1152 FIFTEENTH STREET NW, SUITE 430
WASHINGTON, DC 20005
PHONE: 202-296-2622

August 09, 2024

*Submitted electronically via Regulations.gov*

S. Brett Offutt
Chief Legal Officer/Policy Advisor
Packers and Stockyards Division
Agricultural Marketing Service
U.S. Department of Agriculture
1400 Independence Ave. SW
Washington, DC 20250

**Re: Comments on Poultry Grower Payment Systems and Capital Improvement Systems, 89 Fed. Reg. 49002 (June 10, 2024), Docket No. AMS-FTPP-22-0046**

Dear Mr. Offutt:

The National Chicken Council (NCC) appreciates the opportunity to comment on the proposed rule, "Poultry Grower Payment Systems and Capital Improvement Systems" published in the *Federal Register* on June 10, 2024 (the "Proposed Rule"), by the U.S. Department of Agriculture (USDA) Agricultural Marketing Service ("AMS" or the "agency"). NCC is the national, non-profit trade association that represents vertically integrated companies that produce and process more than 95 percent of the chicken marketed in the United States. Our members would be directly affected by the proposed regulations.

The Proposed Rule would fundamentally alter and constrain the poultry production market to the detriment of growers, consumers, and processors alike. The Proposed Rule suffers numerous legal infirmities and would have devastating effects on the poultry contracting process, injecting needless friction and confusion in the contracting process and upsetting the bargained-for terms in nearly every single one of the roughly 15,000 broiler production contracts in effect. For the numerous reasons discussed in these comments, we urge AMS to withdraw the Proposed Rule. To the extent AMS believes a rulemaking remains necessary, we urge AMS to repropose a rule that addresses these significant issues.

## Executive Summary

NCC opposes the Proposed Rule and urges AMS to withdraw it in its entirety. The current poultry grower compensation system has long worked well to fairly and appropriately reward high-performing growers and drive efficient use of resources, resulting in a highly efficient market and lower prices for consumers. The Proposed Rule is legally unsound and contrary to the clear intent of Congress, AMS's mandate under the Packers and Stockyards Act (PSA), and fundamental Constitutional principles. Further, the Proposed Rule assumes certain inefficiencies in the current poultry growing market that are fundamentally untrue, rendering the Proposed Rule arbitrary and capricious.

Among the issues detailed in these comments, NCC is especially concerned about the following issues with the Proposed Rule:

- The Proposed Rule exceeds Congress's grant of authority in the PSA by prohibiting conduct without requiring a showing of injury to competition or even unfair or deceptive practices;
- The Proposed Rule mischaracterizes dynamics and efficiencies in the current poultry growing industry, rendering it arbitrary and capricious;
- As written, the Proposed Rule is too vague to be considered constitutionally valid;
- The current Proposed Rule is so prescriptive as to unduly impinge on grower and integrator freedom to contract; and
- AMS has greatly underestimated costs associated with the rule and would require an extended implementation period of at least two years.

This rule – which Congress never asked for – will lead to rigid, one-size-fits-all requirements on chicken growing contracts that would stifle innovation, lead to higher costs for consumers, decrease competition, and cost jobs by driving some of the best farmers out of the chicken business.

## I. AMS DOES NOT HAVE THE PROPER AUTHORITY TO ISSUE THE PROPOSED RULE.

The Proposed Rule is grounded in the authority provided to USDA in the PSA. The PSA is over 100 years old and has been amended numerous times over the years. Throughout all of those amendments, not once has Congress explicitly chosen to grant USDA authority to regulate contracts between integrators and their growers. Instead, Congress focused on restricting practices that are determined to cause injury to competition. Because the Proposed Rule prohibits conduct without a showing of injury to competition, it prohibits conduct not covered by the PSA and constitutes a "major question." It also suffers from improper vagueness and impinges on the freedom to contract. AMS has overstepped its statutory authority in issuing this Proposed Rule.

### A. The Proposed Rule would prohibit conduct without regard to injury to competition.

Well-established caselaw—universal among the many circuit courts of appeal to have considered the issue—holds that establishing a violation of Section 202 of the PSA requires showing injury or likely injury to competition. As recently as four years ago, AMS tacitly recognized this as well.[1] AMS implies in the preamble, however, that it could enforce the Proposed Rule without showing competitive injury. Meanwhile, the plain text of the Proposed Rule is silent on the requirement. As a matter of law, all violations of Sections 202(a) and (b) of the PSA require a showing of injury, or the likelihood of injury, to competition. The Proposed Rule ignores this requirement and attempts to reach much more broadly. As such, it would exceed AMS's statutory authority.

#### *1. The agency lacks statutory authority to promulgate any regulation that permits a finding of a violation of Sections 202(a) or (b) of the PSA without a showing of injury to competition.*

[1] For example, AMS recognized "a question" of competitive injury in its 2020 rulemaking addressing criteria for identifying violations of the PSA. 85 *Fed. Reg.* 79779, 79790 (Dec. 11, 2020) ("Whether competitive injury is required to establish a violation of the Act is a broader question applicable to the full provisions of sections 202(a) and 202(b). . . .").

When Congress passed the PSA, it specifically intended to prohibit practices that harmed the competitive process. The language that it used in the statute was understood at the time of enactment to address those practices that were collusive or monopolistic (or monopsonistic) and had a substantial likelihood of reducing output and ultimately raising prices to consumers. Congress incorporated terminology from other regulatory statutes—most notably, the Interstate Commerce Act (ICA) and the Federal Trade Commission Act (FTCA)—that were plainly designed to protect the competitive process for the benefit of the consuming public. The competitive injury requirement, therefore, is not some judicial gloss on Sections 202(a)-(b) but an integral part of the statutory scheme. By importing language from other statutes with well-established legal meaning, Congress necessarily "adopt[ed] the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use convey[ed]."[2] Accordingly, it is the statutory language itself that imposes the requirement of competitive injury. Indeed, there is no other reasonable reading of the statute. The agency has no authority to promulgate any regulation that is broader than, or conflicts with, the underlying statutory provision on which it is based.[3] Because Sections 202(a) and (b) of the PSA mandate a showing of competitive injury, AMS has no power to read out that statutory element through its rulemaking authority.

The PSA is, at its foundation, an antitrust law. There is no dispute that the purpose of Section 202 of the PSA is the elimination of monopolistic or other anticompetitive practices—that is, to protect competition for the benefit of consumers. Only a year after the PSA's passage, the Supreme Court in *Stafford v. Wallace* recognized that the "chief evil" that Section 202 sought to address was "the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and *arbitrarily to increase the price to the consumer, who buys*."[4] "Another evil," according to the Court, was "exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of the livestock through the stockyards, all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers, on the other."[5]

The common thread linking the statutory purposes identified by the Supreme Court is the elimination of anticompetitive practices. First, as the *Stafford* Court noted, Congress sought to prohibit the abuse "unduly and arbitrarily" of monopsony power by packers that leads to a monopolistic restriction of output with the effect of "arbitrarily" increasing the price of products purchased by consumers. Second, Congress intended to prevent "exorbitant charges" and other anticompetitive practices resulting from collusion among market participants. As the Court noted, because of that collusion, "[e]xpenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and *increase the price to be paid by the consumer*."[6] In other words, every aim of Section 202 identified in *Stafford* manifests an intent to protect the competitive process for the benefit of consumers.

Nothing in *Stafford* or in the language of the statute suggests that Congress intended the Act to protect individual market participants from the stringency of competition. Rather, market participants are protected from conduct that itself would have the effect of harming competition and consumer

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[2] *Morissette v. United States,* 342 U.S. 246, 263 (1952).

[3] *Morrison v. National Australia Bank, Ltd.*, 130 S. Ct. 2869, 2881 (2010) (regulation promulgated under a statute "'does not extend beyond conduct encompassed by [the statute's] prohibition'") (quoting *United States v. O'Hagan*, 521 U.S. 642, 651 (1997)); *Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 (1975) ("scope [of a rule] cannot exceed the power granted the [agency] by Congress under [the relevant statute]")*.

[4] *Stafford v. Wallace*, 258 U.S. 495, 514–15 (1922) (emphasis added).

[5] *Id.* (emphasis added).

[6] *Id.* at 515 (emphasis added).

interests. In identifying the aims of Section 202, *Stafford* explicitly connects any protection of producers to the protection of consumers. The Court explained that Congress sought to remove "undue burden[s] on . . . commerce"[7] and "unjust obstruction[s] to . . . commerce"[8] flowing from any "unjust or deceptive practice or combination," confirming that Congress enacted the PSA to maximize market output for the benefit of consumers.

Courts have long recognized that the PSA is rooted in antitrust law.[9] Antitrust law exists to protect the competitive process so that consumers may obtain the highest quality goods and services at the lowest possible cost.[10] In the absence of some likely consumer harm, "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws."[11] In short, the Sherman Act and other antitrust statutes have not been construed to protect producers from the rigors of competition or to strike against aggressively competitive practices. Instead, these laws aim to enhance consumer welfare by ensuring that markets operate efficiently and that products are produced and priced competitively. *Stafford* makes clear that the goals of the PSA are identical.

2. *Every appellate court to have considered the issue has held that Section 202 of the PSA requires a showing of competitive injury.*

In light of *Stafford*, every appellate court to have construed Section 202 of the PSA has held that no violation of subsections (a) or (b) occurs without a showing of competitive injury. Eight different circuits have addressed the issue, and they have uniformly and resoundingly affirmed this understanding.[12] In several of these cases, the agency argued its position directly to the court in question;[13] in others, it filed *amicus* briefs urging the court to adopt its preferred construction.[14] In each instance, the court disagreed.

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[7] *Id.*

[8] *Id.*

[9] *De Jong Packing Co. v. United States Dep't of Agric.*, 618 F.2d 1329, 1335 n.7 (9th Cir.), *cert. denied*, 449 U.S. 1061 (1980) (PSA "incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation"); *Armour & Co. v. United States*, 402 F.2d 712, 722 (7th Cir. 1968) ("Congress gave the Secretary no mandate to ignore the general outline of long-time antitrust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged.").

[10] *See, e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (the antitrust laws protect "*competition*, not *competitors*") (emphasis in original) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription'") (quoting R. Bork, *The Antitrust Paradox* 66 (1978)); *Sanderson v. Culligan Int'l Co.*, 415 F.3d 620, 623 (7th Cir. 2005) ("The antitrust laws protect consumers, not producers. They favor competition of all kinds, whether or not some other producer thinks the competition 'fair.'"); *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1154 (9th Cir. 2003) ("Inefficiency is precisely what the market aims to weed out. The Sherman Act, to put it bluntly, contemplates some roadkill on the turnpike to Efficiencyville."); *Chicago Prof'l Sports Ltd. P'ship v. National Basketball Ass'n*, 95 F.3d 593, 597 (7th Cir. 1996) ("The core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem.").

[11] *Brooke Group*, 509 U.S. at 225

[12] *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.

[13] *IBP*, 187 F.3d 974; *Farrow*, 760 F.2d 211; *De Jong*, 618 F.2d 1329; *Armour & Co.*, 402 F.2d 712.

[14] *Terry*, 604 F.3d 272; *Wheeler*, 591 F.3d 355.

The Sixth Circuit thoroughly summed up the judicial landscape in its 2010 *Terry* decision. The court concluded that, while the question of "whether a plaintiff asserting unfair discriminatory practices or undue preferences under §§ 202(a) and (b) of the PSA must allege an adverse effect on competition to state a claim" was new to the Sixth Circuit, other courts had addressed the question:

> This issue is not novel to other courts; it has been addressed by seven of our sister circuits, with consonant results. All of these courts of appeals unanimously agree that an anticompetitive effect is necessary for an actionable claim under subsections (a) and (b). For the reasons that follow, we join this legion.[15]

In surveying court precedent, the Sixth Circuit noted the "prevailing tide" of circuit court decisions holding "that subsections (a) and (b) of § 192 [PSA § 202] require an anticompetitive effect," after which it concluded:

> The tide has now become a tidal wave, with the recent issuance of the Fifth Circuit Court of Appeals' en banc decision in *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir.2009) (*en banc*), in which that court joined the ranks of all other federal appellate courts that have addressed this precise issue when it held that "the purpose of the Packers and Stockyards Act of 1921 is to protect competition and, therefore, only those practices that will likely affect competition adversely violate the Act." *Wheeler*, 591 F.3d at 357. All told, seven circuits—the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits—have now weighed in on this issue, with unanimous results.[16]

Tellingly, USDA participated in the *Terry* appeal as an *amicus curiae* and advanced the position that a showing of injury is not required for a Section 202(a) or (b) violation. The court expressly recognized USDA's involvement, noted USDA's argument that the court should read Sections 202(a) and (b) not to require a showing of injury to competition, and pointedly concluded, "We decline to do so."[17]

The agency offers no analysis undermining any of these court decisions, nor could it. In six of the ten appellate cases, the agency has participated in some capacity, either as a party or an *amicus*, holding that competitive injury is an element of a Section 202 violation. In light of this record of litigation futility, AMS is not free to ignore the prevailing judicial authority or seek to undo it through the rulemaking process.

3. *When the PSA was enacted, the language of Sections 202(a) and (b) was understood to proscribe conduct that harmed competition.*

AMS blindly ignores the competitive injury requirement in Section 202, instead implying that the language of the section is malleable and open to interpretation. An agency is required to follow the "best" interpretation of a statute, not the agency's preferred interpretation or the interpretation that best advances its subjective desire.[18] It is neither "free to pour a vintage that [it] think[s] better suits present-day tastes"[19] nor otherwise permitted to construe a statute in a linguistic vacuum. The APA does not sanction such "make-it-up-as-the-agency goes-along" exercises of regulatory power.

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15 *Terry*, 604 F.3d at 276.
16 *Id.* at 277 (lengthy string citation of supporting cases omitted).
17 *Id.* at 278.
18 *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___ (2024).
19 *United States v. Sisson*, 399 U.S. 267, 297 (1970).

