NATIONAL CHICKEN COUNCIL

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Submitted electronically via Regulations.gov

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Re: Comments on Fair and Competitive Livestock and Poultry Markets, 89 Fed. Reg. 53886 (June 28, 2024), Docket No. AMS-FTPP-21-0046

Dear Mr. Offutt:

The National Chicken Council (NCC) appreciates the opportunity to comment on the proposed rule, "Fair and Competitive Livestock and Poultry Markets," published in the *Federal Register* on June 28, 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 reflects an impermissible attempt to make an end-run around established judicial precedent requiring a showing of injury to competition to sustain a violation of Section 202(a) or (b) of the Packers and Stockyards Act (PSA). Worse than a solution in search of a problem, the Proposed Rule would cause widespread confusion and inflict staggering costs on the meat and poultry industries, ultimately to the detriment of American consumers. For the numerous reasons discussed in these comments, we urge AMS to withdraw the Proposed Rule.

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

The Proposed Rule is fundamentally an effort to interpret the bounds of Section 202(a) of the PSA. The PSA is more than 100 years old and has been amended numerous times over the years. Throughout all of those amendments, Congress has focused on restricting practices that are determined to cause injury to competition. Because the Proposed Rule broadens USDA's authority to all enforcement against conduct without a showing of injury to competition, it prohibits conduct not covered by the PSA and constitutes a "major question." AMS has overstepped its statutory authority in issuing this Proposed Rule.

A. The Proposed Rule is designed to prohibit conduct without regard to injury to competition.

Well-established case law—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] Although the Proposed Rule does not expressly state that AMS could pursue enforcement action against integrators without a showing of injury to competition, the discussion in the preamble clearly demonstrates that this is the Proposed Rule's intent. In fact, by establishing criteria that would allow USDA to pursue a PSA Section 202(a) violation based on injury to only a single "market participant", the Proposed Rule directly violates the statute's injury to competition requirement. As a matter of law, all violations of Section 202(a) 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 to any practice that "causes or is likely to cause substantial injury to one or more market participants."[2] 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.*

When Congress passed the PSA, it specifically intended to prohibit practices that harmed the competitive process. The language used in the statute was understood at the time of enactment to address those collusive or monopolistic practices 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]."[3] 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.[4] Because Sections 202(a) and (b) of the PSA mandate a showing of competitive injury, AMS cannot 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 to eliminate monopolistic or other anti-competitive 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

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[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). . . .").

[2] 89 *Fed. Reg.* 53886, 53910.

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

[4] *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]").

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*."[5] "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."[6]

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*."[7] 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 the statute's language 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 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"[8] and "unjust obstruction[s] to . . . commerce"[9] 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.[10] Antitrust law exists to protect the competitive process so that consumers may obtain the highest quality goods and services at the lowest possible cost.[11] 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."[12] In short, the Sherman Act and other antitrust statutes have not been construed to

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

6 *Id.*

7 *Id*. at 515 (emphasis added).

8 *Id.*

9 *Id.*

10 *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.").

11 *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.").

12 *Brooke Group*, 509 U.S. at 225

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 competitively priced. *Stafford* makes clear that the goals of the PSA are identical.

2. Every appellate court that has 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, including all circuits with significant poultry production, have addressed the issue, and they have uniformly and resoundingly affirmed this understanding.[13] In several of these cases, the agency argued its position directly to the court in question;[14] in others, it filed *amicus* briefs urging the court to adopt its preferred construction.[15] In each instance, the court disagreed.

The Sixth Circuit thoroughly summarized 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.[16]

In surveying court precedent, the Sixth Circuit noted the "prevailing tide" of circuit court decisions holding "that subsections (a) and (b) of § 192 [PSA section 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.[17]

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

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13 *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.

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

15 *Terry*, 604 F.3d 272; *Wheeler*, 591 F.3d 355.

16 *Terry*, 604 F.3d at 276.

17 *Id.* at 277 (lengthy string citation of supporting cases omitted).

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."[18]

The agency offers no credible analysis undermining any of these court decisions, nor could it. In six of the ten appellate cases holding that competitive injury is an element of a Section 202 violation, the agency has participated in some capacity, either as a party or an *amicus*. 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 policy preferences.[19] It is neither "free to pour a vintage that [it] think[s] better suits present-day tastes"[20] 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.

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 these terms had established statutory and common-law antecedents that were well-known to members of Congress when the statute was enacted. In legal context, these terms concern only business conduct that has an actual or likely adverse effect on competition.[21] 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.[22] By the time of the PSA's passage in 1921, these statutes had been addressed several 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.[23] 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."[24] When Congress transports phrases from one statute to another, there is a strong presumption that adopting such terminology "carries with it the previous judicial interpretations of the wording."[25] 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

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18 *Id.* at 278.

19 *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___ (2024).

20 *United States v. Sisson*, 399 U.S. 267, 297 (1970).

21 *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).

22 81 *Fed. Reg.* 92566, 92570.

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

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

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

the meaning its use will convey to the judicial mind unless otherwise instructed."[26] "[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it."[27] 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 to them in other statutes.[28] 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. PSA Sections 202(a) and (b) do not ban all forms of economic discrimination, preference, or advantage. 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 PSA 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 PSA 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.[29] 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. Therefore, the agency's understanding of the statute 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 PSA 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 PSA Section 202(a) or (b). What is "unfair," "unjust," "undue," or

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[26] *Morissette*, 342 U.S. at 263.

[27] *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)).

[28] Although resorting to the legislative history of the PSA is unnecessary for a proper construction of PSA 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).

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

"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.[30]

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.

B. Eliminating the Injury to Competition Requirement from PSA Sections 202(a) and (b) is a Major Question that Must be Addressed by Congress.

Congress has not authorized AMS to forego the competitive injury requirement of Section 202. The Proposed Rule ultimately stems from rulemaking driven by the 2008 Farm Bill.[31] The 2008 Farm Bill granted no authority to AMS to promulgate a rule that excuses the competitive injury requirement of PSA 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."[32] 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 PSA 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) of the PSA. 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, Packers 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.[33] Moreover, the 2014 and 2018 Farm Bills did not renew the call for these 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

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30 *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.)).

31 Pub. L. 100-246.

32 *Id.* § 11006(1).

33 *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).

requirement out of the PSA. Had Congress intended for the agency to reinterpret Sections 202(a) and (b) of the PSA, Congress readily could have clarified as much in the 2014 or 2018 Farm Bill, especially in light of the significant 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 and rebuked by Congress. 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 and to effectively expand the PSA to regulate ordinary business decisions that may impact only a single market participant raises a major question requiring Congressional direction. As such, AMS may not expand its regulatory framework to change or undermine the current application of PSA 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.[34] The PSA is a hundred-year-old law, and at no point in its history has it been applied to broadly 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.

