) of this section unless otherwise prohibited by Federal, Tribal, or State law, including antitrust laws:

(i) Communicating with a government entity or official or petitioning a government entity or official for redress of grievances with respect to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry.

(ii) Refusing a request of the regulated entity to engage in a communication with a government entity or official that is not required by law.

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

(iv) Communicating or cooperating with a person for the purposes of improving production or marketing of livestock or poultry.

(v) Communicating, negotiating, or contracting with a regulated entity, another covered producer, or with a commercial entity or consultant, for the purpose of exploring or entering into a business relationship.

(vi) Supporting or participating as a witness in any proceeding under the Act, or any proceeding that relates to an alleged violation of any law by a regulated entity.

(vii) Asserting any of the rights granted under Act or this part, or asserting contract rights.

(3) The following actions are considered retaliation or an otherwise adverse action under paragraph (b)(1) of this section:

(i) Terminating or not renewing a contract.

(ii) Performing under or enforcing a contract differently than with similarly situated covered producers.

(iii) Requiring a contract modification or a renewal on terms less favorable than similarly situated covered producers.

(iv) Refusing to deal with a covered producer on terms generally or ordinarily offered to similarly situated covered producers.

(v) Interfering in a farm real estate transaction or a contract with third parties.

(vi) Any other action that a reasonable covered producer would find materially adverse.

(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) Relevant records to paragraph (c)(1) of this section may include: 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.

§ 201.305 [Reserved]

§ 201.306 Deceptive practices.

(a) *Prohibited practices.* A regulated entity may not engage in the deceptive practices in paragraphs (b) through (e) of this section with respect 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 with a covered producer by employing a false or misleading statement, or omission of material information necessary to make a statement not false or misleading.

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

(d) *Contract termination.* A regulated entity may not terminate a contract with a covered producer by employing a false or misleading statement, or omission of material information 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—201.308 [Reserved]

§ 201.389 [Reserved]

§ 201.390 Severability.

If any provision of this subpart, or any component of any provision, is declared invalid or the applicability thereof to any person or circumstances is held invalid, it is the Agricultural Marketing Service's intention that the validity of the remainder of this subpart or the applicability thereof to other persons or circumstances shall not be affected thereby with the remaining provision, or component of any provision, to continue in effect.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

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