The relevant provisions of the Act prohibit “unfair,” “unjustly discriminatory,” and “deceptive” practices and devices, as well as “undue” or “unreasonable” preferences and advantages and “undue” or “unreasonable” prejudices and disadvantages. All of these terms had established statutory and common-law antecedents that were well known to members of Congress when the statute was enacted. Read in legal context, these terms concern only business conduct that has an actual or likely adverse effect on competition.[20] Therefore, the interpretation given by the courts to Sections 202(a) and (b) is not merely the best reading but rather is the only permissible reading of the statute.

The language of Sections 202(a) and (b) is lifted almost verbatim from provisions of the ICA and the FTCA.[21] By the time of the PSA’s passage in 1921, these statutes had been addressed a number of times by the Supreme Court. There was no question at the time that those laws aimed to preserve or restore competition and prevent monopolistic practices either generally, in the case of the FTCA, or in specific economic sectors, in the case of the ICA.[22] The language used in those enactments was understood to effectuate those Congressional goals.

Words used in a statute that “have acquired a specialized meaning in the legal context must be accorded their *legal* meaning.”[23] When Congress transports phrases from one statute to another, there is a strong presumption that adopting of such terminology “carries with it the previous judicial interpretations of the wording.”[24] Moreover, Congress “presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.”[25] “[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it.”[26] Here, nothing in Sections 202(a) and (b) of the PSA suggests that Congress intended the words used in those provisions to have a meaning different from the meaning given them in other statutes.[27] Rather, Congress used terms of art to describe the unlawful practices prohibited by Sections 202(a) and (b). The “plain language” rule requires that those terms of art be given their commonly understood meaning at the time of the PSA’s passage. Accordingly, the statutory language itself requires that either the agency or a private plaintiff prove competitive injury to show a violation of Sections 202(a) and (b).

*4. The structure of Section 202 of the PSA mandates a competitive injury requirement.*

The existence of a competitive injury requirement is also manifest in the structure of the statute. Sections 202(a) and (b) do not ban all forms of economic discrimination, preference, or advantage.

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20 *Wheeler*, 591 F.3d at 364 (Jones, J., concurring). The term “unreasonable,” for example, had a clear antitrust meaning by the time of the passage of the PSA. The Supreme Court had used that terminology to distinguish between those business practices that unlawfully restrained competition from those that were permissible under the Sherman Act. *See, e.g., Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

21 81 *Fed. Reg.* at 92570.

22 *See generally Wheeler*, 591 F.3d at 365–70 (Jones, J. concurring) (collecting cases).

23 *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep’t of Health & Human Resources*, 532 U.S. 598, 615 (2001) (emphasis in original).

24 *Carolene Prods. Co. v. United States*, 323 U.S. 18, 26 (1944).

25 *Morissette*, 342 U.S. at 263.

26 *Moskal v. United States,* 498 U.S. 103, 121 (1990) (quoting F. Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L.R. 527, 537 (1947)).

27 Although resorting to the legislative history of the PSA is unnecessary for a proper construction of Sections 202(a) and (b), that legislative history also confirms that Congress understood the terms used in the statute to address anticompetitive conduct. *See* H.R. Rep. No. 67-77, at 2–10 (1921) (detailed discussion of Supreme Court cases construing the language of the ICA and the FTCA).

Rather, they prohibit only those that are "unjust," "undue," "unfair" or "unreasonable." Therefore, there must be some forms of discrimination, preference or advantage that are legitimate and some that are not. Both the courts and the agency must have an objective standard to distinguish lawful conduct from unlawful conduct. The explicit requirement of competitive injury in other subsections of Section 202 demonstrates precisely what Congress intended that objective standard to be. When examined in context, the only reasonable conclusion that can be drawn is that Sections 202(a) and (b) are intended to be catch-all provisions that sweep up anticompetitive practices not otherwise prohibited by the more narrowly drawn subsections of the statute.[28] Otherwise, Sections 202(a) and (b) would prohibit activities specifically exempted from the other Section 202 subsections, depriving those sections of any meaning and rendering them null, contrary to the canons of interpretation.

Without the competitive injury requirement, there is no objective standard by which courts or agencies can separate prohibited practices from lawful ones. Cut loose from their moorings in competition law, the terms "discrimination," "preference" and "advantage" would have broad meanings that extend well beyond the economic realm. Yet, even AMS has not suggested that the PSA applies to noncommercial practices. The agency's own understanding of the statute, therefore, confirms that Congress intended the PSA to be economic legislation governing commercial relationships. Once that fact is recognized, it follows that the terms "unfair," "unjust," "undue" and "unreasonable" must also have economic content. The only way to give those terms such content is to apply a clear set of objective economic principles that allow a court or agency to ferret out those practices that are harmful—that is, "unfair," "unjust," "undue," or "unreasonable"—from those that are efficient and beneficial to competition overall based on the legal definitions of these terms when the PSA was adopted. The competitive injury requirement, in turn, is the only way to do so consistent with the structure and purposes of Section 202.

Any other interpretation would make it virtually impossible for a business subject to the PSA to order its affairs rationally to comply with Section 202(a) or (b). What is "unfair," "unjust," "undue," or "unreasonable" would depend solely on what a judge or jury decided that it meant in any particular case. To exercise that function, the agency or court would have to make value judgments, choosing one set of priorities over another without any guidance from the statutory text or any other source about which value or set of values is to be preferred in any particular case. Such an approach raises significant constitutional issues, but in any event, there is no need to address those matters because nothing in the statutory text suggests Congress intended to empower the agency or the courts to make such standardless value judgments.[29]

In sum, the plain language of Section 202 of the PSA, its aims, and its structure reveal that Congress intended that the practices banned by subsections (a) and (b) be those that harm competition in some fashion. That conclusion has been unanimously confirmed by every appellate court to address the issue. Therefore, the competitive injury requirement is not merely some gloss on an allegedly ambiguous provision but an integral and permanent statutory command.

[28] *Wheeler*, 591 F.3d at 371 (Jones, J., concurring).

[29] *Id.* at 365 (Jones, J., concurring) (PSA "certainly did not delegate any such free value-choosing role to the courts") (quoting R. Bork, *The Antitrust Paradox* 53 (1993 ed.)).

*5. Any effort to omit the PSA's competitive injury requirement exceeds AMS's statutory mandate and raises a major question requiring Congressional direction.*

Congress has not authorized AMS to forego the competitive injury requirement of Section 202. The Proposed Rule is rooted in rulemaking driven by the 2008 Farm Bill.[30] The 2008 Farm Bill granted no authority to AMS to promulgate a rule that excuses the competitive injury requirement of Section 202(a) or (b). Section 11006 of the 2008 Farm Bill stated in pertinent part that the "Secretary of Agriculture shall promulgate regulations with respect to the Packers and Stockyards Act, 1921 (7 U.S.C. § 181 et seq.) to establish criteria that the Secretary will consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of such Act."[31] The Farm Bill, therefore, authorized only a rule setting forth criteria that the agency would use in determining whether a violation of Section 202(b) of the PSA has occurred. It did not authorize AMS to alter, abrogate, or ignore the fundamental elements of the statute.

Not only did the plain language of the 2008 Farm Bill make that clear, but the legislative record unmistakably demonstrates that Congress authorized no radical alteration of Sections 202(a) or (b). The original draft of the 2008 Farm Bill proposed by Senator Harkin contained an express provision eliminating the competitive injury requirement under Sections 202(a) and (b). Congress removed that language from the final enactment. Accordingly, the 2008 Farm Bill did not authorize AMS to forego the competitive injury element of Section 202 violations.

When AMS's predecessor agency charged with PSA implementation, the Grain Inspection, Packer and Stockyards Administration (GIPSA), nonetheless tried to read into the 2008 Farm Bill a mandate to circumvent the injury to competition requirement, Congress reacted swiftly and clearly by preventing GIPSA from finalizing an overly broad rulemaking for several years.[32] Moreover, the 2014 and 2018 Farm Bills did not renew the call for criteria, nor did they make any reference to GIPSA's 2010 rulemaking that had started—and then had been halted by Congress—in response to the 2008 Farm Bill. They certainly did not indicate that Congress supported attempts to read the injury to competition requirement out of the PSA. Had Congress intended for the agency to reinterpret Sections 202(a) and (b), Congress could have clarified as much in the 2014 or 2018 Farm Bill, especially in light of the considerable controversy caused by GIPSA's 2010 proposed rule. Instead, the 2014 and 2018 Farm Bills were silent on the topic, suggesting, if anything, that Congress felt it was time to move on from the issue raised in that rulemaking. When GIPSA ultimately promulgated an appropriately tailored rulemaking, resulting in 9 C.F.R. § 201.211, Congress did not object.

Given this clear direction from Congress, AMS's attempt to read the injury to competition requirement out of the PSA constitutes a major question requiring Congressional direction. As such, AMS may not expand its regulatory framework to change or undermine the current application of Sections 202(a) and (b). As recently stated by the Supreme Court in *West Virginia v. EPA*, in certain cases of "economic and political significance," an agency must demonstrate "clear congressional authorization" to exercise its powers.[33] The PSA is a hundred-year-old law, and at no point in its history has it been

[30] Pub. L. 100-246.

[31] *Id.* at § 11006(1).

[32] *See* Consolidated and Further Continuing Appropriations Act, 2015, H.R. 83, 113th Cong. § 731 (2014); Consolidated Appropriations Act, 2014, H.R. 3547, 113th Cong. § 744 (2014); Consolidated and Further Continuing Appropriations Act, 2013, H.R. 933, 113th Cong. §§ 742–43 (2013); Consolidated and Further Continuing Appropriations Act, 2012, H.R. 2112, 112th Cong. § 721 (2011).

[33] 142 S. Ct. 2587, 2613–14 (2022) (explaining that in certain cases of "economic and political significance," an agency must demonstrate "clear congressional authorization" to exercise its powers); *see also Nat'l Fed'n of Ind.*

applied broadly to address the type of conduct encompassed in the Proposed Rule or to prohibit conduct that does not result in an injury or the likelihood of injury to competition. Congress knows what the PSA does and does not do, and only Congress may expand the law's reach to cover new conduct. Through the present series of rulemakings, of which this Proposed Rule is a part, AMS seeks to upend animal production contracting in the livestock and poultry industry completely. These sectors account for more than one trillion dollars of annual economic impact, touch all fifty states, and would be drastically affected by a change in the injury to competition requirement. Any attempt to rewrite the PSA's injury to competition requirement by regulation is the very definition of an issue of "economic and political significance." AMS cannot take it upon itself to expand the scope of such a longstanding statute.

### B. The Proposed Rule prohibits conduct beyond that identified in the Packers and Stockyards Act.

The PSA reaches a defined scope of activities. It does not give AMS carte blanche authority to regulate the poultry industry in any way that AMS sees fit. Specifically, Section 202(a) prohibits "unfair" and "deceptive practice[s] or device[s]" that present an injury or likely injury to competition. The Proposed Rule, however, would attempt to extend PSA liability well beyond the limits of Section 202(a) by extending liability to situations even when there is no unfair practice, much less injury to competition. The PSA does not reach this far.

#### 1. The PSA does not impose a duty of fair comparison.

AMS's proposed duty of fair comparison is not grounded in the PSA. The PSA focuses on the outcomes of an action, not the process by which the party engages in that action or its rationale for doing so. The specific language used – "unfair" and "deceptive" – points directly to an objective evaluation of the action. The action was either fair or unfair based on its effects. The representation was either truthful or deceptive based on the understanding it actually conveyed. The longstanding injury to competition requirement reinforces this point; one cannot determine whether injury to competition occurred without looking at the actual consequences of the conduct. The proposed concept of a duty of fair comparison well exceeds the statute's outcome-based approach by attempting to make conduct unlawful without regard to whether an unfair practice has actually occurred, much less whether competition has been harmed overall. The PSA contemplates no such approach.

The Agency tries to sidestep this issue by claiming that failure to meet one's duty of "fair comparison" is in effect per se an unfair practice. But this simply is untrue. Any number of scenarios could involve both an integrator not following any particular process and an entirely fair payment outcome. There is no PSA violation without an unfair outcome and injury to competition. The PSA requires that the analysis focus on the effects of the practice, not the process by which it came about.

The proposed duty of fair comparison creates the untenable situation of extending PSA liability to a situation without determining whether the outcome was actually unfair, much less whether competition was harmed overall. For example, under the Proposed Rule, a grower might receive a payment that aligns with the contract terms, meets the grower's expectations, and is entirely fair when viewed objectively. However, if the integrator did not have or did not perfectly follow a written policy on the

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*Business v. OSHA*, 142 S. Ct. 661 (2022) (per curiam) (rejecting the Occupational Safety and Health Administration's claims of regulatory authority regarding emergency temporary standards imposing COVID-19 vaccination and testing requirements on a large portion of the national workforce); *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (per curiam) (rejecting the Centers for Disease Control and Prevention's claims of regulatory authority regarding a nationwide eviction moratorium).

timeframe for groupings, the Proposed Rule would nonetheless expose that integrator to liability for an unfair practice. But without a finding that the practice was actually unfair (not that it was not performed in accordance with whatever processes AMS feels are appropriate), there can be no liability under Section 202(a) of the PSA.

### 2. The PSA does not provide AMS with the authority to dictate specific pricing contract terms.

AMS's attempt to impose specific contract terms likewise exceeds its authority under the PSA. The PSA, as explained, prohibits unfair and deceptive practices and devices. It does not confer command-and-control economic intervention authority. AMS has failed to demonstrate that a growout contract with a contracted-for target pay rate and performance-based deviations around that rate is inherently unfair or deceptive. AMS points to uncertainty as to where a particular grower might land within a particular comparison pool as somehow rendering the entire concept unfair. However, uncertainty is an inherent aspect of business. No business has absolute certainty as to how much income it will generate. A retailer cannot be certain how many products it will sell and how many discounts it will have to offer, an automobile manufacturer cannot know how many cars it will sell, and a consultant cannot know how many projects he or she will get and what rate he or she will be able to command for his or her time. However, a broiler grower actually has much more certainty than many other businesses. A contract grower faces no uncertainty over cost and availability for key production inputs, no uncertainty as to whether there will be a market for the birds being raised, and overall very little income uncertainty. This lack of income uncertainty is supported by the wide availability of loan facilities available to growers for building new farms or expanding existing farms, as well as the minuscule default rates associated with such loans, particularly those offered with federal government guarantees, such as Small Business Administration 7(a) guarantees and USDA Farm Service Agency loan guarantees. Loan guarantees and loan performance are discussed further below.