The entire animal protein industry has organized its activities around this timeworn application of the PSA. Through the present series of rulemakings, of which this Proposed Rule is a part, AMS seeks to completely upend animal production contracting in the livestock and poultry industry. These sectors account for more than one trillion dollars of annual economic impact and touch all fifty states. They 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 dramatically expand the scope of such a longstanding statute.

C. AMS Relies on Misinterpretations of the Relevant Case Law Addressing the PSA's Injury to Competition Requirement.

In the preamble, AMS suggests that issuing the Proposed Rule will clarify discrepancies in the different circuit court interpretations of PSA Section 202(a). As explained above, though, the case law clearly, consistently, and unambiguously requires a showing of injury to competition or likelihood of injury to competition to sustain a violation of Sections 202(a) and (b). However, in trying to muddy the waters of these cases, including cases to which USDA was a party, AMS misconstrues the holdings and misunderstands the agency's role in interpreting the PSA. Regardless of AMS's view of the merits, the courts have spoken with one voice. As established in *Loper Bright Enterprises,* AMS cannot substitute its own interpretation of Sections 202(a) and (b) when courts have already established the one, correct interpretation: that PSA Sections 202(a) and (b) require a showing of injury to

[34] 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. 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).

competition.[35] Under *Loper Bright Enterprises*, there is only one valid interpretation of a statute: the correct interpretation as articulated by the Article III courts.

AMS nonetheless tries to read ambiguity into some of the case law surrounding PSA Sections 202(a) and (b), but a faithful reading of these cases shows that AMS has misconstrued the cases in an attempt to paste a veneer of ambiguity onto a solid wall of precedent:

- *London v. Fieldale Farms Corp*.[36] – AMS criticizes the holding in *London* as contradictory, arguing the opinion holds that plaintiffs "must show that the defendant's unfair, discriminatory, or deceptive practice adversely affects or is likely to adversely affect competition" while favorably quoting *Armour v. U.S.*[37] which held a more permissive standard was sufficient.[38] This mischaracterizes the *London* court's decision, which quoted *Armour* for the purpose of understanding the origins of the PSA without explicitly incorporating the court's holding.[39] *London* is unambiguous that plaintiffs "must show that the defendant's unfair, discriminatory, or deceptive practice adversely affects or is likely to adversely affect competition."[40]

- *Wheeler v. Pilgrim's Pride Corp.*[41] – The preamble incorrectly characterizes the *Wheeler* decision as requiring an anticompetitive effect for PSA Section 202(a) claims while also citing with approval the decision in *Farrow v. U.S. Department of Agriculture*,[42] in which the court held harm to competition was necessary for a PSA claim.[43] In fact, the decision in *Wheeler* holds that a violation of PSA Section 202(a) requires "proof of injury, or likelihood of injury, to competition" which is consistent with the holding in *Farrow*.[44]

- *De Jong Packing Co. v. United States Department of Agriculture*[45] – AMS supports its framework by citing *De Jong Packing*, however, the conclusion cited (i.e., that failing to pay for condemned cattle within one day was an "unfair practice")[46] was related to the claim brought under 9 CFR 201.43(b), which was promulgated under Section 409 of the PSA, not Section 202(a) or (b).[47]

- *Armour & Co. v. United States*[48] – AMS is quick to highlight that the *Armour* court stated "section 202(a) should be read liberally enough to take care of the types of anti-competitive practices properly deemed 'unfair' by the Federal Trade Commission" but neglects to include the rest of this statement, which clarifies that by going beyond the bounds of the FTC Act,[49] the PSA must "also [] reach any of the special mischiefs and injuries inherent in livestock and poultry traffic."[50] The court continues by stating, in "Section 202(a) Congress gave the Secretary no mandate to ignore the general outline of long-time antitrust policy by condemning

35 *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___ (2024).
36 410 F.3d 1295, 1303 (11th Cir.), *cert. denied*, 546 U.S. 1034 (2005).
37 402 F.2d 712, 717 (7th Cir.1968).
38 89 *Fed. Reg.* 53866, 53892.
39 *London* at 1303-04.
40 *Id.* at 1303.
41 591 F.3d 355 (5th Cir. 2009) (en banc).
42 760 F.2d 211, 215 (8th Cir. 1985).
43 89 *Fed. Reg*. at 53892.
44 *Wheeler* at 363 (emphasis added).
45 618 F.2d 1329 (9th Cir.), *cert. denied*, 449 U.S. 1061 (1980).
46 89 *Fed. Reg.* at 53893.
47 *De Jong Packing* at 1337.
48 402 F.2d 712 (7th Cir.1968).
49 89 *Fed. Reg.* at 53896.
50 *Armour* at 722.

practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged."[51]

AMS's concerted effort to read ambiguity into the case law suggests that AMS based its rulemaking on the now-overturned concept of *Chevron* deference, whereby agencies could in some circumstances apply their own interpretations of ambiguous statutes. The scope of Sections 202(a) and (b) was never a *Chevron* issue because, as discussed above, courts have long and consistently held that these sections require a showing of injury or likely injury to competition. Therefore, the statute is not ambiguous on these points and AMS's attempt to read ambiguity into the prevailing case law is not legally sound. In any event, *Chevron* has been overturned and the *Loper Bright Enterprises* decision reinforces the Article III courts' conclusion that injury to competition is required for PSA Section 202(a) and (b) violations. AMS's implicit basing of its rulemaking on the leeway it felt was provided by now-defunct *Chevron* deference is yet another cause to rescind the proposal to reevaluate its legal foundations.

II. THE PROPOSED RULE IS VAGUE AND UNWORKABLE.

A regulation with the force of law must give persons and entities subject to it fair notice of what is prohibited so that they may comply. Many 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."[52] Any legal rule failing to meet that standard is "void for vagueness." Although most often invoked in criminal matters, the vagueness doctrine has also been applied in cases where a party faced civil sanctions.[53] This Proposed Rule is so riddled with vague requirements that the entire proposed framework would be unworkably vague.

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.*,[54] the Court held unconstitutional under the Fourteenth Amendment Due Process Clause a Colorado antitrust statute prohibiting certain business combinations except those necessary to obtain a "reasonable profit." Similarly, in *United States v. L. Cohen Grocery Co.*,[55] 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*,[56] 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."[57]

Similar to these cases, the Proposed Rule is categorically vague and unworkable. Most of its provisions include vague or undefined terms, and failure to comply with those terms would result in a regulatory violation and potential civil liability. The criteria laid out in the Proposed Rule provide

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51 *Id*.

52 *Skilling v. United States*, 130 S. Ct. 2896, 2927–28 (2010).

53 *E.g.*, *Gentile v. State Bar*, 501 U.S. 1030, 1048–50 (1991) (invalidating state bar disciplinary rule under the void-for-vagueness doctrine).

54 274 U.S. 445, 453–65 (1927).

55 255 U.S. 81 (1921).

56 234 U.S. 216 (1914).

57 *Id.* at 223.

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. A poultry integrator or other entity subject to Sections 202(a) and (b) of the PSA 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. The Proposed Rule, therefore, cannot withstand constitutional scrutiny. It must be withdrawn.

A. Deficiencies in Proposed Section 201.308(a) Unfair practices with respect to market participants.

Proposed Section 201.308(a) purports to define what constitutes an unfair act or practice under Section 202(a) of the PSA, but instead lays out a number of vague and conditional terms that will lead to more confusion and litigation than the current, functional legal standard.

- Throughout the Proposed Rule, AMS makes references to harms caused to "market participants" but fails to define who constitutes a "market participant." There are a number of direct and indirect participants in the broader broiler market, including growers, integrators, distributors, retailers, consumers, and ancillary service providers, only some of which fall under the PSA. By failing to define who exactly is a market participant under the Proposed Rule, AMS makes it impossible for integrators to identify which interactions and relationships are covered by the Proposed Rule, and thus which activity is governed by the Proposed Rule, until an enforcement action is initiated or a lawsuit is filed.

- The provision focuses on regulating any act that "causes or is likely to cause substantial injury." However, substantial injury is not defined in the regulation, which will lead to disputes surrounding how severe an injury must be to violate the regulation. In contrast, the injury to competition threshold inherent in the PSA more clearly defines which types of harms Congress intended to be prohibited through this legislation through decades of antitrust jurisprudence.

- For the injury to be violative, the Proposed Rule states it must be one that the market participant "cannot reasonably avoid," but it does not define reasonable avoidance. It is unclear whether avoiding the alleged harm by, for example, switching to another integrator, upgrading housing, or changing internal processes would be considered reasonable under the rule. The rule also does not clarify whether reasonableness would be measured by the cost of the avoidance mechanism or some other metric. Moreover, the Proposed Rule fails to recognize that, by entering into binding contracts, both parties commit themselves to taking certain actions with consequences for failure to do so. So, the very act of entering into a contract creates a situation in which a party cannot reasonably avoid harm if it breaches its covenants. Without more information, integrators cannot adequately tailor grower expectations and practices.

- The Proposed Rule explains that an act is considered violative if the integrator cannot justify it "by establishing countervailing benefits…that outweighs the substantial injury or likelihood of substantial injury." It is elementary that any business interaction could cause some sort of perceived harm to someone: a party might wish it had gotten a better deal; by committing to an agreement now, a party might forego a more favorable opportunity in the future; or another party not chosen loses out on the business opportunity. Any reasonable PSA Section 202(a) or (b) analysis must recognize this basic economic reality. However, AMS's proposed

approach provides no guidance as to the benefits that would be considered sufficient to outweigh a potential harm. It is unclear whether this provision is meant to function as a safe harbor for actions taken in the name of legitimate business decisions or if this language refers to some other type of arbitrary metric. AMS does not indicate at what scale the weighing analysis should take place—for example, is each event evaluated narrowly in isolation, are events viewed within a broader context, and to what extent are indirect or second-order benefits evaluated? Nor does AMS provide any guidance as to how an integrator would be expected to demonstrate or document compliance with this provision.

Regardless of whether AMS has the authority to promulgate a rule that allows for PSA Section 202(a) and (b) violations without a showing of injury to competition, the current construction of Proposed Section 201.308(a) does not provide sufficient guidance to put industry on notice as to what behavior is violative. Because of this, it cannot hold up to scrutiny and is unconstitutionally vague.

B. Deficiencies in Proposed Section 201.308(b) Standards with respect to market participants.

Proposed Section 201.308(b), in addition to again referencing undefined "market participants," attempts to lay out the factors that could lead AMS to conclude that a practice was likely to cause a substantial injury; however, the construction of the provision is flawed and confusing. First, the provision states that the Secretary "must halt the practice" if it is determined to cause or be likely to cause substantial injury. This suggests that the Secretary has no discretion as to whether to challenge a particular practice, especially if it seems to align with one of the enumerated factors. This ignores foundational concepts of enforcement and prosecutorial discretion, and it would seemingly compel USDA to enforce even the most trivial of perceived violations, wasting scarce taxpayer resources and inflicting massive costs on the regulated industry that would far outweigh any potential benefits. Additionally, the provision lays out several factors the Secretary "may" consider. This construction is concerning because it appears to mean AMS must take action when it believes a substantial injury may occur but fails to outline all possible behaviors that could result in substantial injury. In this way, integrators could be subject to enforcement for practices they had no notice would be considered unfair. In addition to this troublesome construction, the construction of the factors is also too vague to provide guidance as to what types of action could be determined to be violative of this rule.

- The first listed factor includes several vague terms that do not provide sufficient guidance to provide direction for compliance. The phrases "impede or restrict the ability to participate in the market," "interfere with the free exercise of decision-making," "tend to subvert the operation of competitive market forces," and "deny a covered producer the full value of their products or services" are too broad to be useful. Each of these phrases could encompass both actions that are clearly unfair and actions that are part of the normal course of business, such as requiring certain housing standards to receive certain contract terms. Moreover, the criteria "tend to subvert the operation of competitive market forces" implies that AMS would be able to take action against a practice that AMS believes falls into a general category of practices that "tend" to subvert markets even without showing that the specific practice in question had any negative effects. Under this provision, it would seem that a regulated entity could be subjected to liability even if no harm occurred whatsoever from the specific conduct.

- The first factor also includes the absurd criteria of "violates traditional doctrines of law or equity." This appears to be a broad catch-all provision cloaked in legal-sounding but fundamentally meaningless language. The Proposed Rule does not provide any insight into

which traditional doctrines of law or equity are being referenced in this provision, or even where those might be found. Indeed, a violation of a "traditional doctrine[] of law" could be construed as violating any law at all, which clearly reaches well beyond the authority granted to AMS by Section 202(a) or (b). The sole purpose of this provision must be to allow AMS, once again, to enforce against any action it feels is unfair without needing to ground this enforcement in a clear, articulated anticompetitive principle. There is simply no way a regulated party could know how to meet this standard.

- The listed factors include the magnitude of the potential injury, but do not provide guidance on how to determine magnitude. It is also unclear what would be used to determine the size of a given market (i.e., whether local markets or nationwide markets would be considered).

- Building on subsection (a)'s reference to reasonable avoidance, the final factor attempts to outline the types of avoidance that would be considered unreasonable. The listed situations include requiring the market participant to "make unreasonable additional investments or efforts, to avoid the harm." But this does not help at all. AMS has proposed a construct where "reasonable avoidance" is defined as not having to take "unreasonable" actions. This circular construction provides no guidance to regulated parties. Further, based on this phrasing, it is unclear how large an investment or effort is needed to be considered unreasonable and whether reasonableness would be participant-specific or more broadly based on the market.