A reasonable grower can readily determine from a contract what the average pay would be under various scenarios and make informed judgments about likely upward and downward variability based on how the grower anticipates performing relative to the average. As with any business, as a grower gains more experience raising broilers, the grower is likely better able to assess his or her likely performance relative to the average.

There is no basis in the PSA for concluding that mandating a fixed base pay rate is the only way to prevent a comparison-based grower compensation structure from being unfair or deceptive.[34] Nor is there any expectation under the PSA that a party must be able to predict future income perfectly to avoid unfairness. Indeed, in open market transactions, the producer will have very little certainty as to what price the animals will command when they go to market, and this uncertainty increases for species with slower production timelines. AMS simply cannot reconcile why it is not unfair for a cattle or pig producer who chooses to market his livestock through cash markets to be exposed to the risk of taking whatever market price will exist months or years down the road, whereas it would be unfair for a broiler grower to know upfront what his or her payment will be to within a narrow range.[35]

[34] *See*, Question for comment 2 at 89 *Fed. Reg.* 49002, 49011.

[35] Indeed, AMS's previous rulemaking on this topic requires that growers be presented with extensive historical and, at times, forward-looking payment information that AMS has said is intended to allow a grower to make exactly these types of predictions.

Likewise, the PSA does not give AMS authority to dictate other contract terms, such as how high bonus payments may go or what the overall spread in payments may be.

Indeed, when Congress wanted contracts to have specific terms, or for AMS to have authority to require specific terms, it said so directly. For example, Congress amended the PSA to address specifically arbitration provisions in contracts, the right to discuss contract terms, the right to cancel production contracts, and prompt payment terms.[36] This demonstrates that Congress has expressly considered and enumerated the specific instances in which AMS may dictate contract terms. The fact that fair comparison principles have not been part of Congress's edicts demonstrates that this is not a power it intended AMS to exercise.

**3. The PSA does not provide authority to mandate self-audits.**

The PSA likewise does not give AMS the authority to require that companies conduct and document rigorous self-audits to evaluate PSA compliance. AMS has not established, nor could it, that grower contracts are per se unfair or deceptive without integrator self-audits, much less self-audits conducted and documented in the very specific manner that AMS would decree.

AMS's explanation that the audit requirement is necessary so that AMS can more easily conduct audits and take enforcement action falls flat. The proposed audit requirement is vastly different than a requirement that a regulated business must maintain certain records related to PSA compliance and make those available for audit. Rather, AMS would have integrators create entirely new documents, not about the regulated transactions themselves, but rather about the processes and protocols used leading up to those transactions. However, as explained above, the PSA does not regulate the processes that AMS would require to be audited. Moreover, mere added convenience for AMS during audits is insufficient justification for an entirely new and onerous self-audit requirement. This requirement well exceeds the PSA's mandates.

**4. The PSA does not require affirmative disclosures for capital investments**

AMS likewise has failed to establish that affirmative disclosures are necessary in all situations to avoid an unfair or deceptive practice or device. Under the PSA, the actual practice or device must in the specific situation in question be unfair or deceptive, which requires a situation-specific analysis and a showing of injury to competition. The Proposed Rule, however, requires taking the unsupported leap that additional capital investment requests are per se unfair or deceptive without the proposed disclosures, a position that AMS cannot prove.

It is entirely unclear how a failure to provide information such as supporting studies or construction schedules would make a request for an additional capital investment unfair in any circumstance, much less every instance. Even the proposed financial projections are unnecessary. The grower can use his or her chicken production expertise to evaluate the requested capital improvement, review the contract, and assess how much the improvement will help him or her raise chickens more efficiently. Mandatory financial projections could actually themselves become misleading if they cause growers to forego the essential financial due diligence that any business should be doing under the circumstances.

The same holds true for the requirement to provide an analysis of the risks or uncertainties associated with additional capital investments. It is impossible for integrators to accurately characterize all

[36] 7 U.S.C. §§ 197a, 197b, 197c and 229b

uncertainties and risks associated with a particular capital investment, and including a disclosure of this analysis would signal to the grower that the uncertainties identified are the only uncertainties that need to be considered under the grower's specific situation. This is would be misleading and could cause growers ignore the need to perform the independent due diligence expected of any business.

### C. The issues raised in the Proposed Rule constitute a Major Question, which should be addressed by Congress.

More than a decade of clear Congressional direction reinforces that AMS lacks authority under the PSA to conduct this rulemaking. USDA has a long history of overseeing the PSA through established regulations and within the guardrails established by extensive federal appellate caselaw about the scope of PSA Section 202. The PSA has been law for more than 100 years, and Congress has amended it as needed over the years when it determined additional authorities or requirements were required.

Congress also addresses PSA issues periodically through Farm Bills and the appropriations process. Congress most recently addressed PSA issues through the 2008 Farm Bill and subsequent appropriations bills. In the 2008 Farm Bill, as referenced above, Congress directed USDA to identify the criteria that would be used to evaluate whether four different types of conduct violated the PSA.[37] In 2008, the broiler industry was using more or less the same style of grower compensation system as is being used today. Notably, although Congress directed USDA to address several topics, the 2008 Farm Bill did not direct USDA to take any actions related to poultry grower compensation or the so-called tournament system. When USDA responded with a wide-ranging proposed rule that addressed poultry grower ranking systems, among other topics, in great detail, Congress used its appropriations powers to prevent USDA from finalizing and implementing the rulemaking for several years.[38] When the appropriations restriction eventually lapsed, USDA never pursued rulemaking to address poultry grower compensation.

This history demonstrates an exceedingly clear Congressional direction regarding the nature of topics appropriate for USDA rulemaking under the PSA. Through the 2008 Farm Bill, Congress provided USDA with clear direction to address topics that Congress determined needed additional regulations. Congress was undoubtedly well aware of the types of poultry grower compensation systems being used, as those systems had been in place for many years. Nonetheless, Congress specifically did not direct any action with respect to poultry growing arrangements. This directly reflects Congress's view that the prevailing regulatory framework for poultry growing arrangements be maintained. If that were not direction enough, when USDA attempted nonetheless to change the prevailing regulatory structure, Congress promptly stepped in and used its appropriations authority to halt further rulemaking on poultry grower compensation systems, maintaining that prohibition for years. Moreover, Congress did not intervene when USDA stopped pursuing and eventually withdrew the proposed rule on poultry grower compensation systems.

Taken together, this sequence of events clearly shows how, over more than a decade, Congress expressed its consistent view that the then-existing approach toward poultry grower compensation systems was the desired one and that USDA was overstepping by trying to change the system. Despite the current poultry grower compensation system being in use for decades, no federal court

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[37] H.R. 6124, 110th Cong. § 1106 (2008).

[38] Consolidated and Further Continuing Appropriations Act, 2015, H.R. 83, 113th Cong. § 731 (2014); Consolidated Appropriations Act, 2014, H.R. 3547, 113th Cong. § 744 (2014); Consolidated and Further Continuing Appropriations Act, 2013, H.R. 933, 113th Cong. §§ 742–43 (2013); Consolidated and Further Continuing Appropriations Act, 2012, H.R. 2112, 112th Cong. § 721 (2011).

has held that the system violates Section 202(a) of the PSA, further reinforcing that the current regulatory approach, not the proposed one, is intended by Congress.

Given this clear direction from Congress, whether to take any steps to change the current poultry grower compensation system is a major question requiring Congressional direction. As such, AMS may not expand its regulatory framework to change or undermine the currently used system. As recently stated by the Supreme Court in *West Virginia v. EPA*, in certain cases of "economic and political significance," an agency must demonstrate "clear congressional authorization" to exercise its powers.[39] As evidenced by the amount of public attention devoted to chicken industry contracting and attention from the highest levels of USDA and the White House, chicken grower contracting has taken on "political significance." It is also of great economic significance, as it drives billions of dollars in revenue to growers and forms the foundation for the U.S. broiler industry, benefiting growers, processors, and consumers. Not only does AMS lack the necessary "clear congressional authorization" to advance rulemaking into this topic, but Congress has also already voiced its support for the current system and its objection to USDA's efforts to regulate further the existing poultry grower compensation system.

## II. THE PROPOSED RULE IS VOID DUE TO VAGUENESS.

A regulation having the force of law must give persons and entities subject to it fair notice of what is prohibited so that they may comply with it. Several portions of the Proposed Rule fail this basic constitutional test. Under the Due Process Clause of the Fifth Amendment, a rule of law must define a legal violation "with sufficient definiteness that ordinary people can understand what conduct is prohibited and . . . in a manner that does not encourage arbitrary and discriminatory enforcement."[40] Any legal rule failing to meet that standard is "void for vagueness." While the vagueness doctrine is most often employed in criminal cases, it has also been applied in cases in which a party faced civil sanctions as well.[41]

The Supreme Court has applied the void-for-vagueness doctrine to strike down economic regulations that are remarkably similar to the Proposed Rule. In *Cline v. Frink Dairy Co.*,[42] the Court held unconstitutional under the Fourteenth Amendment Due Process Clause a Colorado antitrust statute prohibiting certain business combinations except those that were necessary to obtain a "reasonable profit." Similarly, in *United States v. L. Cohen Grocery Co.*,[43] the Court held unconstitutional Section 4 of the Lever Act, which made unlawful any "unjust or unreasonable rate or charge" for "necessities." In *International Harvester Co. v. Kentucky*,[44] the Court concluded that a Kentucky antitrust statute proscribing the fixing of prices at levels "greater or less than the real value of the article" was unconstitutionally vague. The fatal flaw in each law was the indeterminate liability standard imposed. None of the statutes proscribed any specific conduct but rather made illegality turn on "elements . . . [that] are uncertain both in nature and degree of effect to the acutest commercial mind."[45]

A number of provisions in the Proposed Rule are vague to the point that a company could not reasonably determine how to comply with them. Most critically, the duty of fair comparison, which

[39] 142 S. Ct. 2587, 2613–14 (2022).
[40] *Skilling v. United States*, 130 S. Ct. 2896, 2927–28 (2010).
[41] *Gentile v. State Bar*, 501 U.S. 1030, 1048–50 (1991) (invalidating state bar disciplinary rule under the void-for-vagueness doctrine).
[42] 274 U.S. 445, 453–65 (1927).
[43] 255 U.S. 81, 89 (1921).
[44] 234 U.S. 216, 234 (1914).
[45] *Id.* at 223.

forms the foundation for nearly the entire rule, is fatally vague. The proposed duty is defined by several factors, including a final element requiring the consideration of "any other factor relevant to a fair comparison." This criterion provides virtually no guidance on when conduct would be unlawful. Rather, an act could be determined to be unlawful under the Proposed Rule only after some event has occurred. An integrator or other entity subject to Sections 202(a) and (b) acting in utmost good faith and ordering its affairs in the most rational fashion in an effort to comply with the Proposed Rule could not reasonably anticipate, much less determine with any reasonable degree of certainty, what business practices would ultimately be held illegal under these and other provisions. Moreover, this vague element would make it impossible for an integrator to structure its self-audit program or to be confident its self-audit adequately reviewed the compliance program. The Proposed Rule, therefore, cannot withstand constitutional scrutiny. It must be withdrawn.

Further, the first five elements, although more specific, also contain vague and unclear factors, some of which are discussed further below in these comments, and all of which make it impossible for a company to structure its operations with confidence.

Finally, the Proposed Rule fails to explain how the different elements of the duty of fair comparison relate to each other. It is not clear if the elements form a balancing test or a totality of the circumstances analysis or if failing a single element results in a failure to meet the duty of fair comparison. It is constitutionally untenable for such a foundational aspect of a regulation to be so rife with uncertainty.

## III. THE PROPOSED RULE UNDULY IMPINGES ON THE FREEDOM TO CONTRACT.

The freedom to contract is a well-established liberty grounded in the U.S. Constitution's due process clause, first acknowledged by the Supreme Court well over a century ago.[46] Since that time the freedom to contract is widely accepted as a constitutional right. The Proposed Rule unduly infringes on the freedom to contract by undermining the rights of growers and integrators to enter freely into arms-length, bargained-for contracts.

NCC estimates there are roughly 15,000 growout contracts in the broiler industry. These contracts reflect the bargained-for terms agreed to by the parties. Many of these contracts have been in place for many years, and all of them form the basis for established expectations on the part of both parties. The Proposed Rule would invalidate most, if not all, of these contracts. This would amount to a drastic infringement on the parties' right to establish bargained-for terms and a rewriting of an entire industry's contract structure.

The Proposed Rule assumes that every grower who is presented with a new contract under the fair comparison requirements will want to enter into the new agreement, which appears to vitiate the grower's existing contract rights. Growers have entered into contracts with bargained-for terms and are entitled to enforce those contracts. The Proposed Rule fails to address how an integrator is supposed to comply with the rule if a grower refuses the new terms in favor of an existing contract. Would the integrator be considered in violation of the rule for honoring a contract a grower wants enforced? Would the integrator be forced to choose between complying with the Proposed Rule and breeching an existing contract? Would AMS declare all existing contracts void? The Proposed Rule fails to consider these unintended consequences of the Proposed Rule.

[46] *Lochner v. New York*, 198 U.S. 45 (1905).

The rule would throw the entire industry into uncertainty and impose enormous burdens on businesses that have relied on these agreements to structure their affairs. Parties would be forced to re-establish terms for roughly 15,000 contracts, an enormously difficult and disruptive process. Parties' expectations would be wildly disrupted. Growers who had structured their business dealings based on their expectations and experiences under their growout contracts would be subjected to considerable uncertainty. In particular, high-performing growers would suffer significant uncertainty and economic risk, given the Proposed Rule's emphasis on minimizing the ability to provide adequate incentives for high-performing growers. Taken together, this would amount to an impermissible disruption and nullification of lawful contracts.

AMS raises several questions in its preamble to the Proposed Rule that raise especially troubling concerns about parties' freedom to contract. In particular:

- AMS asks whether it should set a cap on what percentage of a grower's compensation may be a performance bonus.[47] It should not, and it may not. It is important that parties be permitted to establish the compensation structure to which they mutually agree. In some situations or markets, the parties may prefer a bonus-heavy structure; in others, they may prefer less variation. But importantly, the parties (and thus, the market) must be able to make that decision on their own, free of government interference. Nothing in the PSA leads to the conclusion that a grower compensation structure in which more than 25 percent (or any other figure) of the compensation reflects bonus is inherently unfair or deceptive, especially when the compensation structure is captured in the contract. The record does not indicate why USDA is considering specifically a 25 percent bonus cap. The contemplated 25 percent cap appears chosen at random, which would make it arbitrary and capricious.

- Apparently recognizing that the Proposed Rule would require widescale contract revision, AMS asks whether it should construe the target pay rate in existing contracts as the new base compensation rate under the Proposed Rule.[48] Categorically, it may not. AMS's proposal would amount to unprecedented governmental interference in private contracts, imposing pay terms that none of the parties negotiated for. The PSA does not grant AMS fiat power to dictate specific payment terms, and attempting to do so interferes with the parties' freedom to contract.

- AMS also suggests it may consider it an unfair practice if integrators lower the contractual target pay rate to establish the new base pay.[49] Again, this amounts to an impermissible attempt to expand the PSA into authority to dictate prices and exert command and control style intervention in the economy. Lowering the base pay to allow for more growers to earn a bonus would be a natural adjustment to the new rules, and in some situations it may be necessary to ensure that growers are able to continue earning their historical pay. AMS's implicit threat to investigate any integrator that modifies its contracts to allow for a lower base pay amounts to a gross invasion of the freedom to contract.

The same concerns reflected in these examples manifest in many other aspects of the Proposed Rule. The PSA does not provide AMS with the authority to exert fiat-style control over the economy.

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[47] *See*, Questions for comment 3 at 89 *Fed. Reg.* 49002, 49011.

[48] *See*, Question for comment 11 at 89 *Fed. Reg.* 49002, 49012.

[49] *See*, Question for comment 2 at 89 *Fed. Reg.* 49002, 49011.

## IV. THE PROPOSED RULE IS ARBITRARY AND CAPRICIOUS AS IT IS NOT SUPPORTED BY THE RECORD.

Under the Administrative Procedure Act, Agency actions cannot be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[50] Courts have held that Agency action is "arbitrary and capricious" when the Agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[51] In determining whether an Agency action is arbitrary and capricious, courts review the information available in the administrative record.

### A. The current poultry grower contracting system is a well-designed, efficient structure that benefits growers, integrators, and consumers.

The Proposed Rule is based on a fundamentally flawed understanding of how the broiler growout market works and, indeed, how growers participate in and benefit from the market. The current poultry grower compensation system reflects a structure that fairly rewards family farmers for the efficient use of resources and innovation in raising high-quality birds. The current system's fair, honest contracts provide a target pay that high-performing growers can supplement with the efficient use of resources. This system promotes superior results that lower chicken-raising costs, encourage efficient use of resources, and benefit growers, integrators, and consumers.

To describe the performance structure briefly, integrators deliver broiler chicks to growers on the day the chicks hatch. Growers raise the chicks into broilers using feed, veterinary care, and other consultants, such as animal welfare experts, provided by the integrator. Growers are responsible for providing quality housing, farm maintenance, on-farm inputs (such as heat, water, ground cover, etc.), and day-to-day care of the broilers.

In a typical growout contract, growers and integrators agree on a pre-determined target price per pound of weight gain based on an average. This is likely based on production plans that are developed years in advance to meet customer specifications. The specifics vary, but growers are usually either paid the target plus a bonus for high performance, or grower payments are adjusted slightly upward or downward from the target based on relative performance. Overall, regardless of the approach taken, growers earn a predictable payment plus the opportunity to earn a bonus for strong performance. This approach rewards skilled growers who have honed their management practices to raise healthy birds most efficiently.

#### *1. The tournament system's incentive-based pay structure rewards grower efficiency and innovation and promotes bird welfare.*

The current poultry grower compensation system operates like any arrangement between a business and a service provider, where a service provider competes with others to provide the best services as efficiently as possible to increase the provider's net compensation and where businesses compete to secure the best service providers at profitable rates. Growers are provided the same quality resources—broilers, feed, access to veterinary care, and consulting—and use their farming skills to produce high-quality birds at the lowest cost. This rewards-based system allows integrators to

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[50] 5 U.S.C. § 706(2)(A).

[51] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

incentivize efficient use of resources, innovation in management practices, and grower investments in housing and care.

Growers not only take seriously their responsibility to raise their birds ethically, but, through the current compensation system, they also have every business incentive to ensure their birds are well-cared for. Properly cared-for birds experience optimal growth rates and have lower mortality, both of which increase a grower's pay. This contract structure allows the well-being of birds to be an integrator's and grower's top priority because incentives are given to farmers who raise the healthiest, highest-quality birds. Similarly, integrators have every incentive to make sure their growers succeed and produce healthy, quality birds. If an integrator sees a flock struggling or identifies opportunities to increase efficiency, the integrator will provide the grower with assistance through technical experts who are familiar with the breed, business, and growing conditions to help the grower maximize his or her potential. The assertion that integrators are targeting growers to fail goes against the industry's business model. Integrator profits are lower if growers are not as successful as they could be. When growers perform well, so do integrators.

This process results in a highly efficient market and contributes to the global cost-competitiveness of U.S. chicken meat. Chicken meat is a wholesome, nutritious lean protein that has never been more affordable in the U.S., both on a real-dollar basis and when viewed against a typical household's overall buying power. This is despite the immense inflationary pressures facing consumers and businesses from all directions.

2. *The tournament system efficiently allocates risk to the parties best equipped to handle it.*

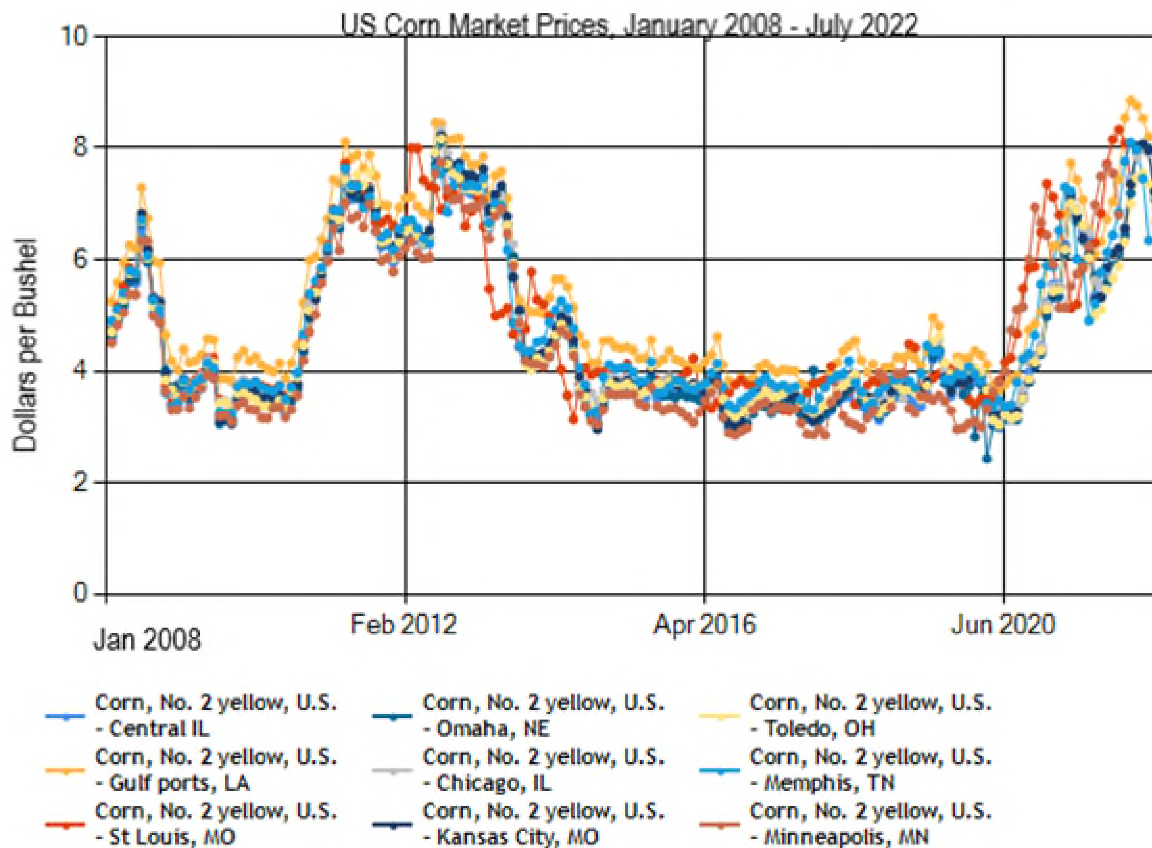
The current poultry grower contracting system has evolved to allocate economic risk to the parties best prepared to burden it. In fact, data show that chicken companies remove approximately 97 percent of the economic risk from growers operating under a growout contract as compared to growers operating outside of an integrator arrangement.[52] Integrators supply growers with a variety of necessary inputs, including broiler chicks, feed, medication and veterinary care, technical advice, and other production resources. This removes much of the economic risk from factors like shifting feed prices, animal health events, and market uncertainty from contract growers to integrators, whereas independent growers would shoulder the entirety of that risk themselves. If feed prices were to skyrocket during a contract term, or weather or disease affect mortality rates among all growers, the grower would still be paid according to the contract. The integrator bears those economic risks instead.

Many of the capital-intensive inputs listed above benefit from large-scale purchasing. For example, broiler chicks themselves are expensive inputs, given the advanced genetics and breeding management required to produce them. Integrators operate at scale and are best equipped to manage the complicated chick supply chain, including hatcheries and grandparent flocks of sufficient size and scale to supply all their farms. It would be impossible for an individual farmer to source chicks with anywhere near the same consistency and efficiency as integrators. The contract structure also protects buyers from needing to find a market for the birds once fully raised, which would be a significantly more variable market for the grower. The contract terms remain in effect for the duration of the agreement, regardless of whether demand for chicken meat plummets and affects a integrator's profits as was seen in recently during the COVID-19 pandemic. A grower will always get paid for the

[52] C.R. Knoeber & W.N. Thurman, *"Don't Count Your Chickens…": Risk and Risk Shifting in the Broiler Industry*, 77 Am. J. Agricultural Econ. 486, 496 (1995).

birds he or she raises and does not have to face the risk of investing heavily in a flock only to have the market crater when it comes time to harvest those birds.

Another major input integrators supply that presents significant risks is feed. Feed is typically the greatest input cost in raising chickens. Integrators secure or produce feed at significant scale and volume, and they do so with their specific bird breeds' nutritional needs or customer specifications in mind.[53] A major ingredient in chicken feed is corn, which regularly experiences significant price fluctuations, as depicted in Figure 1 below. These price fluctuations result from government policies like Renewable Fuel Standard mandates, competing end-users, geopolitical events, and droughts and other major weather events. These price fluctuations could be catastrophic for individual farmers if they had to secure feed on the open market. But under the current system, integrators have the scale and resources, including access to sophisticated hedging strategies, to secure feed at favorable prices and they are better positioned to absorb unexpected increased feed costs. Growout contracts are agnostic to feed prices, and the grower is insulated from these potentially devastating input risks.




[53] Growers were responsible for securing feed, they would also need to obtain additional related support services, such as hiring an animal nutritionist to advise on the birds' diets to ensure growth and nutritional needs are met.

Figure 1, Corn Prices in U.S. Markets, January 2008 – July 2022.[54]

Similarly, integrators are best equipped to secure medication and veterinary care for the chickens. Rather than requiring each grower to retain a veterinarian, schedule veterinary visits, and obtain medication, integrators coordinate veterinary care to ensure birds are well cared for. Alleviating growers from arranging veterinary care also ensures that a grower's economic incentive is aligned with protecting bird health and wellbeing. Whereas an independent grower might have an economic incentive to pay for veterinary services only when it is absolutely clear that care is necessary, contract growers have every incentive to reach for veterinary services whenever they might be needed, better protecting bird health overall. Additionally, because an integrator's veterinarians cover many growers, they are able to work at a more efficient scale and are extremely familiar with the type of birds for which they are caring.

This arrangement removes the overwhelming majority of the economic risk and profit uncertainty that growers would otherwise face, allowing contract growers to dedicate consistent attention and resources to providing high-quality care, land, and housing for their birds. This partnership dynamic promotes the economic vitality and independence of family farms by promoting stable and predictable income. The benefits of this partnership structure were highlighted during the industry's successes during the COVID-19 pandemic, where the industry maintained steady profits for growers even in serious economic uncertainty and supply chain disruptions.

The American poultry industry is the most competitive in the world in significant part because the poultry grower compensation system encourages innovation and investment in the best equipment and practices. NCC is proud to represent an industry that consistently and continuously produces affordable protein, even in times of soaring across-the-board inflation and economic distress that increase prices for consumers.

### B. Data show the current poultry grower contracting system is profitable and works well for growers.

NCC commissioned an independent study, published in March 2022 by Dr. Tom Elam, that captures live chicken production statistics from 2021 and summarizes key trends in broiler production efficiency, returns, and loan quality data (the "Elam Study", attached as Appendix A).[55] The study incorporates recent publicly available government data and analyzes the results of a recent survey of chicken growing contracts. The survey results indicate that current poultry grower contracting relationships are mutually beneficial, successful, and profitable for both growers and integrators. This study is important because it provides an objective showing how growers have behaved and the results they have obtained under the current compensation system. This objective data are especially important because in the preamble to the Proposed Rule, AMS appears to be overly reliant on and accepting of extremely subjective surveys and perception information. It is critical to evaluate the actual facts.

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[54] *Feed Grains Database,* USDA Economic Research Service (accessed September 1, 2022), https://www.ers.usda.gov/data-products/feed-grains-database/.

[55] T. Elam, *Live Chicken Production Trends*, FarmEcon, LLC (Mar. 2022), https://www.nationalchickencouncil.org/wp-content/uploads/2022/03/Live-Chicken-Production-FARMECON-LLC-2022-revision-FINAL.pdf [hereinafter "Elam Study"].