As with the prior section, Proposed Section 201.308(b) does not provide sufficient guidance to put industry on notice as to whether a practice is violative. In fact, the construction of Proposed Section 201.308(b) goes even further and effectively would allow AMS full discretion over whether a PSA Section 202(a) or (b) violation has occurred, which cannot be consistent with the intent of the PSA when enacted.

C. Deficiencies in Proposed Section 201.308(c) Unfair practices with respect to markets.

Proposed Section 201.308(c) is written so broadly as to allow AMS to construe potentially any action or behavior as violating Section 202(a) of the PSA. The provision would prohibit any action found to be a "collusive, coercive, predatory, restrictive, deceitful or exclusionary method of competition that may negatively affect competitive conditions." However, AMS provides no guidance on what constitutes collusive, coercive, predatory, restrictive, deceitful, or exclusionary competitive actions within the context of PSA Section 202(a) or (b). Rattling off a series of terms merely begs the question of what those terms mean, a question AMS leaves unanswered. No regulated entity could reasonably order its affairs based on this provision, while at the same time, AMS is afforded nearly unfettered discretion to decide what conduct it wants to prohibit in any given situation. As with the other provisions, regulated entities would have no actual notice of whether their actions would be prohibited under the Proposed Rule.

D. Deficiencies in Proposed Section 201.308(d) Standards with respect to markets.

Proposed Section 201.308(d) shares several of the same deficiencies noted for proposed Section 201.308(b), including those dictating the Secretary's actions and the reliance on an undefined category of "market participants." Again, the provision states that the Secretary "must halt the practice" if it is determined to pose or likely pose a threat to the market. This suggests that the Secretary has no discretion regarding whether to challenge a particular practice, raising all the abovementioned problems. Additionally, the provision lays out factors the Secretary "may" consider. This construction

is concerning because it suggests that AMS must act when it believes a threat to the market may occur but fails to outline all possible behaviors that would be considered a threat to the market. In this way, an integrator could be subject to enforcement for practices it had no notice would be regarded as unfair. In addition to this troublesome construction, the construction of the factors is also too vague to provide guidance as to what types of action could be determined to be violative of this provision.

- Consistent with the issues noted in subsection (b), the first listed factor includes several vague terms that do not provide sufficient direction for compliance. The phrases "impede or restrict the ability to participate in the market," "interfere with the free exercise of decision-making," "tend to subvert the operation of competitive market forces," and "violates traditional doctrines of law or equity" are too broad to provide meaningful notice of what conduct is actually prohibited. Each of these phrases could encompass both actions that are clearly unfair and actions that are part of the normal course of business, such as requiring certain housing standards to receive specific contract terms, and we incorporate our above feedback on Proposed Section 201.308(b).

- This factor also would prohibit practices with "indicia of oppressiveness" and lists "evidence of anticompetitive intent or purpose" and "absence of an independent legitimate business reason for the conduct" as examples of these indicia of oppressiveness. It is simply impossible for a regulated entity to figure out in advance whether an action would have an "indicia of oppressiveness." Moreover, as with the above discussion of activities that "tend" to subvert marketplaces, this factor would seem to create liability for actions based only on their appearance, not whether they actually cause any harm. Together, these terms, again, are undefined, unworkable, and provide no guidance for industry to understand what behaviors are and are not violative of the rule.

- The second listed factor again includes the reference to actions that "den[y] a market participant the full value of their products or services." This language is particularly concerning because it provides no reference to how a product or service's "full value" would be determined. The poultry market, in particular, varies depending on the performance of a growing period, and any attempt to set a standard value for growing chickens would be out of date quickly after being set.[58] This factor is liable to be heavily litigated and disputed.

Without providing more information or clarity, Proposed Section 201.308(d) fails to provide sufficient notice to the regulated industry of what is prohibited. As written, the Proposed Rule cannot stand and should be rescinded.

III. 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." 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

[58] There is very little cash market activity for fed broilers precisely because growers would face astronomical economic risks in doing so, including exposure to wild swings in input costs and market uncertainty for finished birds. The current broiler production structure developed as a way to mitigate those existential risks for broiler growers.

to a difference in view or the product of agency expertise." In determining whether an agency action is arbitrary and capricious, courts review the information available in the administrative record.

A. The Proposed Rule fails to establish that anticompetitive behavior is occurring in the poultry market, requiring the issuance of the Proposed Rule.

The Proposed Rule is a solution in search of a problem, as evidenced by an insufficient administrative record. Perpetuating a fatal flaw that has plagued rulemaking on this topic for fourteen years, AMS fails to identify any actual harmful conduct requiring this regulation. Yet, it would impose substantial cost and administrative burden on the entire poultry industry (from growers to consumers) with no tangible benefit.

The preamble to the Proposed Rule is littered with vague allusions to potentially violative conduct and generalized complaints lacking sufficient detail for meaningful evaluation. AMS has certainly shown no systemic or endemic problem in the poultry market that requires such extreme intervention to correct. The agency's rationale repeatedly falls back on theoretical scenarios and unverified and anonymous complaints. The preamble does almost no work identifying harms the Proposed Rule would prevent. Instead, it merely relies on the economic structure of the livestock and poultry industries to justify the Proposed Rule. The entire rulemaking seems to presume there is widespread abuse in the poultry and livestock markets without pointing to any actual evidence to support these assumptions.

The preamble is heavy on legal and economic theory and light on actual facts to support the rulemaking. Stripped to its essence, the factual administrative record to support this rulemaking consists of references to unspecified allegations of unfair treatment by integrators, a highly selected set of court cases, and similar past rulemakings that never came to fruition (some of which Congress expressly objected to). None of these are sufficient to establish the need for such an untenable set of regulations. The preamble is rife with vague references to complaints that apparently have been reported to USDA but never acted on.[59] AMS provides no details about these purported complaints, including what specifically they alleged happened, when they were lodged, whether they were substantiated, how AMS investigated or responded to them, what conclusions AMS reached, or even how many AMS has received. The long history of rulemaking on this topic has been peppered with allusions to thinly described complaints, but AMS has never provided any actual details. And most telling, if the unspecified complaints reflected bona fide PSA violations, why did USDA not investigate them and take enforcement action under the statutory authority that AMS claims exists?

AMS recounts some of USDA's past PSA rulemaking efforts, seeming to imply that because USDA decided to initiate rulemaking in the past, there must be a problem that requires solving. However, a federal agency cannot simply conjure a problem into existence by saying it tried to address that problem in the past, nor does the fact that rulemaking occurred legitimize that administrative record. As discussed above, Congress specifically objected to many aspects of those past rulemakings, and the rules were withdrawn.