1. *Despite having options to work with different integrators, most growers have been with their current integrator for over 5 years.*

Most growers are in a position to choose between partnering with two or more processors and can readily cut ties with a bad business partner. Over 50 percent of growers have been with their current integrator for ten years or more, a statistic unchanged from 2015, with an additional 20 percent (for a total of 70 percent) having been with their current integrator for over five years.[56] A majority of the contracts considered in the study were for five years or less, and one-third were for flock-to-flock arrangements. This shows that most growers, when presented with the opportunity to stay with their integrator or to test the market, find it better to stay with their integrator and renew their agreement.

In addition, only 6.3 percent of the study respondents' farmers left their company in 2021, a statistic that includes retiring growers.[57] A grower may part ways with his or her integrator for a variety of reasons, including retirement, financial distress, and declining health. Of the 6.3 percent of grower departures, only 0.7 percent was from growers leaving the industry due to contract termination by the integrator.[58] These data show that growers and integrators both willingly continue doing business after their initial contracts end and that exceedingly few growers see their contracts terminated, further showing the current partnership contracting system is mutually beneficial.

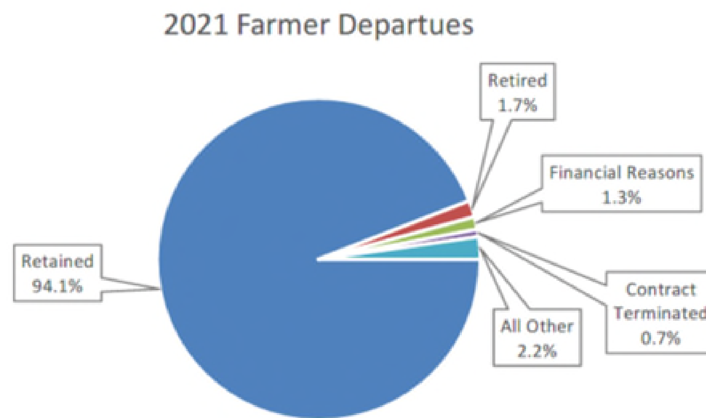


Figure 2, Reasons for Farmer Departures, 2021.[59]

2. *The features of the tournament system allow chicken growers to earn a profitable wage.*

The Elam Study found that USDA data showed, in 2011, the $68,455 median income for chicken farmers was significantly higher than the median income of both U.S. farm households and U.S. households (not restricted to farm households). Sixty percent of U.S. chicken farmer household incomes exceeded the U.S.-wide median.[60] In addition, the top 20 percent of contract chicken farmers earn on average $142,000, significantly higher than the top 20 percent of all farm households

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56 *Id.* at 3.
57 *Id.* at 5.
58 *Id.* An integrator may terminate a contract for various reasons, but most often the reason is tied to poor bird performance or failure to adhere to contract standards.
59 *Id.*
60 *Id.* at 9.

($118,000) and the top 20 percent of all U.S. households ($101,000), according to the same data.[61] Although USDA has not since updated the study reporting this data, there is every reason to believe that these trends have continued. For example, a different USDA dataset showed that, from 2010-2021, the average poultry farm net farm income was $59,800, compared to $38,200 for all farms.[62] This data directly contradicts AMS's assertions that growers are unable to predict income and make appropriate investment decisions under their grower arrangements and demonstrates that growers already are being fairly compensated in a manner that leads to a sustainable business.

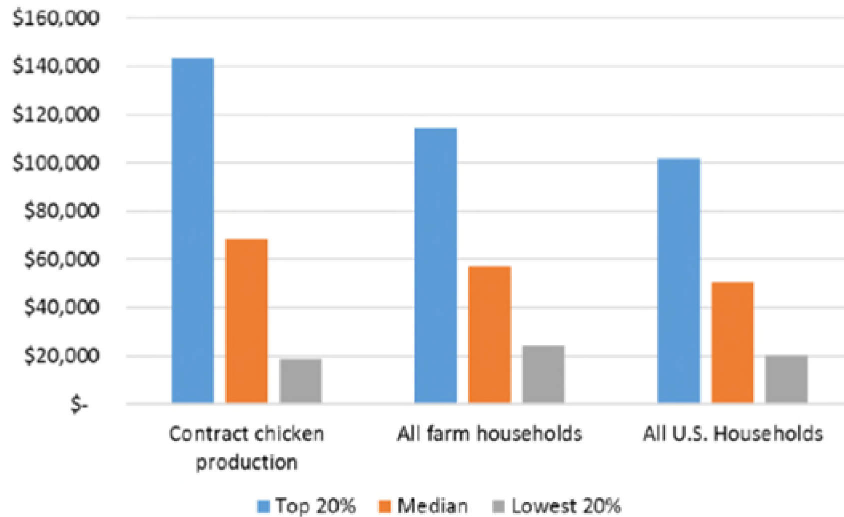


Figure 3, Income Variations Between Contract Chicken Production, All Farm Households, and All U.S. Households, 2011.[63]

3. *The tournament system's features benefit the health and well-being of chickens.*

In 2021, the average on-farm livability of a flock of U.S. broiler chickens was almost 95 percent, compared to only 82 percent in 1925.[64] This improvement in production practices is driven in large part by directly incentivizing growers to care for their birds properly.

4. *Interest in entering the broiler growing industry remains high, showing that the industry can retain its current farmers and has room to grow.*

The Elam Study's findings show interest in entering the broiler growing industry remains high. Companies responding to the survey reported significant waiting lists for entrepreneurs seeking to enter live chicken production or current farmers looking for opportunities to expand their operations. There were 1,672 applications from potential growers and 335 expansion requests from existing

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61 *Id.* at 10.

62 *Id.* This study used different data and is not directly comparable to the figures in the study reporting the 2011 income, although the same trend bears out—chicken farming generates more income than the average farming operation.

63 *Id.* (referencing 2011 data from a USDA financial survey as analyzed by J. MacDonald, *Technology, Organization, and Financial Performance in U.S. Broiler Production*, USDA Economic Information Bulletin Number 126 (June 2014)).

64 *Id.* at 6.

farmers.[65] These applications indicate a steady interest in entering contract chicken production and excitement about entering an industry with a reputation for profitable arrangements.

*5. Default rates on loans for poultry growers and integrators are low.*

As depicted in Figure 4, the Elam Study found that the deficiency percent and charge-off percent for poultry grower loans amount to merely one-third of the average agricultural loan, based on Small Business Administration loan quality data.[66] The data overwhelmingly show that growers and their lenders can effectively and accurately evaluate expected income from poultry growing arrangements. Moreover, these data show growers can earn steady incomes from their growing arrangements that allow them to adequately service their debt obligations, directly dispelling any allegations that growers are somehow saddled with unsustainable debt loads.

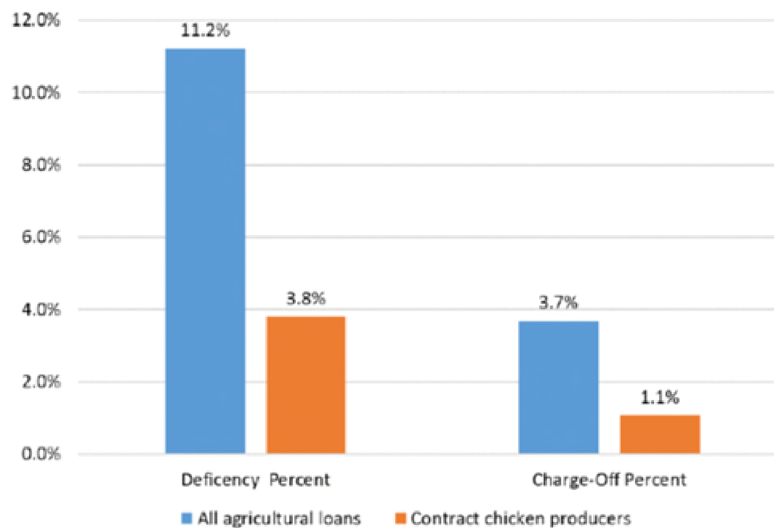


Figure 4, Default Rates for Contract Chicken Producers and All Agricultural Loans, 2015.[67]

**C. The Proposed Rule makes fundamental changes to poultry grower contracting that would hobble poultry producers and dismantle the current successful compensation system.**

NCC is gravely concerned that the Proposed Rule will impose substantial costs on the broiler industry and would undermine the functioning of the very successful grower compensation system. At a time when input costs are soaring and inflation continues to be a top concern for American households, AMS should avoid imposing regulatory burdens that would increase costs for producers and add costs to consumers, and under no circumstances should AMS destroy a highly successful economic structure. We highlight the following overall concerns and general comments regarding the Proposed Rule:

- The Proposed Rule presupposes the current poultry grower contracting system is unfair or problematic. AMS appears to have made up its mind without even considering comments,

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65 *Id.* at 4.
66 *Id.* at 11.
67 *Id.* at 11.

and NCC urges AMS to take an unbiased approach to its rulemaking, especially considering this impression is far from accurate. Tellingly, no court has ruled that the current grower compensation system violates Section 202(a) of the Packers and Stockyards Act, nor has AMS initiated enforcement action on this basis despite the tournament system being in use for decades.

- Existing market practices address or prevent many of the concerns AMS raises. Integrators have every economic and business incentive to promote the optimal growth of birds and maintain productive relationships with their growers. Because chicken processing plants are expensive and only provide sufficient return on investment if they operate at full capacity, integrators are further incentivized to maintain good reputations as good business partners in order to attract new and maintain current growers to their operation and sustain a consistent processing schedule. Integrators that gain a reputation as bad business partners, including by attempts to manipulate a grower's performance or otherwise drive away growers, would quickly see their plants under-supplied and their grower pool taken by competitors. Even in the minority of situations where only one integrator serves an area, that company would have a strong business incentive to maintain a reputation as a good business partner, otherwise its pipeline of future growers would dry up and well-performing growers allow plants to run more efficiently.

- Lenders, including USDA, serve as an additional market check on integrator business practices. Because many growers are financed by experienced lenders, lenders are intimately involved in scrutinizing the revenue expected under a growing arrangement, and they have a sophisticated understanding of the industry. Growers presented with unsustainable, high risk contracts would not be able to secure financing, which in turn would mean integrators would not have anyone to raise their birds. Indeed, USDA's own lending arm, which is involved in financing growers, has its own obligations that would prevent it from taking an unnecessary risk on an unfair contract. This provides a natural market force to reinforce the existing economic incentives toward fair and sustainable contracts.

- The Proposed Rule is aimed at addressing allegedly discriminatory behavior without evidence it is happening in the industry. The Proposed Rule asserts that integrators are purposely directing resources such as feed in a manner that purposely targets certain growers. This assertion is unrealistic. Integrators would not and in all actuality cannot purposely provide low-quality feed or chicks to any particular grower. Feed mills are massive operations, preparing feed for sometimes hundreds of farms and millions of birds. There is no practical way that an integrator would be able to identify pockets of lower-quality feed in a mill's production and direct them to any particular grower. Similarly, hatcheries are extremely large and house millions of eggs. It defies belief to think an integrator could comb through the recently hatched chicks and identify the less robust chicks, much less assemble them for delivery to a specific grower, and do so all within the narrow window for placing day-old chicks. Notably, AMS provides no evidence in the Proposed Rule that this actually happening.

- AMS overlooks the fact that integrators have a strong economic incentive to ensure all growers get optimal inputs. Not only are the birds the integrator's asset, but the birds are the integrator's primary source to produce chicken products. An integrator has every economic incentive to ensure that each grower is provided with the optimal inputs so that birds are grown safely to the correct target weight to produce the highest quality meat using the fewest resources. Poor flock performance significantly affects an integrator's operations and costs, and integrators

work hard to make sure growers are able to deliver optimally sized birds using the least inputs. This is why the current compensation structure emerged in the first place: integrators want to incentivize efficient performance, and to do that, integrators have every incentive to ensure the inputs are optimal.

- AMS has not provided a basis for issuing this Proposed Rule only eight months after the issuance of the Transparency Rule. USDA considered most of these very same issues involving grower expectations and information flow in the Transparency Rule issued in January 2024 and did not determine, based on those facts, that the type of interventions seen in the Proposed Rule were necessary to prevent a 202(a) violation. During that rulemaking, AMS specifically considered information disclosure, how inputs might affect flock performance, minimum pay, and governance, but on that record AMS chose not to take the steps now being proposed. It can be inferred by this omission that AMS at the time of the Transparency Rule rulemaking AMS did not consider fair comparison an issue that needed to be addressed. Additionally, in the wake of the Transparency Rule, it is unclear whether the Proposed Rule is necessary. USDA has not demonstrated that the alleged problems described in the Proposed Rule persist in light of the Transparency Rule, given how little time has passed since the rushed implementation of that rule. The record on which AMS relies is fundamentally outdated given the significant changes wrought by the Transparency Rule.

- AMS should avoid any changes that would allow poor performing growers to succeed at the expense of high performing growers. Limiting integrator's ability to design performance-based pay structures would eliminate the incentives (and rewards) for a grower to put in the hard work, innovate, and make the necessary investments to raise high-quality flocks. This would harm efficiency, jeopardize bird welfare, make it harder for top performers to stay in the poultry growing business, and ultimately affect consumer prices. It would also stifle innovation by growers, to the detriment of American consumers and American agriculture. The current compensation system structure is an efficient and effective means of rewarding the best growers for performing above average and incentivizing less-efficient growers to improve their performance.

- AMS should avoid any requirements that dictate specifically how grower payments are to be calculated. Integrators and growers need the flexibility to set payment structures based on factors such as weight, square footage, density, or others. Regardless of whether integrators are operating a comparison or non-comparison based system, the parties need to be able to determine the calculation method that will work best for their situations.

- The Proposed Rule will ultimately have a destabilizing effect on the poultry growing industry. As written, the best performing growers are likely going to be penalized under the proposed system, which will upset expectations and lead to frustration and confusion within the industry. This will only cause uncertainty in growout markets. Growers do not benefit from constant change and USDA cannot and should not continue to impose changes to the industry that neither growers nor integrators want.

### D. The Proposed Rule is unclear and unworkable.

Many aspects of the Proposed Rule are unclear and unworkable, whether through vague requirements or mandates that cannot reasonably be implemented.