In short, nothing in the record indicates pervasive, or even occasional, discrimination, retaliation, or deception of the type raised in the Proposed Rule, much less that a vague and burdensome series of

[59] 89 *Fed. Reg.* 53886, 53892.

standards and criteria presenting staggering economic costs is justified to address it. This flawed administrative record renders the Proposed Rule arbitrary and capricious under the APA.[60]

B. Contrary to the assertions in the Proposed Rule, 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).[61] 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 behave and the results obtained under the current compensation system.

1. *Despite having options to work with different integrators, most growers have been with their current integrator for over five 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.[62] 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 when presented with the opportunity to stay with their integrator or to test the market, most growers 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.[63] 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.[64] 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. There is no indication from this data to suggest the market is unfair or exploitative.

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60 5 U.S.C. § 706(2)(A).

61 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"].

62 *Id*. at 3.

63 *Id.* at 5.

64 *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.

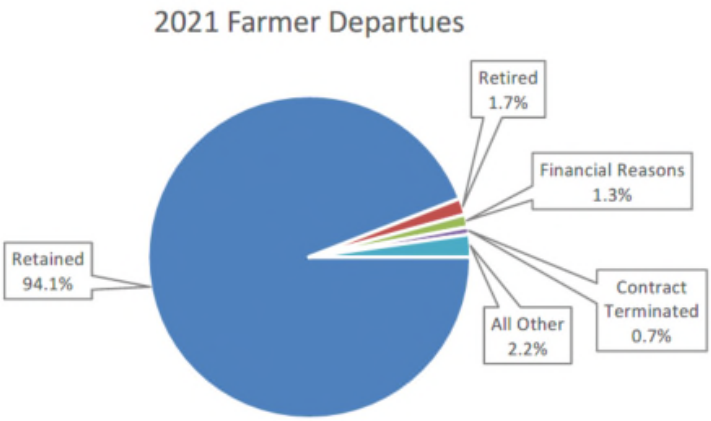

Figure 1, Reasons for Farmer Departures, 2021.[65]

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

The Elam Study found that USDA data showed that 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.[66] In addition, the top 20 percent of contract chicken farmers earned on average $142,000, significantly higher than the top 20 percent of all farm households ($118,000) and the top 20 percent of all U.S. households ($101,000), according to the same data.[67] Although USDA has not since updated the study reporting this data, there is every reason to believe 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.[68] Despite being made aware of this data through previous comments submitted by NCC, AMS fails to rebut it. This data directly contradicts AMS's assertions that integrators exploit market conditions or use their power to engage in unfair practices.

65 *Id.*
66 *Id.* at 9.
67 *Id.* at 10.
68 *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.

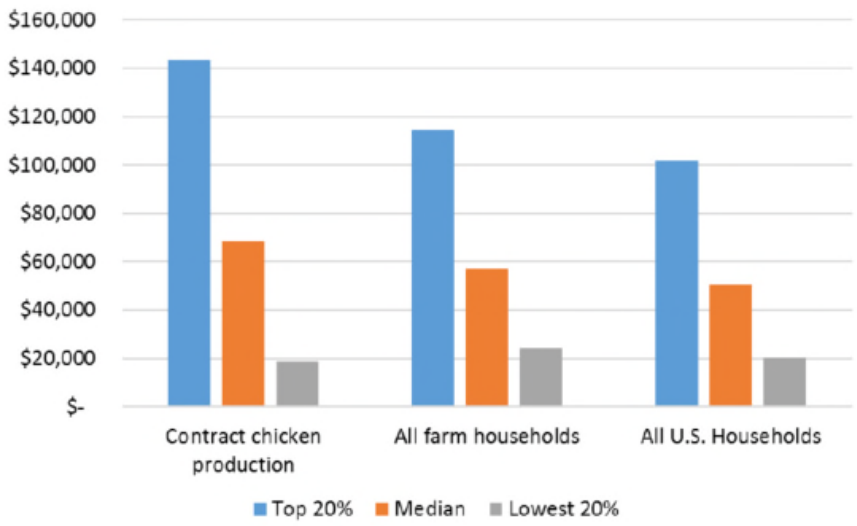

Figure 2, Income Variations Between Contract Chicken Production, All Farm Households, and All U.S. Households, 2011.[69]

3. *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 farmers.[70] These applications indicate a steady interest in entering contract chicken production and excitement about entering an industry with a reputation for profitable arrangements. This would not be the case if the market was unfair and anticompetitive, as the Proposed Rule implies.

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

As depicted in Figure 3, the Elam Study found that the deficiency and charge-off percentages for poultry grower loans amount to merely one-third of the average agricultural loan, based on Small Business Administration loan quality data.[71] 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 or exploited by other market participants.

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69 *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)).

70 *Id.* at 4.

71 *Id.* at 11.

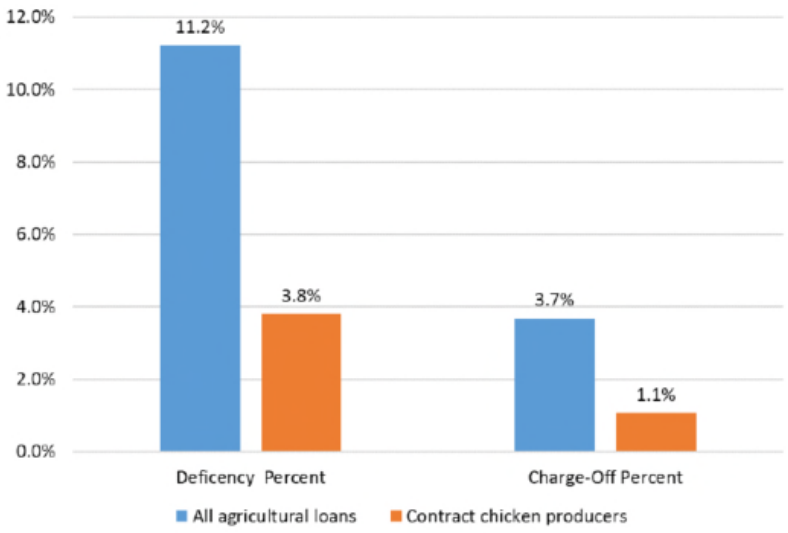

Figure 3, Default Rates for Contract Chicken Producers and All Agricultural Loans, 2015.[72]

IV. THE PROPOSED RULE UNDERESTIMATES THE TRUE COSTS OF THE PROPOSED RULE.

The Proposed Rule estimates that the total administrative costs associated with the Proposed Rule would be $20MM in 2025.[73] This grossly underestimates the costs the industry will incur as a result of the Proposed Rule and ignores entirely the staggering litigation costs that the Proposed Rule would impose. The number of vague and ill-defined concepts in the proposed rule will require decades of litigation across many judicial circuits to establish what the Proposed Rule even means, carrying hundreds of millions of dollars in direct and indirect costs.

The Proposed Rule attempts to undermine years of judicial precedent requiring a showing of injury to competition to bring a claim under PSA Section 202(a). Because the Proposed Rule is so vague, the industry would be flooded with new lawsuits alleging violations that truly do not rise to the level of a PSA Section 202(a) violation, imposing more costs and having a substantial chilling effect on industry innovation. We know this was partially the intent of the Proposed Rule because Assistant Attorney General Johnathan Kanter, in introducing the Proposed Rule with USDA, commented that he hoped plaintiffs would "bring [a] Packers and Stockyards case or two or twenty," clearly expressing the desire to see increased litigation under the Proposed Rule.[74]

Despite acknowledging that the Proposed Rule is intended to drive litigation, USDA declines to even attempt to grapple with the costs of that litigation. Instead, USDA merely notes that these costs would be difficult to determine and then proceeds to ignore them entirely. It's striking that USDA has not even tried to quantify litigation costs even though it clearly anticipates litigation resulting from the Proposed Rule and has taken steps to estimate litigation costs on this topic in the past. For example, in 2016 GIPSA published an interim final rule that also tried to eliminate the injury to competition requirement (and which was later rescinded) titled "Scope of Sections 202(a) and (b) of the Packers and Stockyards

[72] *Id.* at 11.
[73] 89 *Fed. Reg.* 53886, 53904.
[74] Johnathan Kanter, *Increasing Competition and Fairness in Food and Agricultural Markets*, Center for American Progress at 22:02 (Jun. 25, 2024) available at https://www.americanprogress.org/events/increasing-competition-and-fairness-in-agricultural-markets/.

Act." In the preamble to the 2016 rulemaking, USDA devoted pages of the preamble to a detailed analysis of the potential litigation costs of that rule for the cattle, hog, and poultry markets.[75] Although we consider this 2016 estimate unrealistically low, the fact that USDA has previously made an effort to estimate litigation costs of a substantially similar proposal, it defies belief that USDA suddenly is unable to do so here. And, if USDA is truly unable to estimate costs, then it follows that the Proposed Rule itself is so ill-defined that fully understanding the impact will be impossible until the industry is grappling with the likely inconsistent litigation results in real time.

The reality is that the Proposed Rule would be staggeringly costly. Independent economic impact analyses showed that previous iterations of this rulemaking would have imposed economic costs well in excess of $1 billion. These costs were driven heavily by the litigation costs and uncertainty around attempts to circumvent the PSA's injury to competition requirement. In particular, Dr. Thomas Elam of FarmEcon LLC conducted an independent, comprehensive economic analysis related to USDA's 2010 predecessor to this proposed rulemaking.[76] This analysis, which USDA acknowledged in the preamble to the 2016 request for comments on the Scope of Sections 202(a) and (b),[77] included an assessment of all relevant factors related to the costs of the proposed rule to the poultry industry, including the costs related to increased litigation and uncertainty in poultry contracting.[78] In the original 2010 analysis, the total 5-year cost to the industry was $1.03 billion. With the extreme inflation in recent years, this cost would amount to at least $1.5 billion today, orders of magnitude higher than AMS's estimate of $20 million. Based on these estimates alone, AMS has grossly underestimated the costs of implementing the Proposed Rule.

In addition to ignoring litigation costs associated with the Proposed Rule, AMS's cost estimates fail to recognize the cumulative effect this rule has on other PSA programs and rules, as described in more detail below. Implementation of the Proposed Rule would not take place in a vacuum; it affects all existing rules under PSA Sections 202(a) or (b). Because USDA chose a piecemeal approach to implementation of its PSA initiatives, industry will have to redo its earlier efforts to implement the previous rules. This duplication adds time, wastes resources, and unnecessarily disrupts market efficiencies, all of which come at a cost and undermine USDA's administrative priorities ensuring market efficiency, affordable food costs, and widespread food availability.[79] In this way, AMS has not only underestimated the costs facing industry as a result of the Proposed Rule, but it has also failed to see the increased food prices that consumers will naturally experience when production costs rise.

V. THE PROPOSED RULE WOULD REQUIRE AN EXTENDED IMPLEMENTATION PERIOD.

Although the Proposed Rule ought to be withdrawn, any finalized version would require an extensive implementation period of at least a year. The Proposed Rule is not an independent regulatory action with isolated effects. Because the Proposed Rule would fundamentally change the interpretation of

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75 81 *Fed. Reg*. 92566, 92580.

76 Dr. Thomas Elam, Proposed GIPSA Rules Relating to the Chicken Industry: Economic Impact, FramEcon LLC, November 16, 2010. This assessment was updated in 2017 in response to additional GIPSA rulemaking efforts. *See* Dr. Thomas Elam, Expert Response to GIPSA Poultry Contracting Proposed Rules, March 21, 2017.

77 81 *Fed. Reg.* 92566, 92577.

78 Note that in 2010 a separate independent economic analysis estimated that the 2010 processor proposed rule would have a $1.6 billion cost to the livestock and poultry industry which would equate to at least $2.3 billion today. *See* Informa Economics, Inc., An Estimate of the Economic Impact of GIPSA's Proposed Rules, 2010.

79 *See* The Biden-Harris Administration, *Biden-Harris Administration National Strategy on Hunger, Nutrition, and Health*, The White House (September 2022) available at White-House-National-Strategy-on-Hunger-Nutrition-and-Health-FINAL.pdf (whitehouse.gov); and Exec. Order 14,036 3 CFR 36987 (July 9, 2021).

PSA Sections 202(a) and (b) with respect to injury to competition, any other regulation based on PSA Section 202(a) or (b) would be impacted and would need to be reevaluated. For example, the Proposed Rule would have implications for the auditing and governance requirements imposed by the Transparency in Poultry Grower Contracting and Tournaments Rule, the disclosure and contracting considerations outlined in the Poultry Grower Payment Systems and Capital Improvements Systems Proposed Rule, and the requirements of the Inclusive Competition rule, to name but a few. Broadly speaking, any PSA program would need to be reevaluated in light of the Proposed Rule. Because the Proposed Rule is riddled with vague and confusing terms, each of these many analyses would take a significant amount of time and resources to complete.