- Sections 201.110(a)(2)(i) and (ii). These provisions' references to "material differences in performance" do not clearly articulate a standard as it is unclear how materiality will be determined.

- Section 201.110(a)(2)(iv). This provision requires considering conditions or circumstances that could "render comparison impractical or inappropriate," however it is unclear how an impractical or inappropriate comparison would be determined.

- Section 201.110(a)(2)(v). This provision requires integrators to make "reasonable efforts" but does not provide guidance on what would be considered reasonable efforts.

- Section 201.110(a)(3). This provision requires a non-comparison method when fair comparison is not possible, but it does not provide a mechanism for integrators to predict or conclude that fair comparison is not practical. Additionally, without additional guidance, every settlement could be subject to challenge.

- Section 201.110(b)(1)(i). This section assumes integrators are in a position to control natural minor variations in inputs on a very small scale, whereas in practice this is impractical given the scale of many inputs and the speed and complexity of providing them to growers. This section would also require integrators to establish overly prescriptive procedures, creating inflexible systems that cannot react to day-to-day developments, to the detriment of growers.

- Section 201.110(b)(1)(i)(B). The provision requires integrators to document "how and when the live poultry integrator manages differences of quality and quantity in the delivery of inputs to growers." This presupposes difference in quality and quantity are (1) intentional, (2) controllable, and (3) material. USDA has not established that these suppositions are true and the facts of how the industry actual operates would show the opposite.

- Section 201.110(b)(1)(ii)(A). Given the multiple and confusing ways that "density" is used in the Transparency Rule, it is unclear from the regulatory text how AMS understands the term in this provision.

- Section 201.110(b)(1)(iii). These provisions are overly prescriptive and would require integrators to contemplate in advance an extremely complicated set of potential scenarios, and the specificity of these provisions would likely make it difficult for integrators to respond flexibly to unforeseen situations. As a result, integrators may not be able to provide growers with flexibility when needed because the specific scenario was not contemplated.

- Section 201.110(b)(1)(iii)(B). Requiring integrators to document how and when growers will be removed from a ranking group will constrain the integrator's ability to move a grower to a non-comparison system in unanticipated situations. This provision could also require an integrator to move a grower to a non-comparison system even if the grower would have received a higher compensation if they had remained in the comparison pool.

- Section 201.110(b)(1)(iii)(C). This provision requires integrators to document grower groupings for settlement "in any manner other than the one used in recent settlements." Without defining "recent" or "manner" it is unclear what exactly the integrator is supposed to be documenting.

- Section 201.110(b)(2). The compliance review process is overly burdensome and would seem to require essentially a significant internal investigation every two years for each complex. The requirement to interview a potentially very large number of individuals with respect to vague criteria imposes an impossible burden well out of line with a rule of this nature.

- Section 201.110(b)(2)(i). The provision requires integrators to audit their compliance with this rule and that "the reviewer must be independent of the management chain of a particular complex and qualified to conduct the review." It is unclear how independence and qualifications would be evaluated or how USDA defines "management chain." Further, there is no basis for USDA to require the auditor to be an outsider as considered in the preamble. Identifying an outsider, providing them the necessary information to understand the compliance program, and interpreting the results of the audit would be extremely burdensome on the integrator as this rule is complicated (for the reasons noted above) and independent individuals likely do not have the requisite knowledge to evaluate compliance.

- Section 201.112. It is unclear why these disclosures should be required when the Transparency Rule issued in January 2024 includes a disclosure requirement. This makes the audit requirement in the Proposed Rule duplicative, confusing for growers, and needlessly burdensome. When considering the Transparency Rule, the Department must have considered which disclosures were necessary and did not conclude this auditing requirement was necessary. It is unclear what has changed to require this additional disclosure in the past eight months.

- Section 201.112(b). The specific disclosures required in (b)(1) through (b)(3) contain vague terms and are unreasonably burdensome. The provisions specify that the "relevant" information be disclosed but does not provide guidance as to what would be considered relevant to a capital improvement project. Because of this, integrators will be forced to guess what USDA intended or disclose potentially voluminous irrelevant information, which is very burdensome and will likely lead to confusion among growers.

## V. THE PROPOSED RULE UNDERESTIMATES THE COST ASSOCIATED WITH ITS IMPLEMENTATION.

The economic analysis of the Proposed Rule estimates that the first-year cost of the rule will be just under $20 million. This greatly underestimates the true cost of the Proposed Rule. Not only will the implementation of the rule cost integrators far more than estimated, there are a number of less tangible costs such as upset expectations that are not captured in the economic analysis, although in past rulemakings AMS has placed high values on predictability and consistency in compensation structures, even if there is no change to actual compensation.

NCC's members have reported that understanding and complying with the earlier Transparency Rule took well over 1,000 person-hours, legal review, technical expertise, and additional accounting costs, per company. Some members reported needing to establish large teams dedicated full-time to implementation. Others hired new legal and audit staff focused primarily on the rule (and at costs much higher than the hourly rates used in the estimates). These costs were orders of magnitude greater than USDA estimated, greatly calling into question the process used to develop those estimates. In comparison to the Transparency Rule, the Proposed Rule is even more complicated because it will require the revision of roughly 15,000 different contracts. This would require not only changing base contract templates, but also substantially modifying or replacing every contract currently in effect. This would require preparing communications to each grower, distributing the new

contracts to each grower for review, preparing and distributing all required disclosures under the Transparency Rule triggered by those contract changes, and engaging in one-on-one communications with the large percentage of those growers who are likely to have questions as to why their longstanding contracts are being changed in such an extreme and confusing manner.

In addition to these costs, the Proposed Rule will cause additional costs to industry through upset expectations. As discussed above, the bulk of the growers in the industry have been operating for years under the current system. They have learned how the system works and are able to plan and project their earnings accordingly. The Proposed Rule will upset the majority of grower expectations and will result in significant disruption in the industry. This disruption will lead to millions of dollars in lost efficiency and unlike the current system where the integrator bears the majority of the risk, the cost of these disrupted expectations will most directly impact the growers, undermining the intent of the Proposed Rule.

## VI. THE PROPOSAL WOULD REQUIRE A VERY LONG IMPLEMENTATION PERIOD.

Given the complexity and costs associated with implementing the Proposed Rule, a long implementation and compliance period would be needed. A longer implementation period would allow for more orderly staffing and implementation processes. A longer period would also help growers by allowing for more education on the requirements of the rule and greater understanding of how it would impact their operations over the long term. This education would be critical to the implementation process. It would also provide AMS opportunity to develop meaningful implementation guidance and to respond thoughtfully to implementation questions presented by the regulated industry, which is critical for the orderly implementation of a complex rule.

We anticipate that the implementation of the Proposed Rule would take even longer and be far more complex than the Transparency Rule. The new payment programs would need to be developed, tested, and then every single of the roughly 15,000 contracts in the industry would need to be updated. The adjustment to payment terms would create tremendous confusion and concern among growers, and integrators will need time to educate their growers work through concerns and complications. Growers would also need time to work with their lenders to ensure their lenders remain comfortable with the changed contracts and new payment model. We would ask the that any rule issued under this rulemaking be granted a two-year implementation period.

Finally, we urge the agency to propose and implement all planned amendments to PSA regulations in a single rulemaking, or, if this is not possible, provide a single implementation date. NCC is concerned that AMS is taking a piecemeal approach to promulgating regulations for industries regulated by the PSA. Imposing constant regulatory changes on industry only fosters confusion, increases unnecessary costs, and injects uncertainty into an already uncertain economic environment. Implementing changes in a single rulemaking would allow industry to see the true cost of the proposed changes and allow AMS to be transparent with industry about the direction it plans to take. Even if AMS chooses to finalize regulations in a piecemeal fashion, it should implement a uniform effective date for all changes to PSA regulations currently identified in the Unified Agenda.

* * *

NCC appreciates the opportunity to comment on the Proposed Rule. Please feel free to contact us with any questions. Thank you for your consideration.

Respectfully Submitted,

Gary Jay Kushner
Interim President
National Chicken Council

Enclosure

# Live Chicken Production Trends

Disclosures: This study was prepared for the National Chicken Council. FarmEcon LLC was compensated for its preparation.

Dr. Thomas E. Elam

President FarmEcon LLC

thomaselam@farmecon.com

March 2022

# Introduction

This study presents the results of a 2022 broiler industry survey designed to capture 2021 key live chicken production statistics. The survey was designed by FarmEcon LLC and data were collected from National Chicken Council (NCC) member companies. Conclusions drawn are those of FarmEcon LLC. Statistics collected from the responding companies included:

1. Number of live chicken production farmers;
2. Current contract duration;
3. Farmer tenure;
4. Newly granted contract duration;
5. Farmer age;
6. Farmer family experience in live chicken production;
7. Number of persons on waiting lists for entering live chicken production;
8. Existing farmers wishing to expand current operations;
9. 2021 farmer turnover by major reason for departure and;
10. Variability of average live chicken contract fees compared to beef and pork prices.

In addition, the study summarizes several key trends in broiler production efficiency and returns. Loan quality data for live chicken producers will be discussed.

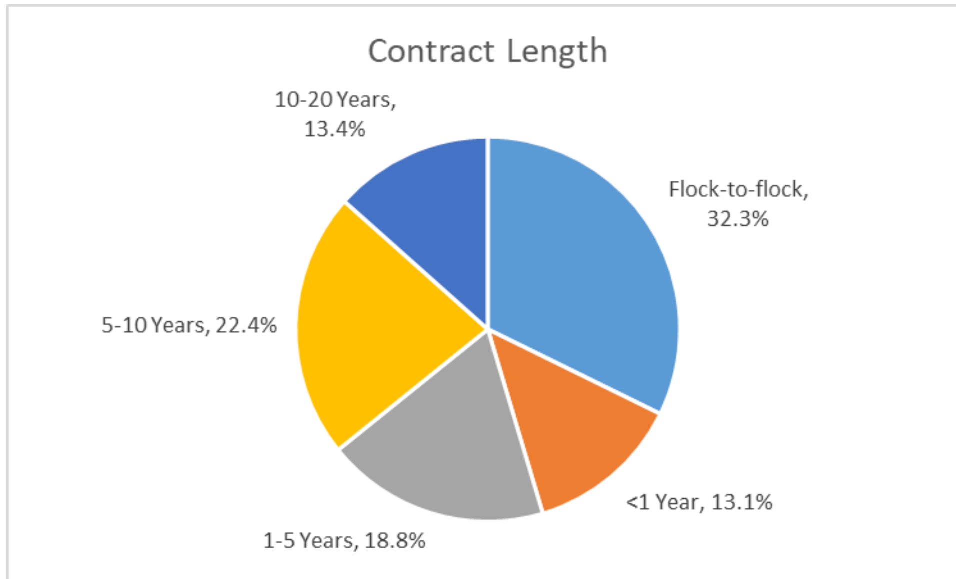
Studies on broiler farmer returns and loan quality are not revised. There are no updates available for these two studies that this study utilized in 2015. However, more recent USDA 2021 poultry farmer financial returns data were found and are cited.

# Survey Results

The survey was collected during early 2022. Twenty companies representing 83% of 2020 top 32 U.S. chicken company production as reported by Watt Publishing responded[1].

1. Companies responding to the survey reported on 8,971 live chicken farmers. The reported farmers held 10,921 production contracts. The 83% response rate implies that the survey is very representative of all 32 top chicken companies.

2. Companies responding reported current contract duration, in years, as shown below.

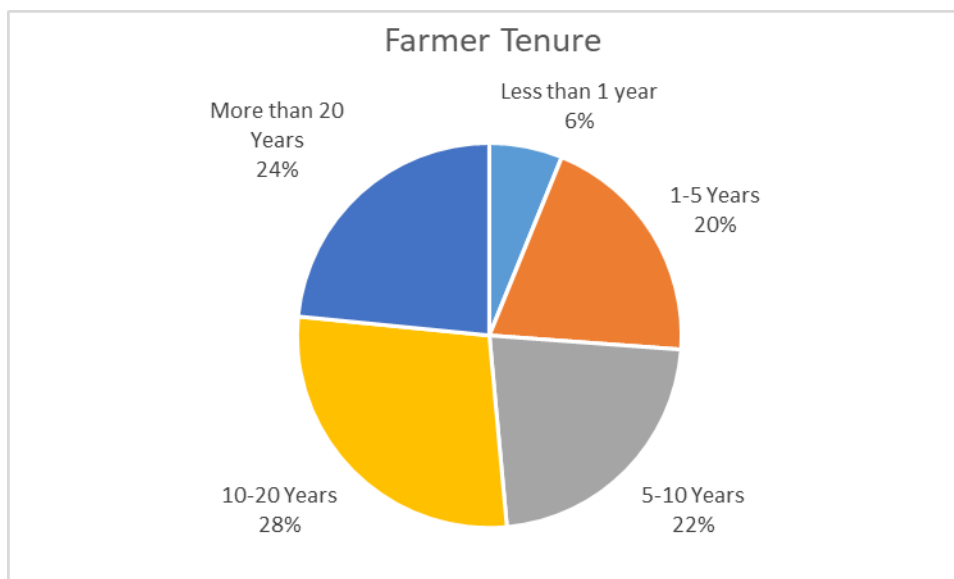



The 32% flock-to-flock percentage is 10 points lower than the 42% reported in a 2015 NCC survey done for the prior version of this report. Other contract durations are correspondingly higher than the prior report.

Flock-to-flock contracts have no obligations for either party past the current flock being grown. These contracts have been criticized for not offering farmers long term assurance of live chicken production with their current company. However, long term contracts also can be canceled for poor performance and not meeting contract terms. In reality, a multi-year contract offers little additional assurance over a flock-to-flock contract. Regardless of stated contract duration, both parties need to agree that the arrangement is beneficial if the contract is to continue.

Companies reported that long term contracts are required, and granted, for new construction. In most cases these contracts run for 10 years or longer as required by lenders.

3. Respondents reported on the length of time that their current farmers have been with their company. Results are shown in the graph below.




More than half the farmers have been with their current company for 10 years or more. Almost three-quarters have been with the same company for 5 years or more. These results are almost identical to the prior version of this report.