Moreover, the vague and confusing nature of the Proposed Rule would necessitate AMS take an active role in implementation, which will require additional time. Because the Proposed Rule relies on vague and undefined terms, AMS will need to provide additional guidance to industry to clarify the various factors. Further, this rule is just one in a long line of PSA rulemakings affecting broiler production. Poultry growers have been subject to a piecemeal implementation of new regulations that have been both complicated and interdependent, with virtually no supporting outreach from USDA. Businesses need continuity, and small family businesses such as broiler growers lack the personnel, time, and resources to keep up with an ever-changing regulatory landscape. AMS would need to engage in significant grower education on the Proposed Rule to prevent confusion. AMS cannot possibly provide industry with sufficient guidance to facilitate a smooth implementation of the Proposed Rule and participate in the necessary grower education in less than a year. As such, we consider a year or greater implementation period to be required for any rulemaking on this topic.

VI. CONCLUSION

The Proposed Rule would fundamentally alter the nature of PSA Section 202(a) violations in a manner that exceeds AMS's authority. As noted above, all eight different federal circuit courts of appeal to have considered the issue unanimously concluded that PSA Section 202(a) and (b) violations require a showing of injury to competition and have uniformly and resoundingly rejected the position advanced by USDA in this proposed rule. This Proposed Rule is ill-advised, unconstitutionally vague, would inflict billions of dollars of economic harm on American agriculture, line the pockets of plaintiffs' lawyers, and increase costs for consumers who are already struggling with inflation in most of their everyday lives.

For the numerous reasons discussed in these comments, we urge AMS to withdraw the Proposed Rule.

* * *

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

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

Live Chicken Production Trends, 2022 Revision

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.

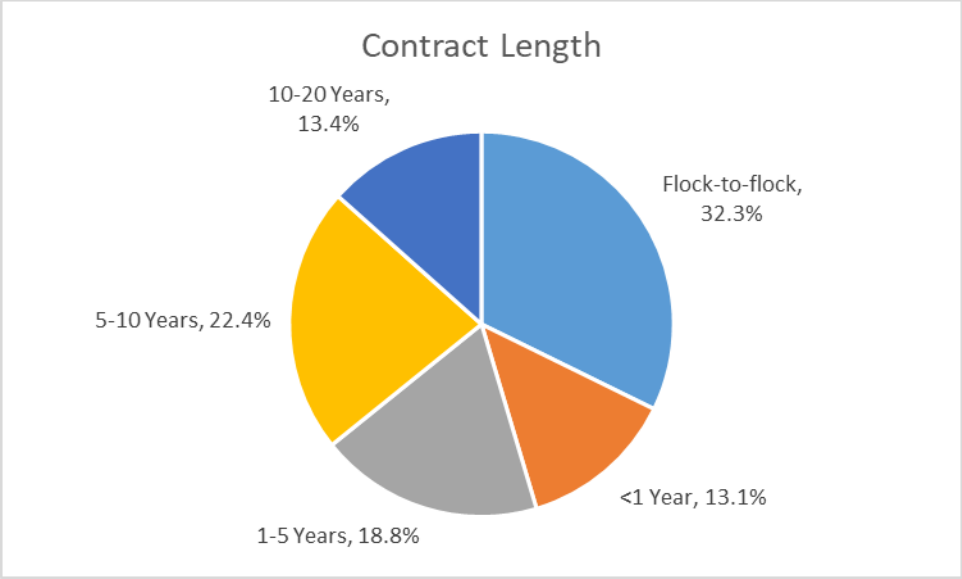
Studies on broiler farmer returns and loan quality are not revised. There are no updates available for these two studies that this study utilized in 2015. However, more recent USDA 2021 poultry farmer financial returns data were found and are cited.

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.

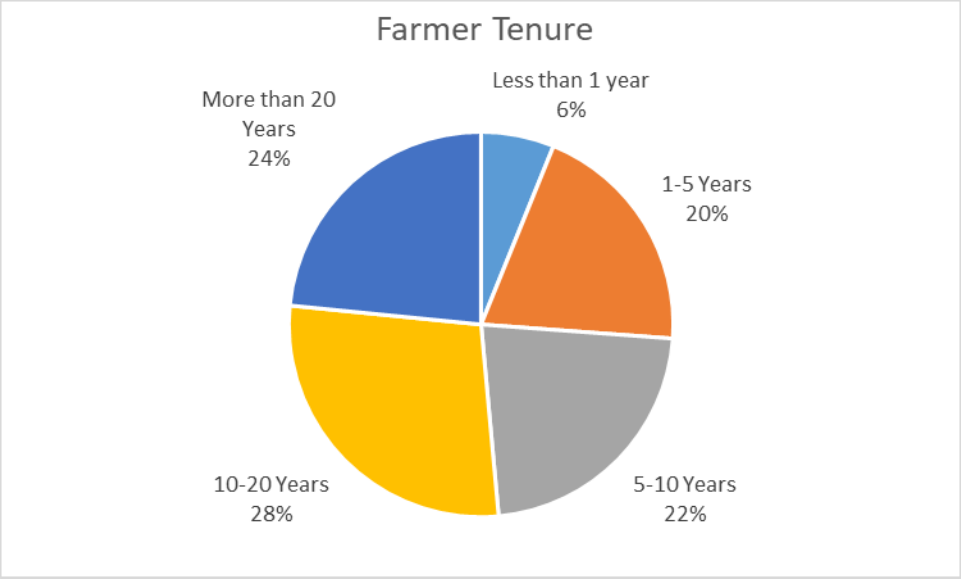


The 32% flock-to-flock percentage is 10 points lower than the 42% reported in a 2015 NCC survey done for the prior version of this report. Other contract durations are correspondingly higher than the prior report.

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.

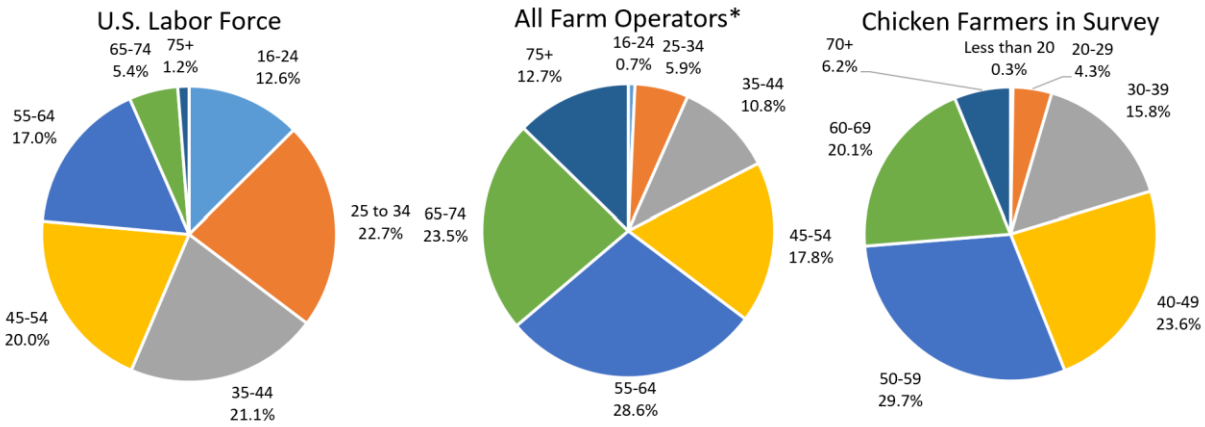
5. Companies reported on the ages of their current farmers. The results for those who track this data show that the vast majority, 80%, of farmers are 40 years old or older. Only 14 farmers were reported to be under 20 years old. This age structure together with the length of time farmers have been with 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.