4. Companies reported on contract duration for newly granted contracts. Responses fell into two broad categories. For contracts granted on newly constructed houses, whether expansion or for a new farm, contracts are granted to satisfy any lender requirements. That was reported to be generally 10 to 15 years. At the other end of the spectrum, many new contracts were granted on a flock-to-flock basis on existing farms with no lender requirements involved. Several companies also reported new multi-year contracts are granted even without a lender requirement involved.

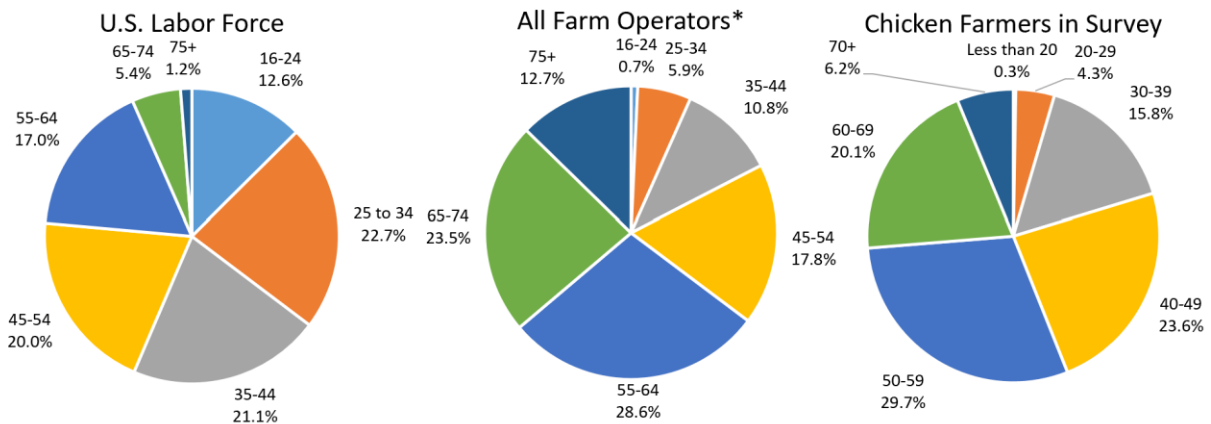
5. Companies reported on the ages of their current farmers. The results for those who track this data show that the vast majority, 80%, of farmers are 40 years old or older. Only 14 farmers were reported to be under 20 years old. This age structure together with the length of time farmers have been with a company is seen as implying that live chicken production is dominated by experienced live chicken producer owner-operators.

   The live producer age structure implies that these farmers are in the business for the long term. It also implies that current farmers are, for the most part, financially sustainable and stable. The relatively few farmers under the age of 30 implies that entry may be somewhat difficult for that age group.

   In contrast to the overall U.S. labor force[2], but in common with all farm operators, chicken farmers have relatively few participants in the under-30 age cohorts. Except for the oldest cohorts, chicken farmers and all farm operator[3] ages are much more comparable.

Ages of chicken farmers indicate that they are generally typical of other farmers but leave chicken farming at a somewhat earlier age. This can be attributed to factors such as ability to finance earlier retirement, time demands of chicken raising, or that farm operators outside chicken farming may remain part-time farm producers longer into their later years. The relative lack of younger people in farming reflects the difficulty of financing a farm at an early age versus obtaining employment in other sectors. It is often the case that entry into farming happens as a result of an aging farm operator within the family of the entering farmer being replaced by a younger family member.

Age cohorts for the overall labor force, all farm operators, and chicken farmers of the surveyed companies are shown in the graphs below.




*Operators whose principal occupation is farming, 2017 Census of Agriculture

6. Companies reported on current farmer family experience in contract chicken production. Of the current farmers 26% were reported have to have had a family background in this type of farming.

7. Companies reported that they have 1,672 applications from potential live chicken producers who would like to get into chicken production. Those applications are 19% of the current farmers reported. This statistic is an indication of the attractiveness of this type of farming for those not involved in it today.

   Also reported were 335 open applications from existing farmers for expansion of their existing operations.

   Taken together, these responses indicate active expansion and investment interest on the part of potential and current farmers. Indirectly the interest level shows that a significant number of persons outside and inside live chicken production regard it as an attractive farming option and investment opportunity.

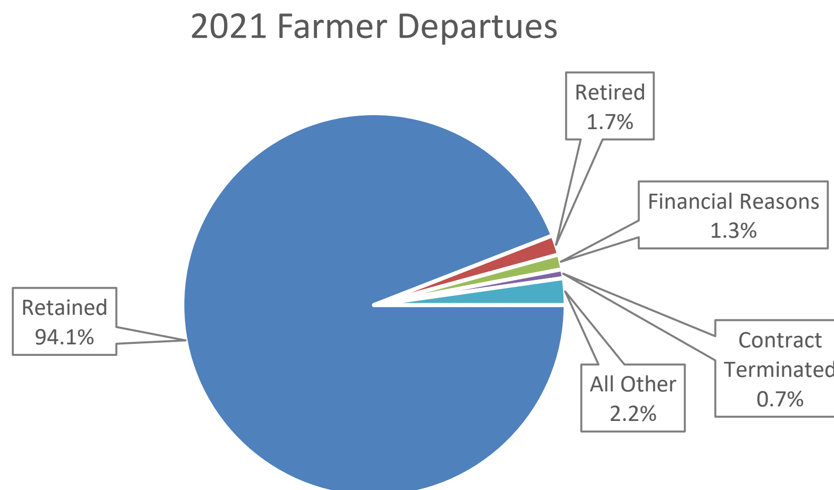
8. Companies reported on reasons for 2021 farmer departures. There are many and varied reasons that farmers might leave a chicken company. These, include among others, retirement, financial distress in the farming operation, declining health, farm

catastrophes, to take an offer from another company, and contract termination by a company.

9. Unfortunately, as in any business arrangement, not every partnership works out to the satisfaction of both parties. In the chicken farming business, we see both sides of this fact. Producers can and do leave a company for what they regard as a better opportunity with another company. Companies have the right to terminate a farmer that is not meeting their performance expectations or is not otherwise living up to the terms of the contract.

   The least likely reason, accounting for only 0.7%, for a farmer leaving broiler production was contract termination on the part of their company. There are several reasons for a contract termination, but the major ones are poor bird performance and failure to adhere to contract terms.

   Put into a perspective of the total number of contract producers and reasons for their leaving a company, contract termination was the least numerous in 2021. Results of the survey are presented in the graph below.




In 2021 563, or 6.3%, of live chicken farmers left their company. The "All Other" category includes farmers who moved to a different company. In many cases farmers who left chicken production sold facilities that remained in production after that farmer departed chicken raising. Only if a production facility is so obsolete that it is not financially attractive to keep it in production is it normally abandoned.

Though not directly comparable, employee turnover due to job separations in the overall economy averages 3-4% per month[4]. The 6.3% contract farmer figure is for an entire year, and includes retirements. The major difference between employee turnover and live chicken production is that the chicken farmer has a significant financial

investment at risk in the business whereas most employees do not. That farm investment makes chicken farmers, and farmers in general, less mobile than employees.

# Live Chicken Production Technical Performance

The table below shows selected average live chicken performance trends since 1925[5].

| | Market Age | Market Weight | Average Daily Gain | Feed to Meat Gain | Feed Per Bird | Mortality |
|---|---|---|---|---|---|---|
| Year | *Average Days* | *Pounds, Liveweight* | *Grams* | *Pounds of Feed per Pound of Live Broiler* | *Pounds Feed Per Broiler* | *Percent* |
| 1925 | 112 | 2.50 | 10.12 | 4.70 | 11.75 | 18.00 |
| 1935 | 98 | 2.86 | 13.24 | 4.40 | 12.58 | 14.00 |
| 1940 | 85 | 2.89 | 15.42 | 4.00 | 11.56 | 12.00 |
| 1945 | 84 | 3.03 | 16.36 | 4.00 | 12.12 | 10.00 |
| 1950 | 70 | 3.08 | 19.96 | 3.00 | 9.24 | 8.00 |
| 1955 | 70 | 3.07 | 19.89 | 3.00 | 9.21 | 7.00 |
| 1960 | 63 | 3.35 | 24.12 | 2.50 | 8.38 | 6.00 |
| 1965 | 63 | 3.48 | 25.06 | 2.40 | 8.35 | 6.00 |
| 1970 | 56 | 3.62 | 29.32 | 2.25 | 8.15 | 5.00 |
| 1975 | 56 | 3.76 | 30.46 | 2.10 | 7.90 | 5.00 |
| 1980 | 53 | 3.93 | 33.63 | 2.05 | 8.06 | 5.00 |
| 1985 | 49 | 4.19 | 38.79 | 2.00 | 8.38 | 5.00 |
| 1990 | 48 | 4.37 | 41.30 | 2.00 | 8.74 | 5.00 |
| 1995 | 47 | 4.67 | 45.07 | 1.95 | 9.11 | 5.00 |
| 2000 | 47 | 5.03 | 48.54 | 1.95 | 9.81 | 5.00 |
| 2005 | 48 | 5.37 | 50.75 | 1.95 | 10.47 | 4.00 |
| 2006 | 48 | 5.47 | 51.69 | 1.96 | 10.72 | 5.00 |
| 2007 | 48 | 5.51 | 52.07 | 1.95 | 10.74 | 4.50 |
| 2008 | 48 | 5.58 | 52.73 | 1.93 | 10.77 | 4.30 |
| 2009 | 47 | 5.59 | 53.95 | 1.92 | 10.73 | 4.10 |
| 2010 | 47 | 5.70 | 55.01 | 1.92 | 10.94 | 4.00 |
| 2011 | 47 | 5.80 | 55.98 | 1.92 | 11.14 | 3.90 |
| 2012 | 47 | 5.85 | 56.46 | 1.90 | 11.12 | 3.70 |
| 2013 | 47 | 5.92 | 57.13 | 1.88 | 11.13 | 3.70 |
| 2014 | 47 | 6.01 | 58.00 | 1.89 | 11.36 | 4.30 |
| 2015 | 48 | 6.12 | 57.83 | 1.89 | 11.57 | 4.80 |
| 2016 | 47 | 6.16 | 59.45 | 1.86 | 11.46 | 4.50 |
| 2017 | 47 | 6.20 | 59.84 | 1.83 | 11.35 | 4.50 |
| 2018 | 47 | 6.26 | 60.42 | 1.82 | 11.39 | 5.00 |
| 2019 | 47 | 6.32 | 60.99 | 1.80 | 11.38 | 5.00 |
| 2020 | 47 | 6.41 | 61.86 | 1.79 | 11.47 | 5.00 |
| %1925-2020 | -58% | 156% | 511% | -62% | -2% | -72% |

Over the entire 1925-2020 span there was a steady improvement in live chicken performance. In recent years the industry has held average days to market steady and allowed improved ADG performance to be expressed as higher average market weights. The result has been a bird that is 156% heavier than 1925 on about the same amount of feed and in 58% fewer days. This improvement is due to both investments by chicken companies and the financial incentives offered in the contracts between the companies and their farmer partners.

Feed-to-gain improvement has slowed since 1995. This is entirely due to raising birds to ever-heavier weights at a constant 47-48 average days of age. Note that while days to market

stopped declining, average market weights accelerated. All else equal, as chicken weights increase FCR performance tends to decline. Maintaining FCR at increasing average weights over time is actually a significant performance improvement. As will be shown below, increasing average weights at 47-48 days has also been a significant benefit for chicken farmers.

Death loss declines were rapid until about 1960 but have plateaued at 4-5% in recent times.

The next table translates chicken productivity increases into live pounds per square foot produced in farmer facilities and grower payments in current and 2012 dollars.

| Year | Average Grower Payment, Cents/Lb., Current Dollars | Average Grower Payment, Cents/Lb., $2012 | Live Young Chicken Production, 000 Pounds | Total Grower Payments, $2012, 000 | % Change | Live Pounds Per Sq. Foot | Average Grower Payments, Per Sq. Foot, $2012 |
|---|---|---|---|---|---|---|---|
| 1990 | 4.08 | 6.33 | 25,549,696 | $1,617,672 | 4.8% | 33.12 | $2.10 |
| 1991 | 4.11 | 6.19 | 27,170,780 | $1,680,540 | 3.9% | 33.44 | $2.07 |
| 1992 | 4.14 | 6.10 | 28,997,878 | $1,768,320 | 5.2% | 33.77 | $2.06 |
| 1993 | 4.22 | 6.08 | 30,474,243 | $1,851,444 | 4.7% | 34.09 | $2.07 |
| 1994 | 4.23 | 5.96 | 32,765,941 | $1,954,314 | 5.6% | 34.77 | $2.07 |
| 1995 | 4.32 | 5.97 | 34,352,980 | $2,051,491 | 5.0% | 34.93 | $2.09 |
| 1996 | 4.30 | 5.84 | 36,034,815 | $2,104,723 | 2.6% | 34.75 | $2.03 |
| 1997 | 4.46 | 5.96 | 37,207,401 | $2,219,110 | 5.4% | 34.87 | $2.08 |
| 1998 | 4.53 | 5.99 | 38,054,849 | $2,280,572 | 2.8% | 35.26 | $2.11 |
| 1999 | 4.68 | 6.09 | 40,444,167 | $2,463,925 | 8.0% | 36.09 | $2.20 |
| 2000 | 4.78 | 6.07 | 41,293,525 | $2,508,363 | 1.8% | 36.23 | $2.20 |
| 2001 | 4.87 | 6.07 | 42,335,507 | $2,569,145 | 2.4% | 36.03 | $2.19 |
| 2002 | 4.81 | 5.89 | 43,715,247 | $2,575,580 | 0.3% | 34.64 | $2.04 |
| 2003 | 4.90 | 5.88 | 44,317,531 | $2,606,601 | 1.2% | 37.22 | $2.19 |
| 2004 | 5.04 | 5.88 | 46,109,201 | $2,709,460 | 3.9% | 38.56 | $2.27 |
| 2005 | 5.24 | 5.92 | 47,578,696 | $2,814,545 | 3.9% | 39.15 | $2.32 |
| 2006 | 5.39 | 5.93 | 48,332,516 | $2,863,716 | 1.7% | 38.97 | $2.31 |
| 2007 | 5.43 | 5.82 | 49,089,999 | $2,856,088 | -0.3% | 38.56 | $2.24 |
| 2008 | 5.64 | 5.93 | 50,441,600 | $2,992,748 | 4.8% | 38.84 | $2.30 |
| 2009 | 5.62 | 5.90 | 47,752,300 | $2,816,920 | -5.9% | 38.19 | $2.25 |
| 2010 | 5.67 | 5.85 | 49,152,600 | $2,877,597 | 2.2% | 38.48 | $2.25 |
| 2011 | 5.78 | 5.86 | 50,082,400 | $2,932,593 | 1.9% | 39.40 | $2.31 |
| 2012 | 5.85 | 5.81 | 49,655,600 | $2,883,515 | -1.7% | 39.07 | $2.27 |
| 2013 | 5.93 | 5.78 | 50,678,200 | $2,931,633 | 1.7% | 39.12 | $2.26 |
| 2014 | 6.19 | 5.94 | 51,378,700 | $3,053,616 | 4.2% | 39.52 | $2.35 |
| 2015 | 6.27 | 5.97 | 53,376,200 | $3,187,929 | 4.4% | 40.03 | $2.39 |
| 2016 | 6.42 | 6.03 | 54,259,100 | $3,271,137 | 2.6% | 39.93 | $2.41 |
| 2017 | 6.63 | 6.10 | 55,573,900 | $3,390,586 | 3.7% | 39.04 | $2.38 |
| 2018 | 6.84 | 6.15 | 56,797,700 | $3,494,614 | 3.1% | 38.31 | $2.36 |
| 2019 | 6.93 | 6.13 | 58,259,100 | $3,573,514 | 2.3% | 38.08 | $2.34 |
| 2020 | 7.02 | 6.13 | 59,405,600 | $3,644,069 | 2.0% | 38.09 | $2.34 |
| **% Increase** | **72.1%** | **-3.1%** | **132.5%** | **125.3%** | **NA** | **15.0%** | **11.4%** |

Farmers have benefited from this improved performance. The investments made in genetics and feeds by their companies have increased the throughput of their facilities, resulting in increased production per square foot of their chicken housing. The table above shows how that increased performance has expressed itself in increased constant dollar farmer payments per square foot of their owned chicken housing[6]. Payments per square foot in 2012 dollars did decline slightly between 2016 and 2020 as companies changed to slightly slower growing breeds.

While average current dollar farmer payments per pound of chicken have increased 72% since 1990, corrected for overall inflation, those payments have declined slightly. However, a 15% increase in average pounds of chicken production per square foot of farmer-owned housing has more than compensated for the decline in inflation-corrected payments per pound. Though declining slightly in recent years, the overall result is that inflation-corrected annual farmer payments per housing square foot have increased over 11.4% since 1990.

The gains reflect both company investments in chicken performance and farmer improvements their housing required to take advantage of that increasing chicken performance capability.

While farmer payments per pound are highly visible to both farmers and their companies, payments per square foot are not. Arguably, payment per square foot is a much better farmer payment and return on investment metric than payment per pound of chicken raised.

Contract farmers and their companies have mutually benefited from the investments that have improved bird performance. Farmers who focus on payment per pound of chicken could be looking at a more meaningful metric that includes both a payment per pound measure and the productivity trend of their housing investment.

# Live Chicken Producer Income Stability

Survey data were collected for 2020-2021 monthly average chicken farmer payments per pound of live chicken production. From these data the average, standard deviation and coefficient of variation (CV) were calculated. The average over all months and all companies was 6.76 cents per pound, the standard deviation was 0.11 cents per pound, resulting in a CV of 1.6%. This overall CV is a statistical measure of the variation in monthly average payments relative to the two-year average. It has little meaning unless compared to other CV statistics for similar data.

Spreadsheet data for U.S. average cattle and hog prices were obtained from the Economic Research Service of USDA and CV was calculated for each[7].

For all slaughter cattle prices reported in the spreadsheet the average was $1.42 cents per pound, standard deviation $0.19 and CV was 13%. For hogs the average was $0.55 per pound, standard deviation $0.16 and CV 29% .

Cattle and hog prices represent the payments to producers for each pound of live animal delivered to market. In that respect they are similar to broiler farmer fees received from broiler companies. However, in another respect broiler payments are different. Cattle and hog prices are market-based. Broiler farmer fees are contract-based. Broiler farmer fees paid to individual farmers are subject to variation around the contract average based on terms and conditions that determine premiums and discounts based on broiler performance. However, overall cattle and hog average prices also do not reflect variation in individual producer prices received based on live animal quality that also result in price premiums and discounts.

Also, cattle and hog producers pay for feed and the animals they raise out of their income stream. Broiler farmers receive feed and chicks from their companies at no cost.

The conclusion is that overall average producer payments per pound of live animal produced are much less variable for broiler farmers than payments to cattle and hog producers.

# Live Chicken Producer Financial Performance

Statistics on live chicken producer returns are not routinely gathered by USDA or any known university farm records systems. In 2011 USDA did conduct a special financial survey that included live chicken farmers. Results of that survey are detailed in an August 2014 article by USDA economist James MacDonald[8]. This study is reported here for historical context.

The survey showed that farmers who raise broilers under contract generally realize higher average incomes than other farm households and other U.S. households. However, the range of household incomes earned by broiler farmers is also wider than other groups.

MacDonald compared average incomes using the median, at which half earn less than and half earn more. In 2011, the median income among all U.S. households was $50,504, while the median income among farm households was $57,050. The $68,455 median for chicken farmers was significantly higher than both all farm households and all U.S. households. Sixty percent of chicken farmers earned household incomes that exceeded the U.S.-wide median.

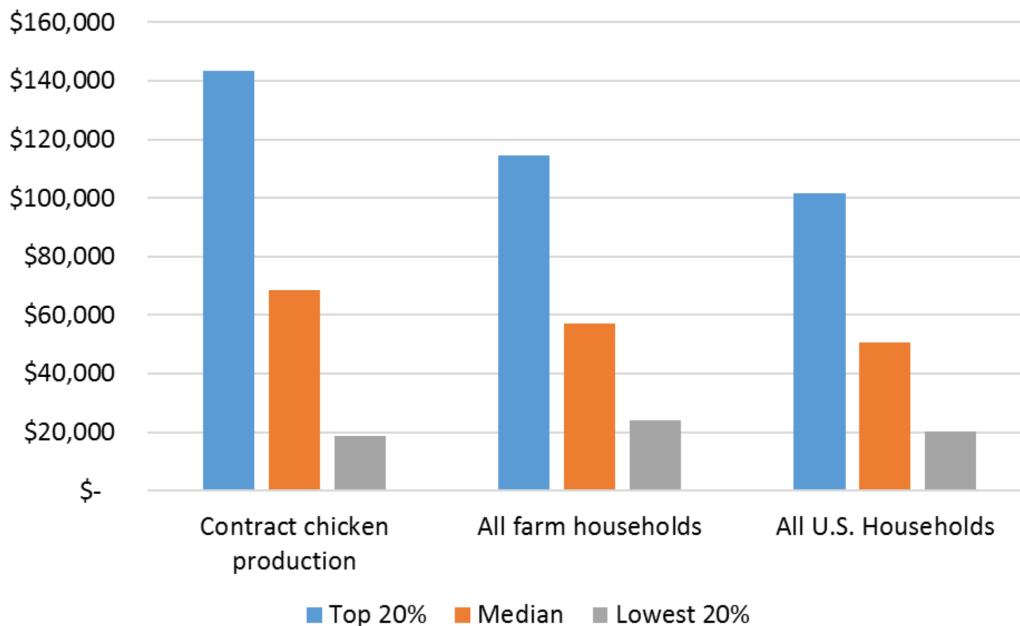
In part the higher income spread was due to a wide scale of live chicken production among chicken operations. Larger producers may also be better at raising chickens and receive higher payments per pound based on their higher-than-average performance. Similar to all businesses, those who are most successful at raising chickens will tend to earn more income than those who are less successful.

MacDonald also points out that the contracting system has substantially reduced some financial risks borne by contract farmers. Feed, medication and baby chick costs are the responsibility of the chicken company. As MacDonald points out, “These risks are not small; feed prices rose or fell by at least 5 percent in 11 of the 60 months between January of 2009 and December of 2013. Poultry companies also bear production risks that commonly affect farmers. For example,

if weather or disease affects mortality among all farmers, base payment rates remain the same."

Comparing the top 20% of live chicken farmer returns to the same statistic for other farm households and all U.S. households shows a significant advantage for top performing contract chicken producers. Median incomes are also higher for chicken farmers, while at the bottom end, the lowest 20% are slightly lower than all farms, but comparable to the U.S. average. Chicken farmer incomes have a wider range than all farms and all households, but this is almost entirely due to the significantly higher level of the top 20% of chicken farmer incomes.

The graph below shows the results for these three income categories.




As this is only one year of data the results need to be viewed with some caution. Farm incomes, especially for farms not selling on contracts, can vary widely from year to year. Still, the results do tell a story about the relative returns of live chicken production. At the top end and on average, well-run chicken farms tend to earn significantly more than both the average U.S. farm and U.S. non-farm household.

Recent USDA data also show that over the last decade poultry farms have on average financially outperformed the average farm. From 2010 to 2021 average poultry farm net farm income was $59,800 compared to $38,200 for all farms[9]. The averages cannot be directly compared to the medians reported in the MacDonald report but directionally the conclusion is the same.

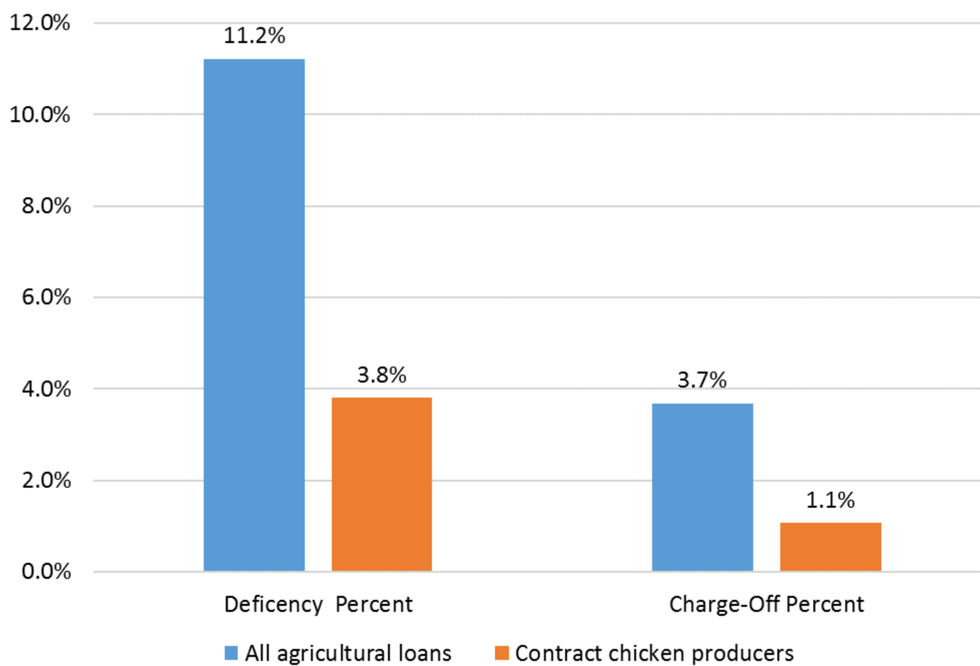
## Comparative Live Chicken Production Loan Performance

Available agricultural lender statistics also strongly support the USDA survey showing that live chicken production has favorable returns compared to other farming activities.

In 2015 NCC obtained loan quality data from the Small Business Administration, a significant lender to live chicken producers. The data showed significantly lower charge off and deficiency percentages for chicken producers compared to all agricultural loans.

The deficiency rate for live chicken farmers was about one-third the rate for all agricultural loans, and the charge-off rate was less than 30% of all agricultural loans.

These loan results also support the financial advantages of contract chicken production compared to other types of farming operations. The following graph summarizes an overview of these data[10]. The vastly different chicken farmer loan results are largely due to the lower level of cost and income risks that are the result of the specific contracting arrangements between chicken farmers and their companies.




## Summary and Conclusions

Data from the NCC survey and evidence from third party sources all show that live chicken production is broadly and generally being run by a group of effective and experienced farmers. Chicken farmers generally have higher incomes compared to all farms and all U.S. households, and have an age structure that is similar to all farm operators. Compared to the entire U.S.

labor force both chicken farmers and all farm operators tend to be older than non-farm employees. This is seen as a result of the substantial financial investment often required to enter farming.

The 2021 turnover rate of chicken farmers was 6.3%, the majority of which was voluntary or due to external factors beyond the control of companies and farmers.

Responding companies also reported significant waiting lists for those who would like to enter live chicken production or expand existing operations.

An analysis of farmer payment data obtained from Agri Stats showed that inflation-corrected farmer payment rates per square foot of farmer owned housing have increased over time. The increase is due to improved bird daily weight gain performance that has increased with no significant effect on feed used per bird. Chicken companies who furnish the feeds have benefited from the feed efficiency gains. Farmers who furnish live chicken housing have captured the benefits of increased growth rates.

The current contracting system has helped promote the steady improvements in live chicken performance that have benefited chicken farmers, the companies they produce for, and ultimately consumers. Both farmers and their companies benefit from those performance gains.

A USDA farm financial survey shows that broiler producers generally have significantly higher incomes than all other farming enterprises and the average U.S. household. The lowest 20% of contract farmer incomes are only slightly less than the similar statistic for all U.S. households, but lower than bottom 20% of all farm operators.

SBA farm loan data show much lower loan deficiency and charge-off rates for live chicken production than all agricultural loans. These data support the findings of the USDA survey.

Agri Stats data show that inflation-corrected farmer income per square foot of chicken housing has benefited financially from increases in chicken growth rate performance. Higher growth rates are primarily the result of breeding investments made by chicken companies and farmer investments in their own operations that help chickens realize their improving genetic potential. Average daily gains have decreased in the last few years, but have been partially offset by higher payments per pound.

Viewed in totality, live chicken production is a viable, mutually beneficial and attractive farming enterprise for the vast majority of farm families who raise chickens in partnership with the companies they work with.

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