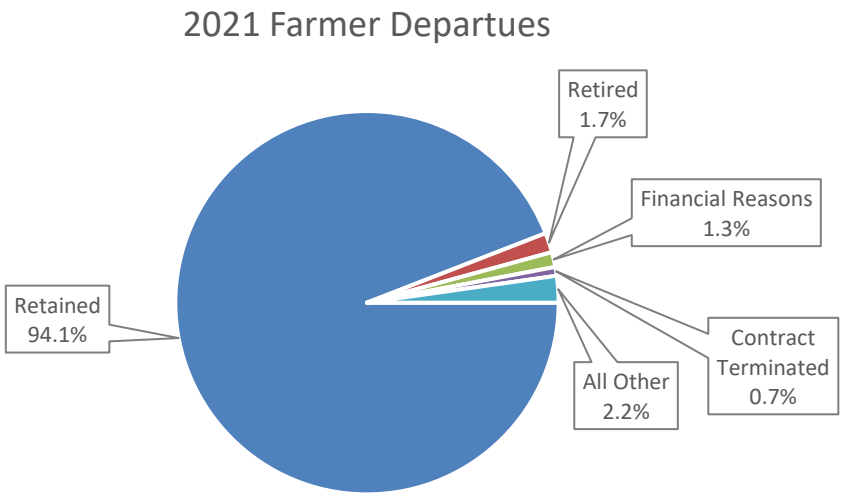
8. Companies reported on reasons for 2021 farmer departures. There are many and varied reasons that farmers might leave a chicken company. These, include among others, retirement, financial distress in the farming operation, declining health, farm

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.

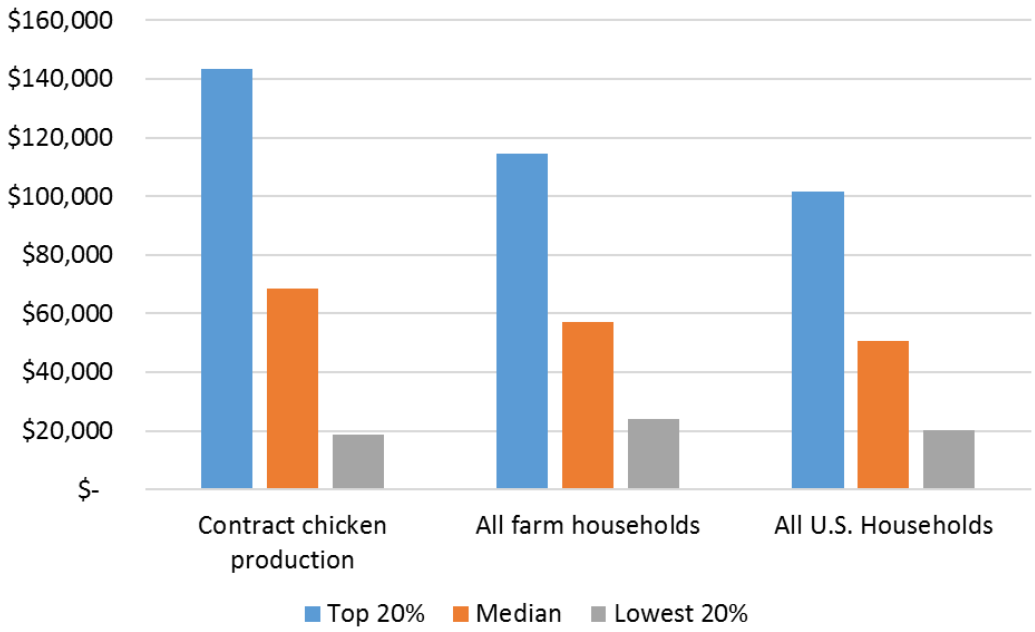
In part the higher income spread was due to a wide scale of live chicken production among chicken operations. Larger producers may also be better at raising chickens and receive higher payments per pound based on their higher-than-average performance. Similar to all businesses, those who are most successful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

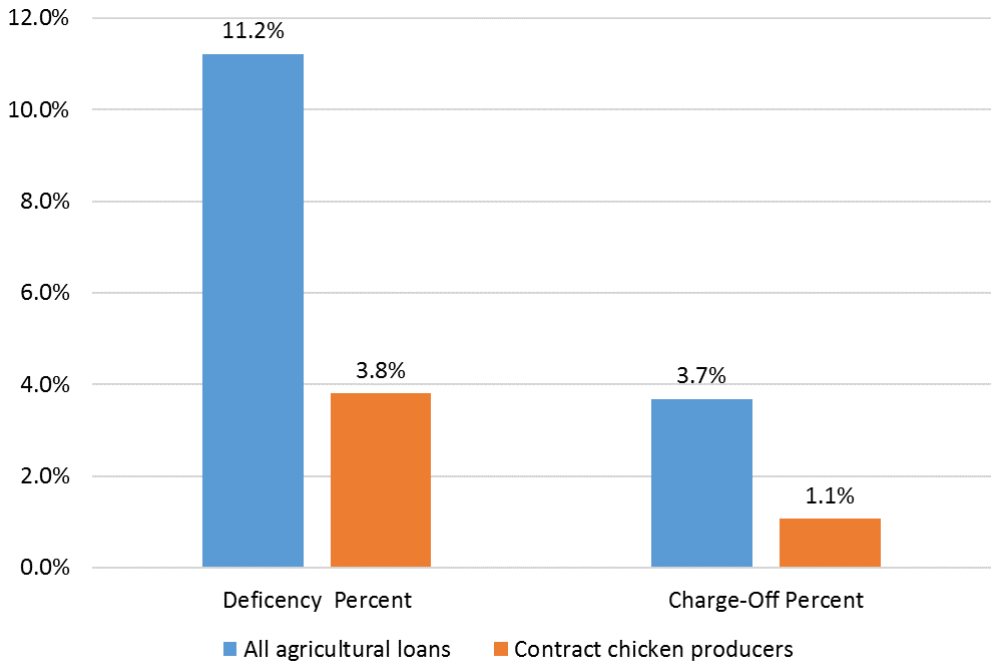
Comparative Live Chicken Production Loan Performance

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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[1] Watt Publishing. *Poultry USA*. "2020 Top Poultry Companies." March, 2021. Pp 14-50.
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